EMPLOYMENT TRIBUNALS

Claimant ***Respondent***

Adebola Ibitoye **AND** **1. Network Rail Infrastructure Ltd**
2. Nigel Carr
5. Alan Muir

HELD AT: **London Central (remote hearing by CVP)**

ON: **2, 3, 5, 8, 9, 11, 12 February 2021**
17, 19 February (In Chambers) 2021

BEFORE: Employment Judge Brown
Mrs M Pilfold
Mr R Todman

Representation:

For Claimant: **Ms C D'Souza, Counsel**
For Respondent: **Ms J Shepherd, Counsel**

JUDGMENT

The unanimous Judgment of the Employment Tribunal is that:

1. **The Respondents did not subject the Claimant to direct race discrimination.**
2. **The Respondents did not subject the Claimant to direct disability discrimination.**
3. **The Respondents did not subject the Claimant to discrimination arising from disability.**
4. **The Respondents did not fail to make reasonable adjustments.**
5. **The Respondents did not subject the Claimant to race related harassment.**
6. **The Respondents did not subject the Claimant to disability related harassment.**
7. **The Respondents did not victimise the Claimant.**
8. **The First Respondent did not constructively dismiss the Claimant.**

9. **The Claimant's claim for unpaid holiday pay is dismissed on withdrawal.**

REASONS

The Claim

1. The Claimant brings complaints of direct race and disability discrimination, discrimination arising from disability, failure to make reasonable adjustments, race and disability related harassment and victimisation against: the First Respondent, his former employer; the Second Respondent, his former line manager; and the Fifth Respondent, his former line manager's manager.

2. The Claimant had also brought claims against the claims against Maria Murray, HR adviser, and Stuart Kirkwood, his line manager's earlier manager, as Third and Fourth Respondents, respectively. He withdrew those claims on the concession by the First Respondent that it is vicariously liable for their acts and omissions, as recorded in a case management order of EJ Sage. The First Respondent does not rely upon the statutory reasonable steps defence in relation to the Second and Fifth Respondents, Messrs Carr and Muir.

3. The Claimant relies on his bronchiectasis condition and his stress and anxiety conditions in his disability complaints. He relies on his black Nigerian colour/ethnicity in his race complaints.

The Issues

4. The grounds of claim and allegations in them had been agreed between the parties as follows:

> **Comparator:** Save as where specifically identified below, the Claimant relies upon a hypothetical comparator for his claims of direct race discrimination, direct disability discrimination and failure to make reasonable adjustments.
>
> **Continuing Act:** The Claimant (C) relies on the continuing course of conduct set out below in the various allegations as forming part of the discriminatory treatment he was subject to from when he returned to work on 7 January 2013 following his previous Employment Tribunal claim against the First Respondent (R1) until his prolonged period of sickness absence from 11 September 2017 and, ultimately, his resignation on 30 April 2018.
>
> **Respondents:** The First Respondent (R1) has accepted vicarious liability for Maria Murray and Stuart Kirkwood, previously the Third and Fourth Respondents (respectively) in these proceedings.
>
> **Direct Discrimination**

1. C was subjected to less favourable treatment, which constituted direct discrimination contrary to s13 Equality Act 2010 (EqA) because of C's race.

2. C was subjected to less favourable treatment, which constituted direct discrimination contrary to s13 EqA because of C's disability caused by his bronchiectasis condition.

3. C was subjected to less favourable treatment, which constituted direct discrimination contrary to s13 EqA because of C's disability caused by his stress and anxiety.

Discrimination Arising From Disability

4. C was subjected to unfavourable treatment because of something arising in consequence of his disability caused by his bronchiectasis condition contrary to s15 EqA.

The "something arising" relied upon by C is:

- With regard to ground 11, the need for provision to be made and/or for the disclosure or discussion to effect reasonable adjustments because of C's lung condition.

- With regard to ground 20, being the need for C to attend physiotherapy because of his lung condition.

- With regard to ground 21, C's need for support or assistance and/or C's need to work from home.

- With regard to ground 29, C's need for disclosure or discussion to effect the reasonable adjustments set out in ground 29 to be implemented because of his condition.

- With regard to ground 31, C's need to have flexible working arrangements because of his lung condition, not a reduction in hours (the former being a recommendation made by Mr Houssein Peerally in the OH report dated 20 June 2017).

- With regard to grounds 34 and 35, the Claimant's absence from the workplace caused by his disability

5. C was subjected to unfavourable treatment because of something arising in consequence of his disability caused by his stress and anxiety contrary to s15 EqA.

The "something arising" relied upon by C is:

- With regard to allegation 19, the need on the part of C to have his stress and anxiety alleviated

- With regard to grounds 34 and 35, the Claimant's absence from the workplace caused by his disability.

Failure to Make Reasonable Adjustments

6. C asserts that there was a failure to make reasonable adjustments contrary to s20 EqA in relation to his disability caused by bronchiectasis condition and/or stress and anxiety.

The PCP relied upon by the Claimant in respect of this claim is the requirement, practice or condition that the Claimant work at R1 's offices each working day within normal working hours and not to work flexibly and/or from home and/or attend appointments related to during to his disability and/or that the Claimant should report to R2 on arrival at work daily and that the Claimant should sit within sight of R2.

Harassment

7. C was subjected to a course of conduct which violated his dignity and created an intimidating, hostile and degrading environment related to his race, which constituted harassment contrary to s26 EqA.

8. C was subjected to a course of conduct which violated his dignity and created an intimidating, hostile and degrading environment related to his disability caused by his bronchiectasis condition, which constituted harassment contrary to s26 EqA.

9. C was subjected to a course of conduct which violated his dignity and created an intimidating, hostile and degrading environment related to his disability caused by his stress and anxiety, which constituted harassment contrary to s26 EqA.

Victimisation

10. C was subjected to a detriment/detriments because of a protected act (namely the bringing of Employment Tribunal Proceedings in 2012 and raising a grievance(s) in February 2017) which constituted an act/acts of victimisation, contrary to s27 EqA.

Grounds (The numbering is correct: some allegations/grounds were not pursued by the Claimant)

2. In January 2013, Stuart Kirkwood (former R4) promoted R2 to a Band 2 position to lead a team without prior people management experience. R2 thereby became C's Line Manager. This was in breach of R1's Equal Opportunity, Recruitment and Promotion policy in that there was no notice of this role being advertised and thus no opportunity for C to apply for it.

This allegation is referred to at paragraph 6 of the Details of Claim.

Allegations: Direct race discrimination; Direct disability discrimination (Bronchiectasis); Harassment related to race; Harassment related to disability (Bronchiectasis); Victimisation **Discriminator** : R1

3. In or about January 2013, R2 said to C words to the effect of "It's no good complaining, I'm here for a reason." which C reasonably understood to mean that C was to be carefully monitored because of his complaint to the Employment Tribunal.

This allegation is referred to at paragraph 7 of the Details of Claim.

Allegations: Harassment related to race; Harassment related to disability (Bronchiectasis); Victimisation
Discriminator: R2

4. In February/March 2013, R2 told C that, at all times, C should be sat within his sight and that, every morning, C was to discuss his progress with R2. No such condition was imposed on any other employee within the team, and the department operated a flexible working policy. No explanation was given as to why C was being singled out for such treatment.

This allegation is referred to at paragraph 7 of the Details of Claim.

Allegations: Direct race discrimination; Direct disability discrimination (Bronchiectasis); Harassment related to race; Harassment related to disability (Bronchiectasis), Victimisation
Discriminator: R2

6. On 3rd June 2013, C applied for the post of Estate Manager London. C's application was not even acknowledged by R1. C asserts that his application was never reviewed, considered and/or processed as reasonably expected and that R1's policies on recruitment, promotion, equality and diversity were not adhered to or were deliberately ignored and steps were not taken to rectify this for C.

C asserts that R1 did not follow its own processes in respect of recruitment, promotion, diversity and equality and access to opportunity. C asserts that white male graduates that C managed and trained were promoted ahead of him and that he was deliberately overlooked for promotion.

This allegation is referred to at paragraphs 8 and 9 of the Details of Claim.

Allegations: Direct race discrimination; Direct disability discrimination (Bronchiectasis); Harassment related to race; Harassment related to disability (Bronchiectasis); Victimisation
Discriminator: R1

10. On 19th August 2013, R2 required C to produce a sick note for less than 7 days absence, when R1's policy was that an absence of less than 7 days could be self-certified.

This allegation is referred to at paragraph 10 of the Details of Claim.

Allegations: Direct race discrimination; Direct disability discrimination (Bronchiectasis); Harassment related to race; Harassment related to disability (Bronchiectasis); Victimisation
Discriminator: R2

11. On 12th December 2013, C was asked to attend an OH appointment without a prior discussion about the referral with C so that he was clear why he was being referred. The OH report was never disclosed or discussed with C with a view to making reasonable adjustments.

This allegation is referred to at paragraphs 11 and 12 of the Details of Claim.

Allegations: Discrimination arising from disability (Bronchiectasis); Failure to make reasonable adjustments; Harassment related to race; Harassment related to disability (Bronchiectasis); Victimisation
Discriminator: R1

12. On 31st March 2014, R2 carried out a performance review of C and found that C had only partly achieved his objectives. This was done without any discussion with C or completion of the necessary paperwork, or without putting a support plan in place, contrary to R1's policies and procedures in respect of performance reviews.

This allegation is referred to at paragraph 13 of the Details of Claim.

Allegations: Direct race discrimination; Direct disability discrimination (Bronchiectasis); Harassment related to race; Harassment related to disability (Bronchiectasis); Victimisation
Discriminator: R2

13. On/around 31st March 2015, R2 carried out a performance review and failed to discuss the same with C, contrary to R1's policies and procedures in respect of performance reviews.

This allegation is referred to at paragraph 13 of the Details of Claim.

Allegations: Direct race discrimination; Direct disability discrimination (Bronchiectasis); Harassment related to race; Harassment related to disability (Bronchiectasis); Victimisation
Discriminator: R2

14. On 31st March 2016, R2 carried out a performance review and stated that C had only partly achieved his objectives, but failed to discuss the same with C or to put a support plan in place, contrary to R1's policies and procedures in respect of performance reviews.

This allegation is referred to at paragraph 15 of the Details of Claim.

Allegations: Direct race discrimination; Direct disability discrimination (Bronchiectasis); Harassment related to race; Harassment related to disability (Bronchiectasis); Victimisation
Discriminator: R2

15. In November 2016, at R1's Property Equality and Diversity Day, C became aware from another employee, Ms Claridge, that R2 encouraged others to talk about C behind his back, spoke in adverse terms about C, mocked C's accent and C as a person and called C a name. The name referred to by Ms Claridge was 'nigger'. Ms Claridge referred to R2's behaviour towards C during a Diversity & Inclusion meeting attended by Tom Higginson and Jo Lewington (members of the Leadership Team) and Richard Walmsley (HR), and then spoke privately to the Claimant after the meeting at which point she referred to the name detailed above.

This allegation is referred to at paragraphs 17, 18 and 19 of the Details of Claim.

Allegations: Direct race discrimination; Direct disability discrimination (Bronchiectasis); Harassment related to race; Harassment related to disability (Bronchiectasis); Victimisation
Discriminator: R2

16. From November 2016 and on a continuing basis, R2 became particularly critical of C's work, there was a hostile working environment and C felt side-lined. Examples of sidelining include C being assigned fewer projects than other team members (see 23 below); R2 sending out plans in C's Railton Road project without consulting the Claimant first (January 2017); applying pressure to C in terms of timescales and cost when such matters were beyond his control (Railton Road) in March 2017 and Sept 2017; providing critical feedback on written work; instructing C not to carry out further work on his project (Cottage Grove Clapham North). C asked for a formal investigation in light of R2's behaviour described in 15 above, and nothing was done.

This allegation is referred to at paragraphs 19 and 20 of the Details of Claim.

Allegations: Direct race discrimination; Direct disability discrimination (Bronchiectasis); Harassment related to race; Harassment related to disability (Bronchiectasis); Victimisation
Discriminator: R2

17. In or about November 2016, R2 spoke to C critically about C's work on Investment Papers in respect of Herne Hill Property Investment Project. R2 told C words to the effect of "This is not good

enough" but did not provide any constructive criticism or suggested improvements. C believes this was done to affect his confidence and/or manage him out of the organisation.

This allegation is referred to at paragraphs 19 and 20 of the Details of Claim.

Allegations: Direct race discrimination; Direct disability discrimination (Bronchiectasis); Harassment related to race; Harassment related to disability (Bronchiectasis); Victimisation
Discriminator: R2

19. In January / February 2017, C told R2 that he was suffering stress and anxiety as a result of ill- treatment at work. R2 failed to take any action.

This allegation is referred to at paragraph 22 of the Details of Claim.

Allegations: Direct race discrimination; Direct disability discrimination (stress & anxiety); Discrimination arising from disability (stress & anxiety); Failure to make reasonable adjustments; Harassment related to race; Harassment related to disability (stress & anxiety); Victimisation
Discriminator: R2

20. In or about February 2017, R1 failed to make reasonable adjustments to cater for C's health by scheduling work appointments when R2 was aware that C was required to attend physiotherapy.

This allegation is referred to at paragraph 23 of the Details of Claim.

Allegations: Direct race discrimination; Direct disability discrimination (Bronchiectasis); Discrimination arising from disability (Bronchiectasis); Failure to make reasonable adjustments; Harassment related to race; Harassment related to disability (Bronchiectasis); Victimisation
Discriminator: R2

21. On 6th February 2017, during a 1-2-1 meeting, R2 told C that he could not do a good job when working from home and commented on seeing more of him in the office. During the course of the meeting, C had increasing chest pains and difficulty breathing. R2 failed to offer any support or call medical assistance. Further, on 8th February 2017, R5 informed C that his flexible working arrangement needed to be regulated as soon as possible, and on 15th February 2017, that the Claimant would need to make a flexible working request.

These allegations are referred to at paragraphs 24, 31 and 35 of the Details of Claim.

Allegations: Discrimination arising from disability (Bronchiectasis); Harassment related to race; Harassment related to disability (Bronchiectasis); Victimisation
Discriminator: R2 R5

22. On 6th February 2017, during a 1-2-1 meeting, R2 said to C words to the effect of "I do not think your condition is that serious or unpredictable as you have been suggesting". Following the meeting, on 7th February 2017 C emailed R2 within which he reiterated this comment and told R2 that he felt humiliated by such demeaning remarks and that it was not acceptable.

This allegation is referred to at paragraph 25 of the Details of Claim.

Allegations: Direct disability discrimination (Bronchiectasis); Harassment related to disability (Bronchiectasis); Victimisation
Discriminator: R2

23. By about February 2017 and on an ongoing basis, C was only allocated one project, namely Railton Road, whereas C's colleagues all had five to six projects. C was being disadvantaged and deskilled and there was an unfair allocation of work. C raised this with R2 and R5 in an email on 8 February 2017, together with other concerns including the information raised at the Property Diversity Day, his stress at work and R2's comments on 6th February 2017.

This allegation is referred to at paragraphs 29 and 30 of the Details of Claim.

Allegations: Direct race discrimination; Direct disability discrimination (stress & anxiety); Harassment related to race; Harassment related to disability (stress & anxiety); Victimisation
Discriminator: R2

24. C asserts that the allegations contained within his emails to R2 and R5 on 7 and 8 February 2017 constituted a grievance. R5 acknowledged that C's emails contained serious allegations and he asked Maria Murray (former R3), to become involved and suggested Ms Murray meet with C and R2. On 15th February 2017, Ms Murray copied R2 into an email to C regarding his grievance against R2. C asserts that this was inappropriate as his grievance involved R2.

This allegation is referred to at paragraph 34 of the Details of Claim.

Allegations: Direct race discrimination; Direct disability discrimination (stress & anxiety); Harassment related to race; Harassment related to disability (stress & anxiety); Victimisation
Discriminator: R1 via Maria Murray

25. In her email of 15th February 2017, Ms Murray did not automatically take steps to address the grievance that had arisen, informally or otherwise, despite the allegations being serious (and despite this being acknowledged by R5). Instead, Ms Murray put the burden on C to progress a formal grievance and make a formal flexible working request.

This allegation is referred to at paragraphs 34 and 36 of the Details of Claim.

Allegations: Direct race discrimination; Direct disability discrimination (Bronchiectasis); Harassment related to race; Direct disability discrimination (stress & anxiety); Failure to make reasonable adjustments; Harassment related to disability (Bronchiectasis); Harassment related to disability (stress & anxiety); Victimisation
Discriminator: R1 via Maria Murray

26. In February 2017, C attended a grievance investigation meeting. At the meeting, R5 required C to withdraw the email C sent to R2 on 8 February 2017 setting out his complaints and to apologise to R2 in order for C's grievance to proceed to the next stage. C declined, and the grievance did not proceed and R1, Ms Murray and R5 took no further action in respect of the Claimant's grievance and request for flexible working.

This allegation is referred to at paragraphs 40 and 41 of the Details of Claim.

Allegations: Direct race discrimination; Direct disability discrimination (Bronchiectasis); Direct disability discrimination (stress & anxiety); Failure to make reasonable adjustments; Harassment related to race; Harassment related to disability (Bronchiectasis); Harassment related to disability (stress & anxiety); Victimisation
Discriminator: R5 and/or R1 and/or R1 via Maria Murray

27. Following the grievance investigation meeting, in February 2017 (and on an on-going basis), C experienced increased hostility and repeated pressure from R2 and other Development Team members, including Dale Wilkins, Malcolm Carpenter and Claire Fowler. C was blanked by team members when he said hello to them and C was ostracised.

This allegation is referred to at paragraph 42 of the Details of Claim.

Allegations: Direct race discrimination; Direct disability discrimination (stress & anxiety); Harassment related to race; Harassment related to disability (stress & anxiety); Victimisation
Discriminator: R1and/or R2

28. On 31st March 2017, C's performance was assessed as "partially achieved" as part of a performance review, without any discussion with C and without a support plan being put in place, without R1's policies and procedures in respect of performance reviews being followed.

This allegation is referred to at paragraph 43 of the Details of Claim.

Allegations: Direct race discrimination; Direct disability discrimination (stress & anxiety); Harassment related to race; Harassment related to disability (stress & anxiety); Victimisation
Discriminator: R1 and/or R2

29. On 19th June 2017, C attended a further OH assessment following a referral from R2/R1 relating to C's lung condition. Four reasonable adjustments were recommended in the report (dated 20 June 2017 and sent to R2/R1) as follows:

(i) flexibility to attend hospital appointments;
(ii) working from home;
(iii) avoiding travelling in adverse conditions; and
(iv) ongoing management support and understanding to accommodate him at work with his [lung] condition.

None of the recommended reasonable adjustments were implemented by R1 or R2, either following receipt of the report on 20 June 2017 or on an ongoing basis.

This allegation is referred to at paragraph 45 of the Details of Claim.

Allegations: Discrimination arising from disability (Bronchiectasis); Failure to make reasonable adjustments; Harassment related to race; Harassment related to disability (Bronchiectasis); Victimisation
Discriminator: R1 and/or R2

30. In July 2017, C could not be present at a Development Team Meeting in person due to suffering breathing difficulties, so C dialled in from home. During the meeting, the cost of development was discussed and C began to speak so as to contribute to the conversation. R2 said words to the effect of "Hold on, you don't need to talk, whatever you think you want to say, it would be helpful if put in an email." R2 therefore silenced C and prevented C from speaking at the meeting.

This allegation is referred to at paragraph 21 of the Details of Claim.

Allegations: Direct race discrimination; Direct disability discrimination (Bronchiectasis); Harassment related to race; Harassment related to disability (Bronchiectasis); Victimisation
Discriminator: R2

31. During a 1-2-1 meeting with R2 on 7th September 2017, R2 told C that, acting on the advice of Ms Murray, it was to be recommended that C's working hours would be reduced to 3.5 days per week with a consequential reduction in pay. C was told that a letter would be sent to him to that effect. C considers that this recommendation was made because of/related to his disability caused by his bronchiectasis condition in that C could not physically attend the office 5 days a week.

This allegation is referred to at paragraphs 46 and 47 of the Details of Claim.

Allegations: Direct race discrimination; Direct disability discrimination (Bronchiectasis); Discrimination arising from disability (Bronchiectasis); Harassment related to race; Harassment related to disability (Bronchiectasis); Victimisation
Discriminator: R2 and/or R1 via Maria Murray

32. From C's return to work in January 2013 (and on an ongoing basis), C was paid less in relation to basic salary and bonuses, compared to his colleagues, in particular, Adam Roberts and Malcolm Carpenter. C's annual bonus was £2,000 less than it had been prior to his return to work in January 2013.

This allegation is referred to at paragraph 55 of the Details of Claim.

Allegations: Direct race discrimination; Direct disability discrimination (Bronchiectasis); Harassment related to race; Harassment related to disability (Bronchiectasis); Victimisation
Discriminator: R1
Actual comparators: Adam Roberts and/or Malcolm Carpenter and/or hypothetical comparator.

33. In November 2017, an invoice for C's registration as a Chartered Surveyor was sent to R2, but R1/R2 never paid the invoice (at the time C was employed and on sick leave). Therefore, C was required to pay the invoice in order to stay on the register of Chartered Surveyors.

This allegation is not included in the Details of Claim. The Claimant's application for permission to amend his claim by the addition of this allegation 33 against R1, was allowed by Employment Judge Truscott At the Preliminary Hearing on 28 August 2018.

Allegations: Direct race discrimination, Direct disability discrimination (stress & anxiety), Harassment related to race, Harassment related to disability (stress & anxiety), Victimisation
Discriminator: R2

34. Contacting the Claimant by letter on 25th April 2018, when in a letter dated 10 November 2017 from the Claimant's solicitor to the Respondent the Claimant's solicitor had requested that any contact be

directed to the Claimant's solicitor, as direct contact was affecting the Claimant's health.

This allegation is referred to in section 8.2 'Details of Claim' in the Claimant' second claim form, when read together with his resignation letter dated 30th April 2018

Allegations: Harassment related to race, Harassment related to disability (Bronchiectasis), Harassment related to disability (stress & anxiety), Victimisation
Discriminator: R1

35. By its letter of 25th April 2018, requiring the Claimant to maintain direct regular contact with the Respondent, when such contact would impede his recovery.

This allegation is referred to in section 8.2 'Details of Claim' in the Claimant' second claim form, when read together with his resignation letter dated 30th April 2018

Allegations: Harassment related to race; Harassment related to disability (Bronchiectasis); Harassment related to disability (stress & anxiety); Victimisation
Discriminator: R1

5. Grounds 2 to 35 are advanced as particulars of breach of the implied term of trust and confidence.

6. The following was the agreed position in relation to disability and protected acts: -

(1) C suffered with a disability by way of 'asthma/some lung issues' from 2012 onwards;

(2) the Rs had knowledge of such disability during that period;

(3) C suffered with a disability by way of stress from 2015/6 to the date of termination;

(4) the Rs had knowledge of such disability during that period;

(5) the Rs accept that C did the following protected acts: -

a) bringing Tribunal proceedings for race discrimination in 2012;
b) complaining of discrimination in his email dated 7th February 2017.
c) complaining of discrimination in his email dated 8th February 2017.

7. In relation to the admitted protected acts, the First Respondent has not alleged that either of the February 2017 emails were sent in bad faith.

8. The Claimant does not pursue his claim for holiday pay.

9. The Tribunal heard evidence from the Claimant.

10. It also heard evidence from: Mr Kirkwood, Development Director in the First Respondent's Property Team; Mr Carr Development Manager of the Asset Development Team; Maria Murray, Senior HR Business Partner; Alan Muir, Director of Commercial Estate; Tom Higginson Director of Planning Group Property and Executive lead for Diversity & Inclusion in the Property Directorate (all roles as at the relevant time).

11. There were 2 Bundles of documents, a main bundle and a supplemental bundle. Pages were added during the hearing. Page numbers in the supplementary bundle are indicated by "S/B" in these reasons.

12. The hearing was conducted by CVP. There were a few connection difficulties but all were resolved. The Tribunal heard all evidence regarding liability at this hearing. The parties exchanged written submissions and replies. The Tribunal reserved its judgment and set a provisional remedy hearing date. Given the Tribunal's judgment, however, that remedy hearing will not now take place.

The Facts

13. The Claimant is a black Nigerian Chartered Surveyor who was employed by the First Respondent from 3 December 2007 to 30 April 2018. He was initially employed as a Portfolio Manager. He performed well in that role, receiving performance ratings of either good or outstanding, pp992, 1001 & 1622.

14. In about 2010 the Claimant was nominated to be part of the First Respondent's Talent Management Programme, p964. His manager at the time, Richard Egan, said the following about the Claimant when nominating him for the Programme, "Adebola is an exceptional performer who has successfully tackled issues that have historically been ignored due to their complexity. Adebola has also nurtured emerging talent and continues to help change the ethos within the commercial estate ….Adebola has produced very impressive figures both in terms of income and OPEX, his approach is dynamic, smart and infectious and shows a glimpse of what can be achieved within the CE. Adebola is a strategic thinker with a constant eye on the bigger picture. Adebola constantly hones his skill base and shares his knowledge within commercial property." P966.

15. Following a reorganisation in 2011, the Claimant was appointed to the role of Asset Development Surveyor (ADS), which was his second choice of role pp 1012 and 1973 – 1974.

16. The Claimant had brought a claim for race discrimination against the First Respondent in September 2011, pp 1045 – 1051. A mediation took place

in December 2012 and the claim was settled by a compromise agreement dated 4 January 2013. During those proceedings, the Claimant was signed off work, sick, with stress-related health problems in 2011 - 2012.

17. As part of the compromise process, the Claimant attended a Return to Work meeting with Mr Kirkwood Development Director in the First Respondent's Property Team, following which a return to work letter was issued, p1097.

18. Mr Kirkwood was responsible for the First Respondent's Development Team, which generated profit from the disposal of surplus land. In 2012 Mr Kirkwood had assumed responsibility for the Commercial Estate Development team (CED). This team was responsible for delivering refurbishment and development projects within railway arches to generate income.

19. The Claimant returned to work on 7 January 2013 in his new Asset Development Surveyor (ADS) role. When he returned, his manager was Nigel Carr, Development Manager of the Asset Development Team.

20. Mr Kirkwood was Mr Carr's line manager. Mr Kirkwood knew about the Claimant's first Tribunal claim, having been involved in the settlement process for that claim, p 1071.

21. Mr Kirkwood did not inform Mr Carr of the full terms of the Return To Work letter dated 3 January 2013, nor Occupational Health reports obtained in relation to the Claimant in 2012, pp1851, 1873. Mr Kirkwood told Mr Carr that the Claimant was returning on a phased return to work.

22. Mr Carr was not aware that the Claimant had a disability, but knew that he had a long-term health condition, which he believed to be asthma. Mr Carr was also aware that the Claimant had considerable accrued annual leave to take. Mr Carr knew that there had been a Human Resources dispute between the Claimant and the First Respondent, which had been resolved, and he accepted in evidence that he probably would have known that the Claimant had brought a claim against the First Respondent.

23. The managers who managed the Claimant during the period relevant to this claim had not undergone any recorded training in Diversity & Inclusion or Equal Opportunities with the First Respondent. The Oracle training records for each manager, pp 989, 990, S/19, show that they underwent no relevant training conducted by the First Respondent until after the Claimant went off work, sick, in September 2017.

24. The First Respondent's Diversity & Inclusion Policy dated 2014 provided that all key managers and decision makers would be trained, p754. It appeared from the evidence that that requirement was not implemented until late 2017.

25. Mr Carr told the Tribunal that he had attended an Inclusive Leadership day and lectures in Inclusive Design, but had received no disability-specific training.

26. Mr Carr had been seconded into the role of Development Manager from January 2013. Mr Carr had already been in a Band 2 role with the First Respondent since 26 June 2007, pp 655 – 657. That Band 2 role had been in a new team which had been set up to create a Joint Venture company. Mr Carr told the Tribunal that, since joining the First Respondent in 1999, he had always worked in its Development and Sales Team, dealing with land disposals and development opportunities. He said that he had extensive experience of setting up sites for development, as well as experience of dealing with third parties, including forming joint ventures for regeneration sites.

27. Mr Kirkwood, who appointed Mr Carr to the 2013 Development Manager secondment, had not been trained in accordance with the First Respondent's Recruitment and Selection ("R&S") policy, which requires all 'interviewers and selectors' to be trained, p698 at 5.1.

28. Mr Kirkwood did not apply the R&S Policy to Mr Carr's secondment, or subsequent permanent appointment to the Development Manager role. Neither the secondment, nor permanent, role was advertised.

29. Mr Kirkwood explained in evidence that, in 2012, the Asset Development Surveyors had been being managed by one of the Surveyors, Mr Roberts, on an interim basis, but that the team had not been hitting its milestones.

30. Mr Carr had no people management experience, having had no direct reports in his previous roles. He was not trained in people management before starting his secondment.

31. It was put to Mr Kirkwood in cross examination that, if the Development Manager role had been advertised, management skills would have been one of the criteria specified. Mr Kirkwood disagreed. He said that the First Respondent had previously promoted employees without management experience into management roles, and that, for this role, knowledge of development procedure was more relevant. The Asset Development Team's Projects were late and were not being completed in the right way. Mr Kirkwood needed someone with development experience. He said that Mr Carr had that experience.

32. Mr Kirkwood explained that he had become Mr Carr's line manager when Mr Kirkwood joined the First Respondent in April 2011. At that time, Mr Carr was a band 2 development manager supporting Solum, a Joint Venture with Kier, focused on delivering development projects on Network Rail land in the South East.

33. The Tribunal accepted Mr Kirkwood's evidence regarding the need for a manager who had knowledge of development procedure. He explained in

what way the Asset Development Team was failing and therefore what was required to turn it around. The Tribunal accepted his evidence, which was corroborated by Mr Carr, that Mr Carr did have that relevant experience. Mr Carr's employment history with the First Respondent demonstrated this.

34. There was no documentation before the Tribunal showing how that appointment was made permanent. Mr Carr accepted that he did not have to apply for the role.

35. The Claimant had people management experience, but not experience in the relevant development procedure. He was not a Band 2. In the Claimant's one to one meeting with Mr Carr on 26 February 2013, the Claimant said that he was not a development surveyor and had no experience in undertaking development schemes; he had previously been involved in the management of estate and not the development of it, p1129.

36. The Claimant disputed the content of all Mr Carr's meeting notes. Mr Carr told the Tribunal that he took notes of meetings which he thought would be difficult. The Tribunal noted that the 26 February 2013 meeting notes appeared to be a full record of a two-way exchange. The Tribunal decided that Mr Carr's meeting notes were accurate.

37. Mr Carr did not know the Claimant before his appointment.

38. The Claimant returned to work in January 2013 on a phased return. In accordance with the Occupational Health (OH) reports of 7 August and 30 November 2012, pp 1851 – 1853, 1873 – 1875, he returned to work initially 3 days a week.

39. The 7 August 2012 OH report had recommended that the Claimant should be reviewed 4 to 6 weeks after he started work, when an increase in his work schedule was anticipated. Mr Carr did not refer the Claimant back to OH, because he had not seen these reports and was unaware of the advice contained in them. The Claimant did not request a further OH appointment in early 2013.

40. Shortly after he started in the ADS role, the Claimant had asked Mr Carr if there was a manual explaining how to run the team's projects. Mr Carr explained, in an email on 29 January 2013, p1120, that there was no such manual, but recommended that the Claimant sit down with one of the team to see how they worked. The Claimant confirmed that he would be doing this on 11 February.

41. The Claimant told the Tribunal that, in or about January 2013, Mr Carr said to him words to the effect of "It's no good complaining, I'm here for a reason." The Claimant said that he had a clear recollection of this conversation. He said that, supported by Mr Carr's demeanour and the timing of his appointment and the conversation, the Claimant understood Mr Carr to mean that he would be carefully monitoring him because of the claim he had brought in the Employment Tribunal.

42. Mr Carr held a one to one meeting with the Claimant on 26 February 2013. In it, Mr Carr checked on the Claimant's progress with the one Portfolio Operation Manager ("POM") plan the Claimant had been allocated. The Claimant reported that it was 50% complete. Mr Carr said that he would have expected him to be further through, given that the Claimant had only been allocated 1 POM and 1 Hot Spot, p1128. The Claimant said that he was on a phased return and Mr Carr responded that he had deliberately not overloaded him.

43. Mr Carr told the Tribunal that he would have completed the POM plan within 14 days himself. The Claimant had been back at work for about 8 weeks.

44. In the meeting, the Claimant said that he was not a development surveyor and had no experience in doing development schemes. He again asked whether there was a manual for undertaking an Arch Development Scheme. The notes of that meeting record that Mr Carr reassured the Claimant that the Claimant had much experience in lettings and dealing with tenants, which the Claimant could share with the team. In turn, Mr Carr explained that the team would help the Claimant understand how to deal with a development case. Mr Carr notes recorded, "I reiterated that the team was there for a reason and that people should not feel isolated. The team was there to help, but that he needed to get stuck in and ask questions", pp 1130.

45. The Tribunal decided that Mr Carr did not tell the Claimant that 'he' was there for a reason. He was advising the Claimant that the team was there for a reason – namely, to support each other and share knowledge, to the benefit of the Claimant.

46. There was a further one to one meeting between Mr Carr and the Claimant on 22 April 2013, pp 1164.

47. The notes record that the Claimant agreed that he had returned to work full time, pp 1164. However, the Tribunal noted that the Claimant was still entitled to a very large amount of additional annual leave which he had accrued during his sick leave.

48. The notes of the meeting also record that Mr Carr said that he needed to see the Claimant in the office, that it was important that his employer knew where the Claimant was and that he was safe, and that it was important for the team that they all saw him as they needed to start to work better as a team.

49. The notes record that the Claimant explained that there were reasons that the Claimant was not in the office – sick leave, holiday and working from home. Mr Carr responded that that was all fine but "we needed to start working better as a team."

50. The Tribunal considered that the notes of this exchange were likely to be accurate – Mr Carr's requests for the Claimant to attend the office and to sit with his team became a consistent theme in the two men's interactions.

51. In evidence to the Tribunal the Claimant denied that the ADS team sat together in their office in Burrell Street. He said that the First Respondent operated a hot desking system, so there was no set area for the team to sit. He said that he had asked that his orthopaedic chair be placed on the ground floor there. He never moved it and always sat on the ground floor when he was in that office.

52. Mr Carr told the Tribunal that the ADS team always sat together in the mezzanine when they were at Burrell Street. He described them sitting together in a pod. This meant that the Claimant always sat on a different floor to the rest of his team members.

53. The Tribunal accepted Mr Carr's evidence on this. His evidence was clear and credible. By contrast, in evidence, the Claimant appeared unwilling to accept that there might be any benefit to sitting with his team. From his own evidence, he appeared to have been stubbornly unwilling to sit there. Further, as it appeared that he never sat on the mezzanine, the Claimant could not have known where the team members were sitting, in his absence.

54. In the meeting on 22 April 2013, Mr Carr said that he would like to have a sit down with the Claimant every Monday "for a run through on how things were going", p1164. Mr Carr recorded, p 1164 – 1165, that he was proposing this to help him as the Claimant "had expressed concern that he did not know how to do the job as he was a portfolio manager, not a developer." Mr Carr recorded that he thought this would be helpful to get the Claimant "up to speed." The notes record that the Claimant was very resistant to this, as it was not what the others were subject to.

55. In cross examination, the Claimant said that the proposed meetings did not take place as he did not agree with Mr Carr's suggestion. He said that Adam Roberts was not required to work in London.

56. Mr Carr told the Tribunal that he expected the team to sit together.

57. He said that he requested that the Claimant sat with team, as a good means of integrating and bouncing ideas around. He told the Tribunal that his suggestion was to sit down together 1 day a week, to go through cases, because the Claimant was struggling with those and Mr Carr thought it would help the Claimant.

58. Mr Carr also told the Tribunal that Adam Roberts worked from the First Respondent's York office, not from home. Adam Roberts had managed the team for a year and knew the other team members. Most of his work was based outside London.

59. It was not in dispute that other team members were not required to meet Mr Carr weekly to discuss their projects.

60. The Tribunal accepted Mr Carr's evidence about Adam Roberts' working arrangements – he was his manager and would know this information.

61. The Tribunal found that Mr Carr did not tell the Claimant that he should be "sat within his sight". Rather, he asked the Claimant to sit with the team, like the other team members whose work was in London. Mr Carr explained why it would be beneficial, both for the Claimant and for the team, for the Claimant to do so.

62. The Tribunal also found that Mr Carr did not tell the Claimant that, every morning, the Claimant was to discuss his progress with him. The proposal was a weekly meeting. That proposal was made in the context that the Claimant had not made expected progress on his POM and that the Claimant was expressing lack of confidence in his skills as a development surveyor. The Tribunal found that Mr Carr suggested a weekly meeting to support the Claimant, who was struggling with his projects. There was no evidence that other team members were struggling with their projects.

63. The Respondents' witnesses told the Tribunal that the Claimant did not regularly update his Outlook diary as to his whereabouts. Mr Carr told the Tribunal that he would often not know whether the Claimant was working from home, attending a medical appointment, out on site, working in a different part of the office, or was off sick or on annual leave. There were email exchanges in the bundle showing Mr Carr trying to locate the Claimant, for example p1122.

64. On 15 May 2013, the Claimant applied for the Band 2 role of Head of Leasehold Advisory, pp 1175 – 1176. This would have represented a promotion for him. He was interviewed for that role on about 28 June 2013, pp 1196, but was unsuccessful. The Claimant was provided with detailed feedback on that application on 12 July 2013, pp 1197 – 1199. The feedback explained that in some areas his application lacked the substance, the detail and stretch required at a leadership level.

65. The Claimant then applied for the role of Estate Manager, Band 2, on 3 June 2013, p1177. His application was submitted to Digby Nicklin, Director of Commercial Estate. The application was not formally acknowledged by Digby Nicklin, nor anyone else at the First Respondent. No HR/Oracle record was created for the application. The Claimant received no formal rejection of his application. Digby Nicklin told the Claimant, later, that his application had not been taken forward because of an unwritten policy that, where an employee had applied for a promotion to a higher band and was rejected, the First Respondent would not consider a further such promotion application made within 6 months.

66. In an email dated 23 July 2013, pp 1200, Mr Nicklin announced that Mr Shaun Mobsby, a white male, had been appointed to the Head of Leasehold

Advisory role and stated that Mr Mobsby would also be assuming management responsibilities for the London Estate Manager role until an appointment was made to it.

67. Mr Kirkwood told the Tribunal that, shortly after the recruitment process for the London Estate Manager had commenced, the First Respondent had announced a 15% head count reduction – and that, as a result, Mr Nicklin decided that the Leasehold Advisory and Estate Manager roles would be combined and that Mr Mobsby would take on both roles.

68. Digby Nicklin was a direct report of David Biggs (Managing Director). Mr Kirkwood told the Tribunal that David Biggs was present at the Claimant's Judicial Mediation on 9 November 2012 in which his Tribunal claim was compromised. He accepted in evidence that Mr Nicklin reported to David Biggs, and that it was likely that Mr Nicklin also knew about the Tribunal claim.

69. Mr Kirkwood told the Tribunal that there was no documentary evidence of the existence, or application, of the 6-month rule. He also said that he was not personally aware of the 6-month rule. He acknowledged that it was bad practice on behalf of the First Respondent not to acknowledge applications.

70. The unwritten practice of not permitting promotion applications within 6 months of an unsuccessful one was outside the terms of the R&S policy (which had only recently been revised following a high level diversity review publicly supported by the CEO, p1015, and conducted by external consultants).

71. On 19 August 2013 the Claimant emailed Mr Carr stating "Nigel, Just to let you know that I am unwell and have been placed on medication for 5 days, and as a result I'll be unable to come to work. Regards, Adebola", p 1204. Mr Carr replied "OK, thanks for letting me know and I hope you feel better soon. Just to cover off procedures could you email me a note from your doctor to this effect?" The Claimant responded saying that he could self-certify for 7 days.

72. At a one-to-one meeting on 18 September 2013, p1265, Mr Carr explained to the Claimant that he had not known that a doctor's note was not necessary initially, but that, as the Claimant had said that he had been placed on medication for 5 days, Mr Carr had assumed that he had a doctor's note to this effect and that he would send this in. Mr Carr said that this was his mistake as he did not know the sick leave policy. The Claimant responded that Mr Carr's conduct was intimidatory and felt like a witch hunt.

73. Mr Carr confirmed in evidence that he had made a mistake about the requirements of the sick leave policy.

74. The Claimant had not, in fact, been to the doctor on this occasion, but has started taking antibiotics which he kept at home in the event of a flare up of his bronchiectasis condition.

75. The Tribunal accepted Mr Carr's evidence and found that Mr Carr was an inexperienced manager of people. It accepted that he had been mistaken about the requirements of the sickness policy and that he had been prompted, by the wording of the Claimant's email, to ask for a copy of his sick note. The Tribunal considered that the wording of the Claimant's 19 August email had implied that he had been to the doctor and been given a sick note.

76. In the event, the Claimant was off work, sick, from 19 August – 17 September 2013. He attended a one-to-one meeting with Mr Carr on 1 October 2013. Mr Carr mentioned that he would like to get Occupational Health ("OH") involved, to ensure that they were doing as much as they could to help the Claimant with health issues. The Claimant agreed, p 1271.

77. The Human Resources Direct adviser records for 4 October 2013, p1225, record that advice was given to Mr Carr to make an OH referral and, generally, as to next steps. Mr Carr, who was unfamiliar with the system, did not refer the Claimant to OH until late November/early December 2013, p1900.

78. The Claimant attended the appointment with OH on 16 December 2013, pp 1889 – 1890 and the resultant report was disclosed to the Claimant by OH the same day, p 1891. The Claimant gave authority for it to be released to the First Respondent.

79. The report stated "As mentioned, he is perfectly capable of the requirements of his role most of the time. However, from time to time when his condition worsens, he may well find it useful to have the flexibility to work from home, and unfortunately his condition is such that he is likely over time to suffer from more serious episodes which will generate further brief episodes of absence…I do not think there are any other particular workplace modifications that one can suggest here, p1890."

80. At this time, the Claimant was working from home when suffering exacerbations of his condition. There was no evidence that Mr Carr ever challenged the Claimant's assertion that he needed to attend appointments, or to work from home due to bronchiectasis flare ups.

81. Mr Carr and Mr Kirkwood, through inexperience in using the HR system, could not locate the 16 December 2013 OH report. The Claimant mislaid his own copy of the report and could not provide it to them.

82. On 21 March 2014, the report was retrieved by HR and passed to Mr Carr, p1333. Tina Bannon of HR acknowledged at the time that 'we may have to concede that we have been a bit useless', p1340.

83. When Mr Carr discussed the report with the Claimant, the Claimant pointed out that the details of his medication and treatment programme had not been recorded, nor his wish to work from home 3 days each week. Mr Carr submitted further questions to OH on 14 May 2014, p1354. OH indicated that a further face to face assessment of C was required, p1352. Mr Carr re-

referred the Claimant to OH. The new OH appointment took place on 27 June 2014, p1369.

84. A further OH report was received on 20 August 2014, p1369. The report said that the Claimant needed to attend the hospital for lung physiotherapy 3 days per week. It stated that the Claimant had found it difficult to attend work after hospital appointments, when he felt extremely fatigued. It recommended that the Claimant work from home when he had to attend hospital appointments, or when his symptoms flared up.

85. There was no evidence that Mr Carr ever refused to allow the Claimant to work from home when the Claimant did attend hospital appointments. The Claimant agreed, in evidence, that he was never denied the opportunity to go to appointments.

86. HR Direct advised Mr Carr on 24 September 2014, p1254, that he should meet with the Claimant to discuss: when he would be working from home and when he would be in the office; determine whether OH should rebook Adebola for another medical in 3 months or whether a second referral would need to be made; and upload the notes from the meeting with the Claimant.

87. On 12 January 2015, the HR Direct record showed that Mr Carr had advised HR Direct that the Claimant "still works from home" and "Things do appear to have settled down and he is happier at work", p1254. HR Direct advised Mr Carr to meet with the Claimant to discuss his attendance at work, reinforce that Mr Carr wished to see him in the office more frequently and to refer the Claimant to OH.

88. On 17 February 2015, p1255, HR Direct contacted Mr Carr saying, "Further to your discussion with my colleague in January, can you please confirm whether you referred Adebola to OH and if so can you please upload a copy of the OH report for review".

89. There were two failed attempts by HR Direct to contact Mr Carr on 3 and 16 March 2015, p1255; 1256.

90. On 19 March 2015, p1257, the HR Direct case records stated, "Adebola is working from home 3 days a week and the situation appears to have settled down. A referral was not made in January and is due. However, it is unknown if OH are case managing Adebola".

91. Further failed attempts were made by HR Direct to contact Mr Carr on 17 April 2015, p1258; 7 May 2015, p1259, 12 February 2016, p1259. HR Direct then closed the case.

92. The Claimant was working from home on a regular basis during 2014 – 2016.

93. Mr Carr was cross examined about why he had not responded to contact from HR Direct in this period. He told the Tribunal that things had settled down and that the Claimant was happier at work in 2014 – 2016.

94. The Claimant, as other employees, was required to undergo Performance Development Reviews ("PDRs") in 2014, 2015, 2016 and 2017.

95. There were no completed PDR forms for the Claimant in 2014, 2015, 2016 or 2017. The Claimant's ratings for these years were as follows. In March 2014, the Claimant was given the grade 'Partially Achieved', p1622. In March 2015, the Claimant was graded as 'Good'. On 25 March 2015 Mr Carr emailed the Claimant his 2014-2015 Targets and Objectives and asked him to complete the review form "for our forthcoming review", p1390.

96. In March 2016, the Claimant was graded as 'Partially Achieved'. On 10 March 2016 Mr Carr emailed the Claimant his specific targets for the year and asked him to complete the performance review document in advance of their performance review meeting, p1439, 1441, 1447.

97. Mr Carr told the Tribunal that, in every one of the years 2014 - 2017, Mr Carr carried out both an interim and end of year performance review meeting with the Claimant. The Tribunal accepted this evidence – it was supported by the available documents. For example, Mr Carr carried out an interim review on 24 October 2013, p1301, and assessed him as "partially achieved". The Claimant questioned this grade at the time. Mr Carr agreed to discuss the grade with Mr Kirkwood and gave the Claimant a further explanation at a one-to-one meeting on 16 January 2014, p1312.

98. The Claimant was provided with individual targets regarding his own projects, for example, in 2014-15, pp S/B 30 – 31. He was also given targets for contributing to team targets, S-B, p34.

99. End of year review meetings were typically held in March each year and took at least an hour. In none of the years 2014 – 2017 did the Claimant complete review forms containing evidence of his performance for these meetings. The performance management procedure required that he did this, p844.

100. His performance was discussed at each of the review meetings. The Claimant never appealed the ratings he was given.

101. It is correct that the Claimant, in 3 out of the 4 years in question, only "partially achieved" his targets.

102. There was no evidence from which the Tribunal could conclude that that the Claimant was performing as well as others in the team who were given better grades in these years. The Claimant did not regularly work alongside his fellow team members, so he was not in a position to give a reliable assessment of the quality or quantity of their work.

103. The Claimant contended that his ratings of 'Partially Achieved' should have triggered the institution position of a support plan, in accordance with the Performance Improvement procedure at p688 - 689.

104. Mr Carr told the Tribunal that he gave the Claimant informal support. It is clear that he offered to meet the Claimant on a weekly basis to talk through his projects. The Claimant rebuffed this attempt to support him. Mr Carr did not set out a written support plan, with timescales for improvement.

105. The First Respondent's Performance Improvement Policy and Procedure 2013 stated that if minor shortcomings were identified in an employee's performance, the line manager would, amongst other things, make the employee aware of the standards expected of them, identify in what way the employee's performance is falling short of the standards and agree ways forward, agree SMART (specific, measurable aligned, realistic, time-specific) objectives, put in place appropriate support, set a timescale for review and confirm this in writing.

106. Every year the Claimant was given objectives and was given interim and year end reviews. He was given one-to-one meetings with Mr Carr. Mr Carr told the Tribunal that he went for coffee with the Claimant on a regular basis.

107. The 2017 procedure in the Tribunal Bundle provided that the Performance Improvement Procedure should only be implemented where an employee had a rating of 'Significant Performance Improvement Required', Performance Management Guide, p 886.

108. While the Claimant did not complete the PDR forms, Mr Carr did not complete the forms either. He did not complete his manager comments, even on the Claimant's 2017 form, which the Claimant produced in May 2017, after the review process had been completed in April 2017.

109. Mr Muir told the Tribunal that he considered that the manager's comments form should have been completed, even if the form was submitted late. Nevertheless, the Tribunal noted that the primary responsibility for competing the PDR form each year was with the employee, not the manager.

110. The Claimant attended a Property Diversity & Inclusion Workshop on 12 September 2016 in Milton Keynes, p S/B48. Ms Claridge, a former colleague of the Claimant in Mr Carr's team, also attended. She had a disability.

111. The day was led by Tom Higginson and Jo Lewington (members of the Leadership Team) and Richard Walmsley (from Human Resources).

112. Mr Higginson told the Tribunal that Ms Claridge had already moved out of the Claimant's team by the date of the workshop. This was consistent with the Claimant's pleaded case, p47.

113. It was not in dispute that, at one point during the day, Ms Claridge became upset and spoke about her personal experiences of discrimination.

114. Mr Higginson told the Tribunal he understood Ms Claridge to be talking about her experiences in relation to gender and “glass ceilings”.

115. The Claimant told the Tribunal that Ms Claridge said words to the effect of “For example, in my team the main person who is racist is the manager, Nigel Carr”. The Claimant said that Ms Claridge had then pointed at the Claimant and stated, “They don’t like him because of his…”, tapping her arm to indicate skin colour. He told the Tribunal that Ms Claridge also disclosed during the meeting that Mr Carr encouraged other people to talk about him behind his back, speaking in adverse terms and mocking his accent and the Claimant as a person more generally. The Claimant said that Mr Higginson had asked Ms Claridge if she had reported her disclosures to Mr Carr's manager, Stuart Kirkwood. She said she had not, because she did not feel supported and she was concerned about the potential backlash from doing so.

116. The Claimant said that he had left the meeting room with Ms Claridge and, that Ms Claridge had told him that the name Mr Carr used for him was “nigger”. She said words to the effect of: “I am sorry but I did not plan to reveal this to you but he [Mr Carr] has been calling you a nigger and I challenged him and that was why I got into trouble with him” ... “He is already looking for ways to get me out of the team for speaking up”.

117. The Claimant told the Tribunal that Mr Carr confirmed, a few weeks later, that Ms Claridge was no longer in the Asset Development Team

118. Mr Higginson told the Tribunal that that Ms Claridge did not say that Mr Carr was racist, or had engaged in any discriminatory behaviour towards the Claimant. He denied that she had pointed to her skin, or said that Mr Carr had discussed the Claimant’s accent. Mr Higginson said that, if she had he, Ms Lewington and Mr Walmsley would have been compelled to act on that information.

119. The Claimant did not include the allegation that Ms Claridge had told him that Mr Carr had used the word “nigger” about him in his original claim. He did not raise it until December 2019, in response to an order for further particulars of his claim.

120. It was not in dispute that Mr Higginson called a break when Ms Claridge became upset. The workshop resumed following the break.

121. Mr Higginson told the Tribunal that the Claimant resumed participation in the workshop for the remainder of the day and was engaged and composed. He said that the Claimant showed no sign of having been made aware of very distressing allegations in relation to him.

122. Ms Claridge did not give evidence to the Tribunal for either the Claimant or the Respondent.

123. Mr Carr denied ever having used the word “nigger” in relation to the Claimant. He was forthright in his denial and said that he was deeply offended by the allegation. His evidence was, ‘Not in a million years would I say that.’

124. Mr Carr did agree that the team had had a discussion about the Claimant’s accent. He was asked about this in some detail at the Tribunal, both in cross examination and by the panel.

125. The Claimant contended, in closing submissions, that Mr Carr had modified his account during evidence. The Tribunal considered, however, that Mr Carr was asked more detailed questions on each occasion and answered them accordingly, providing further detail.

126. Mr Carr told the Tribunal that the team had had a short discussion about strong accents in the team, including Adam Robert’s accent, who was from Zimbabwe, an Essex accent and Eileen Claridge’s strong Glaswegian accent. It had been said that the Claimant’s pronunciation of words was sometimes difficult to understand. Mr Carr told the Tribunal that the Claimant does have a strong accent. Mr Carr said that the discussion was very brief and that the conversation had quickly moved on. Mr Carr said that no one had ever mocked the Claimant’s accent.

127. The Claimant was not present during this discussion about accents.

128. Tom Higginson, said in his evidence, that he would be concerned about a comment being made about the Claimant’s accent, but that he could not comment further.

129. Mr Carr also recounted in his witness statement, at paragraphs [70] and [73], that there was some frustration amongst members of the team with the lack of attendance by the Claimant, as they had difficult targets to hit and there were concerns that the Claimant was ‘not pulling his weight.’

130. Mr Carr stated this was raised in a team meeting and that he had explained that the Claimant was allowed to work from home and had periods of absence due to sickness. Ms Claridge had commented that it was unfair to discuss the situation with the Claimant not being present, with which the team agreed and the discussion moved on.

131. Mr Carr recalled that the Claimant had raised the issue of ‘name calling’ with him in 2017. Mr Carr asked the Claimant what he meant by this, but the Claimant did not elaborate further, simply repeating that there had been name calling.

132. The Tribunal preferred Mr Higginson’s evidence to the Claimant’s regarding what Ms Claridge had told the Diversity and Inclusion day. The Claimant’s account was inconsistent with the fact that Ms Claridge had already moved from the Team. The Tribunal accepted Mr Higginson’s evidence that if such serious allegations had been made, he would have acted upon them. Mr Higginson appeared, from his evidence, to be a serious-

minded individual who was committed to furthering equality and inclusion. He agreed that he would have been concerned about team members making comments about the Claimant's accent.

133. It was not in dispute the Claimant rejoined the meeting after the break. Mr Higginson described him as being composed and engaged thereafter. The Claimant's evidence did not contradict this.

134. The Tribunal considered that it was very unlikely that the Claimant would have appeared unmoved having been told of such offensive behaviour towards him.

135. The Tribunal also noted that the allegation that Mr Carr had described the Claimant as "nigger" was not made in the original pleadings. If it were, true the Tribunal would have expected that to have been one of the primary allegations made against Mr Carr. The Tribunal concluded that Ms Claridge did not tell the Claimant, during the break, that Mr Carr used the word "nigger" in relation to him.

136. The Tribunal also found that the APS team had once had a brief discussion about accents and difficulty understanding strong accents. There was mention that the Claimant had a strong accent and that team members had difficulty understanding some words. There was also a discussion, at a different meeting, about the Claimant's absence in the context that the team perceived that he was frequently absent and they believed he was not "pulling his weight." Mr Carr tried to defend the Claimant, by explaining that there were health issues.

137. The Claimant contended that he was not given as many projects as his fellow APS team members. There was a list pf projects assigned to the APS team members in the supplemental bundle at pp 164 – 165. This showed that the Claimant was assigned a total of 13 projects. Malcolm was assigned 14, Dale, 16, Claire 13, and Adam, 10, plus minor enhancements around the country. Mr Carr told the Tribunal that he had compiled this list from his milestone reports at the time.

138. In late 2016 there was a 'Capex freeze' on investment expenditure in the First Respondent. Only schemes which were still on site and had approval to continue were permitted to do so. Many of the team's schemes were paused. By February 2017, the number of live projects had reduced to approximately 30, p1549. Mr Carr said that many of these projects shown as being live in February 2017 had, in reality, been completed, but were awaiting financial sign off.

139. Mr Carr told the Tribunal that some projects had been re-allocated at an earlier stage, when members had left the team. At that time, however, the Claimant had had a full allocation of schemes and would have been overloaded if those projects had been transferred to him.

140. The Claimant was left with one scheme, Railton Road, following the expenditure freeze. Mr Carr told the Tribunal that it was a complex and high profile scheme and that delivery on time was important. He said that the Claimant would have been busy with a lot of project meetings before commencement on site and then with site visits and project meetings once the scheme had started. Mr Carr had to check with the Claimant on a regular basis because the Claimant was not on top of the project in November 2016.

141. The Tribunal accepted Mr Carr's evidence. It accepted that the list compiled from the milestone plans was accurate because it was based on contemporaneous tracking documents. Mr Car was the manager and had a good overview of the team's work. The Claimant had broadly the same number of projects as his team members. Insofar as he was left with one after the Capex freeze, this was a complex site which would have kept him busy.

142. The Claimant told the Tribunal that Mr Carr applied pressure on him, in terms of timescales and costs, even when those matters were outside his control. He also said that the Mr Carr made unnecessary and unjustified criticism of his work. In one project, the Herne Hill Property Investment Project, the Mr Carr had sent the Claimant's investment paper back to him numerous times. The Claimant also told the Tribunal that Mr Carr had instructed him not to carry out any further work on one particular project.

143. The Tribunal noted that, on 30 January 2017, Robert Rose, Portfolio Operation Manager, emailed the Claimant, copying in Mr Carr, saying, "Could you please send the plans as requested. It is causing some issues for me and I feel that you are not taking my requests seriously." P1520.

144. The subject of the email was marked "Railton Road Plans URGENT".

145. Mr Carr promptly forwarded the plans to Mr Rose.

146. The Claimant then emailed Mr Carr, saying that he had been taken aback by Mr Carr's intervention without speaking to the Claimant. Mr Carr apologized, saying that Mr Rose had also asked him about the matter the previous Friday, p1519.

147. Mr Carr told the Tribunal that he had been trying to keep Mr Rose, the internal client, happy and that he would, as a matter of practice, forward documents from the team's Sharepoint, to clients, if he was cc'd into such emails.

148. The Tribunal found that Mr Carr sent on the plans because he was copied into an email requesting them, by a client who was expressing clear dissatisfaction with the Claimant having failed to do so.

149. Mr Carr accepted in cross examination that issues did arise which were not within the Claimant's control. However, he said that it was the Claimant's responsibility to control a project's budget and to have the budget approved. The Claimant needed to know when additional authority for funding would be

required. Mr Carr found that he had to monitor the Claimant's projects in this regard.

150. Mr Carr also told the Tribunal that team members would submit draft reports to him and that he would review them and make tracked changes, or comments, on them. He said, "It would not be unreasonable for me to push the Claimant or any team member where there was additional information required".

151. He agreed that work had ceased on one of the Claimant's projects, Cottage Grove. He said that work had only ceased because a planning consent had been refused, the tenant was unhappy and there was therefore a difficult political situation.

152. The Tribunal accepted Mr Carr's evidence on all these matters. The Claimant's evidence was generalized. By contrast, Mr Carr was able to give a precise account of each matter. The Tribunal found that Mr Carr provided comments and pushed back on all team members' reports, where this was required.

153. The Claimant told the Tribunal that, from November 2016, he had informed Mr Carr that he was experiencing stress and anxiety as a result of ill treatment at work. In an email sent on 8 February 2017, pp 1529 and 1530, the Claimant said, "Since November 2016 I have been explaining to you that I was experiencing stress and anxiety as a result of the happenings at work, but you have ignored this."

154. In evidence Mr Carr accepted that, during a meeting in early 2017, the Claimant informed him that he was "experiencing anxiety related to his belief that other members of the team were ignoring him".

155. The First Respondent's Stress Management Policies recognise that interpersonal relationships with colleagues can be a source of workplace stress, pp649 and 857. Mr Carr had not undergone any stress management training, and was not familiar at the time with either the Stress Management Guide or the Stress Risk Assessment ("SRA") process.

156. Mr Carr told the Tribunal that he discussed the Claimant's concerns about the team's behaviour with him, and explained that it was not in the nature of the team to ignore their colleagues and that Mr Carr had not himself witnessed any such behaviour.

157. The Tribunal has already found that the Claimant had consistently failed to sit with his colleagues when present in the office. Mr Carr told the Tribunal that he continued to encourage the Claimant to sit with his colleagues, so that he could better integrate into the team. Mr Carr said, "I did not consider that any further support was required as the source of the stress was made clear, namely the Claimant's relationship with other team members."

158. The Tribunal considered that Mr Carr was correct in believing that the Claimant had failed to build a rapport with his team. It noted that the Claimant did not allege that the team had been unwelcoming towards him when he first joined it.

159. The Tribunal found that Mr Carr did not undertake any formal stress risk assessment process, or consult stress management policies. The Stress Management Guide advises that, where relationships are causing stress, the relevant stressors are that "Employees may be subjected to unacceptable behaviours at work, including bullying and harassment." It then suggests as measures to address such stressors include, "Promote positive behaviours at work to avoid conflict and ensure fairness • Ensure employees are aware of relevant policy and procedures to prevent or resolve unacceptable behaviour • Ensure all complaints of discrimination, harassment or bullying are quickly investigated and resolved • Take a proactive stance on dealing with conflict where it occurs to ensure it does not escalate."

160. The Claimant did not make any formal complaint of bullying and harassment by the team. The Tribunal found that Mr Carr did not consider that there was any unacceptable behaviour towards the Claimant but, rather, that the Claimant had failed to build a relationship with the team. He gave advice to the Claimant as to how he could address that issue. That is, that the Claimant should sit with the team and be in the workplace when he was able. The Claimant declined to follow that advice.

161. The Claimant told the Tribunal that, in around February 2017, work appointments were frequently scheduled between 8.30am and 9.30am (or around those times) when the Respondents were aware that the Claimant was required to attend physiotherapy appointments and to avoid travelling during rush hour, to protect his health. He said that he believed that the scheduling of these meetings was consciously and deliberately done. He gave an example of him having to request that a meeting be moved on account of a medical appointment in December 2016, p 1516.

162. The Claimant's pleaded claim (ET1, para 4, p43) stated that his lung condition 'requires regular medication and treatments such as chest physiotherapy three times a week and daily home management twice a day.'

163. Paragraph 23 of his Claim Form also stated, 'Since December 2007, when the Claimant's employment with the First Respondent commenced, and after his return to work in January 2013, following the Claimant's previous Employment Tribunal Claim and protected disclosures, the Claimant worked flexibly, including at home, so as to be able to attend some of the three chest physiotherapy sessions that he was invited to attend each week by the Royal Brompton hospital…However, on at least two occasions, the Respondents prevented the Claimant from being able to attend his physiotherapy appointments, by scheduling work appointments such as meetings, at times when the First and Second Respondents knew that the Claimant needed to attend his physiotherapy."

164. It was not in dispute between the parties that the Claimant is and was, at all material times, a disabled person by reason of his condition of bronchiectasis, a chronic lung condition. It was also agreed that the Claimant's stress condition amounted to a disability at the material times.

165. In his witness statement, the Claimant asserted at paragraph [2.1] that his bronchiectasis condition '…requires regular medication and treatments such as chest physiotherapy three times a week and twice daily home management. The requirement to attend chest physiotherapy three times a week at the Royal Brompton Hospital was in operation throughout my employment with the First Respondent (although there were occasions when I was unable to attend because of work). At para [2.2] he stated: 'I, therefore, need to follow a strict management routine to prevent exacerbations, reduce symptoms to maintain a good quality of life, while minimising the progression of my lung disease. I have to adhere to a tight programme of chest physiotherapy which lasts between 45 to 90 minutes per session…'

166. In his witness statement at para [4.57] he further stated: 'In around February 2017, work appointments were frequently scheduled between 8.30am and 9.30am (or around these times) when the Respondents were aware I was required to attend physiotherapy appointments…I typically had medical appointments on Mondays, Wednesdays and Fridays, although they did sometimes change.'

167. The Claimant informed the First Respondent's OH physician in August 2014 that he 'has to attend the hospital for lung physiotherapy three days a week…he has recently noticed that he has found it difficult to attend work following hospital appointments when he feels extremely fatigued and some of his symptoms flare up…', pp 1369. In June 2017 he also told the First Respondent's OH physician that '…he has respiratory physiotherapy as an outpatient three days per week…His appointments are up to an hour and sometimes it may take him 1 – 2 hours to recover from the effects…'

168. The Claimant told the Tribunal in evidence that his care plan was for 3 physiotherapy appointments each week at the Brompton. He said that he would have to change these at the last minute, but that the physiotherapists would agree to see him at short notice, sometimes very early in the morning before work.

169. The Tribunal asked to see evidence of the Claimant's physiotherapy appointments. The Royal Brompton hospital provided all its medical letters and records for the Claimant, both private and NHS, from 2009 onwards. Those documents were at S/B pp 346 – 373.

170. The relevant entries from the Claimant's medical records are as follows:

171. Pp 358 – 21 September 2009 – Dr Wilson, Consultant Physician, 'I have discussed bronchiectasis with him. I will see him again in a month's time with the results of the above investigations, together with the information that I

have received from yourself. He will have an appointment with out (sic) physiotherapists at that visit.'

172. Pg 357 – Dr Wilson, Consultant Physician, 23 November 2009 – 'I am pleased he has had a session with our physiotherapists and I have encouraged him to practice his drainage exercises regularly.'

173. Pg 178 – Dr Wilson, Consultant Physician, 6 July 2011 – 'He has had a session with our physiotherapists who have reviewed his techniques and also given him an Acapella assist device.'

174. Pg 359 and pg 361 – Physiotherapist: Rachel Johnston, 22 August 2012 – 'Mr Ibitoye attended physiotherapy today for a HTS trial. He reports that he is currently performing Physiotherapy airway clearance 1 x daily in upright sitting 5 – 10 minutes consisting of ACBT with acapella,' 'Mr Ibitoye passed the hypertonic saline trial and has been advised to take it as prescribed pre physiotherapy…these will be reviewed on his next appointment 19/11/2012.' The entry for "Physio Management" in that document was empty.

175. Pg 362 – Gemma Pound Band 6 Physiotherapist, 12 March 2013 – 'Thank you for referring the above patient for a HTS trial. They attended on 22/8/12 and passed the trial. They were due to attend for a 1/12 follow up to review their progress but failed to attend, therefore we have discharged them from physiotherapy. Please re-refer in the future if required.'

176. Pg 363 – 365 – 6 November 2013 – 'Mr Ibitoye was seen by one or more of our therapy and/ or psychological services during their in-patient stay. Any on-going involvement of these services with Mr Ibitoye will be communicated separately.'

177. There are no records of any physiotherapy between December 2013 and June 2016.

178. Pg 187 – Mr Michael Loebinger, Consultant Respiratory Physician, 14 June 2016 – 'He has not recently seen the physiotherapist and I do think this would be of value.'

179. Pg 366 – 367 – Georgie Housley, Highly Specialist Outpatient Respiratory Physiotherapist 15 July 2016 – record of appointment with physiotherapist. The entry for "Physio Management" in that document was empty.

180. Pg 348 from Mr Michael Loebinger, Consultant Respiratory Physician, 19 July 2016 'He saw the physiotherapist who went back through his airway clearance techniques, but also did some work with his breathing pattern. The physiotherapist thought that he may well have some breathing pattern dysfunction as a cause for some of his symptoms. He is due to see the physiotherapist again next month.'

181. Pg 1941 – Mr Michael Loebinger, Consultant Respiratory Physician, 5 December 2016 – 'Unfortunately he didn't see the physiotherapists following my last assessment but I do think this would be an extremely important part of his ongoing management and I have asked him to see them today.'

182. Pg 368 – Georgie Housley, Highly Specialist Outpatient Respiratory Physiotherapist, 5 and 8 December 2016 – ''Apparently using Acapella twice a day, 5 – 7 mins, whilst in bed…As ML wants to optimise physio first before considering starting colo, pt will have a ACT appointment with CL this Thursday: to review use of Acapella, and to optimise regular daily usage in relation to using HTS – ie establish regular regime that pt will adhere to. Plan: For this Thursday – to establish regime; pt already has Jan appt to f/up before he sees ML in Feb.'

183. Pg 370 – Georgie Housley, Highly Specialist Outpatient Respiratory Physiotherapist 21 March 2017 – 'I have discharged Adebola Ibitoye from physiotherapy outpatient, whom you referred for airway clearance initially as a PP, he then transferred to the NHS…He has had several sessions with us, during which time we have optimised his regime, which was very effective when we saw him in December and urged him to get back on track if this has fallen by the wayside. He was unable to attend his last appointment in January. I see you are due to review him in June.'

184. On the Claimant's case, in the period between 7 January 2013 and 7 September 2017, he was required to attend physiotherapy at the Royal Brompton 3 times a week. This would have represented 100s of appointments. In fact, the records show the Claimant attended 3 outpatient physiotherapy appointments in this period: on 15 July, 5 and 8 December 2016. He also saw a physiotherapist when an inpatient in November 2013. The Claimant attended no physiotherapy appointments between 7 January 2013 and 14 July 2016.

185. In cross examination the Claimant suggested that, although the "3 times each week" physiotherapy treatment plan was in place throughout the course of his employment, he was prevented from following his physiotherapy regime. He said that he was able to go 3 times a week when he was on leave.

186. He provided 2 specific examples of when be believed he had been prevented from attending appointments.

187. The first was when he was asked by Mr Carr to attend a meeting at 9am, another in relation to Railton Rd when asked to attend a meeting at 8.30am.

188. By letter of 5 December 2016, S/B p196, the Claimant was sent a notice of a physiotherapy appointment on 8 December 2016. On 6 December 2016, p1513, Mr Carr had sent the Claimant an invitation to a 1-2-1 meeting, which the Claimant had accepted. The Claimant then asked for the meeting to be moved from Thursday 8 December to Friday 9 December because he was due to be at the Brompton on 8 December, p1514, 1515.

189. It was clear from chronology that, on 6 December 2016, Mr Carr arranged and the Claimant accepted, a 1-2-1 meeting for 8 December, when neither knew of the physiotherapy appointment. When the Claimant became aware of the physiotherapy appointment, he asked for the meeting to be moved, which it was.

190. The Tribunal found that the Claimant did not attend, nor was he invited to, any physiotherapy appointments in February 2017. He did not provide any evidence of meetings that were deliberately scheduled by Mr Carr to prevent him from attending appointments.

191. The First Respondent's grievance policy and procedure 2011, in place at the relevant times, pp 675 – 683, provides "1.1 Every effort should be made for the majority of problems relating to work or the work environment to be resolved informally between employees and their immediate line manager in the course of their normal working relationship." It also provides, "2. How to Raise a Grievance 2.1 As a first step, the employee should speak to their immediate supervisor/line manager and seek to resolve the matter informally. If their complaint concerns the behaviour and/or actions of their line manager, they should, in the first instance, speak to that person's manager."

192. At para 4.1.1 the grievance policy provides 'If the matter has not been resolved informally, or if the employee considers the problem too serious for an informal approach, he/she must put their grievance in writing, stating what their complaint is and the reasons for it.'

193. The Harassment policy and procedure, pp 763 – 767, advises employees to raise "concerns directly and informally in the first instance to the person you believe is harassing or bullying you", at p765. The policy says that the person may be genuinely unaware that their behaviour is upsetting and will stop without the need for formal action. It advises that, if this does not work, a grievance can be raised. The harassment policy also states that all complaints of harassment, bullying or victimisation will be treated seriously and investigated fully and, if upheld, may result in disciplinary penalties up to and including dismissal, p764. The Equality, Diversity & Inclusion Policy, p754, says, "Complaints about discrimination, harassment or bullying will be regarded seriously and investigated, which may result in disciplinary sanctions, and even dismissal."

194. The Tribunal considered that the policies indicated that, while grievances would primarily be dealt with informally, discrimination and harassment grievances would generally be fully investigated formally, in that they could lead to disciplinary sanctions.

195. The Claimant told the Tribunal that, on 6 February 2017, during a 1-2-1 meeting, the Mr Carr told him that he would like to see more of the Claimant in the office and that there was no way he could do a good job when working from home. The Claimant said that Mr Carr commented that he did not think the Claimant's condition was as serious or unpredictable as the Claimant had been "suggesting". The Claimant said that, during the course of the meeting,

he experienced increasing chest pains and difficulty breathing because he was so stressed and anxious. He told the Tribunal that Mr Carr failed to offer any support or call medical assistance.

196. The Claimant said that he had been so upset about what had happened that he emailed Mr Carr on 7 February 2017, p1531, to repeat the comments Mr Carr had made and how they had made the Claimant feel; which was utterly humiliated.

197. In his email to Mr Carr of 7 February 2017 at 10.15, the Claimant said, 'I note your comment regarding "seeing more of you in the office". I took the opportunity to remind you of my long term impairments, how these impact on my daily lived experience and commuting related problems; to which you responded that, "I do not think your condition is that serious or unpredictable as you have been suggesting". I must reiterate that I felt humiliated by such demeaning remarks which is not the first of such discriminatory comments from you.'

198. Mr Carr replied on 7 February 2017, pp 1529 – 1530, saying that he had not said this or anything remotely like this, and "I actually said I completely understand and accept the issues you have with your condition. I did say however that I do need to see you more than I do currently, which is correct. I have seen very little of you since the beginning of December as discussed yesterday. It is important that you are in as much as you are able for your own benefit as much as being able to liaise with C & M and the client, myself and the rest of the team."

199. In a second email that day Mr Carr said, "My comments about coming into the office still stand. They are as much for your benefit as anything else. It is really important for you to be able to liaise with the team, C&M and the client."

200. Mr Carr agreed that, on 6 February 2017, Mr Carr had commented that he had seen very little of the Claimant in the office since December 2016 and again reiterated that, although the Claimant could not attend the office if he was unwell, that, when he was well enough, he should be attending more regularly. Mr Carr agreed that, at that point, the Claimant had become anxious and left the room, as he was coughing. Mr Carr said that he was not aware that the Claimant required any medical assistance, nor did the Claimant indicate that to be the case.

201. There were no notes of the relevant 1-2-1 meeting.

202. The Tribunal found that Mr Carr did encourage the Claimant to attend the workplace, as he had done throughout the Claimant's employment. He may well have so an insistent manner, given the Claimant's resistance. The Tribunal noted Mr Carr's second email on 7 February 2017, "My comments about coming into the office still stand. They are as much for your benefit as anything else. It is really important for you to be able to liaise with the team, C&M and the client."

203. The Tribunal did not accept the Claimant's evidence that Mr Carr said there was no way he could do a good job when working from home, or that he did not think the Claimant's condition was as serious or unpredictable as the Claimant had been "suggesting". The evidence showed that Mr Carr had always accepted the Claimant's assertions about his need for hospital appointments and to work from home. The notes of meetings since 2013 showed that Mr Carr talked about the benefits of working from the office, which was a positive encouragement to the Claimant, rather than any criticism of the Claimant's condition. There was no reason that the tenor of this conversation would have been any different.

204. Mr Carr did not call medical assistance. Mr Carr saw that the Claimant was coughing.

205. In the course of Mr Carr and the Claimant's subsequent email exchange about the meeting on 6 February 2017, pp1547 – 1543, Mr Carr emailed the Claimant saying that he had discussed the contents of the Claimant's email with Mr Muir, his manager, p1546.

206. The Claimant responded to Mr Carr, on 8 February at 09.41, copying in Mr Muir, and saying that he stood by the allegations in his email and said, "Following Property Diversity day held at Milton Keynes towards the end of last year, I brought to your attention that name-calling is unprofessional and goes against the company's value. Even though you denied this, Eileen had stated this in the presence of the group." He said that was being disadvantaged and de-skilled within the team, p1546.

207. Mr Muir replied to this email, copying in Maria Murray from HR, on 8 February 2017, p1545. He suggested that any flexible working arrangement should be regulated and that there should be a meeting with HR to determine how to deal with the allegations the Claimant was making. He said that Ms Murray had already agreed to this. He replied to both the Claimant and Mr Carr when he sent his email.

208. On 15 February 2017 Ms Murray replied to all, pp 1543 – 1544, saying "1. As a business, we take any allegations seriously and below are the links for you to do this formally. 2. I understand that the current working arrangement is no longer sustainable and should you wish to have a more formal flexible arrangement to be put in place, you will need to submit a flexible working arrangement request. Otherwise, the normal core working hours should be adhered to. 3. As already mentioned, should anyone require any support on this matter, we have Validium available to us all to use at our disposal ..[The First Respondent's external stress counselling service] 4. If there are any other matters that needs to be address. then I would suggest a meeting with myself and Nigel or Alan."

209. On 22 February 2017 at 09.45 the Claimant replied, pp 1537 – 1538, querying Ms Murray's reference to a formal grievance. He said, 'Your point one refers to formal action which I believe I have a choice to either pursue or

not…thank you for pointing out my formal options and I will take a considered approach in making a decision should this be my only option to raising my concerns.'

210. On 23 February 2017, the Claimant attended a meeting with Ms Murray and Mr Muir, arranged via Outlook with the subject 'HR Catch Up'. The Claimant understood it to be an informal meeting. Ms Murray also told the Tribunal that she believed the meeting was an informal meeting, to discuss processes. Mr Murray did not take notes of the meeting.

211. The Claimant told the Tribunal that Ms Murray said that there would need to be a formal investigation of the Claimant's complaints and that Mr Carr had also levied some allegations against the Claimant, arising out of the Claimant's email on 7 February, which might need to be dealt with under the First Respondent's disciplinary policy.

212. The Claimant said, in evidence, that Mr Muir told the Claimant to withdraw the email he had sent, and to apologise to Mr Carr. The Claimant said that he made clear that he wished to stand by his email.

213. The Claimant said that, during the meeting, he became emotional and broke down, crying profusely. He said that Ms Murray asked if it would help if she excused herself and left the Claimant with the Mr Muir. The Claimant agreed.

214. The Claimant gave evidence that, after he had become calm, he asked Mr Muir whether Mr Muir had experienced discrimination. The Claimant said that Mr Muir responded, "No. I'm white and middle class. ..You need to forget about your past achievements".

215. The Claimant said that he was shocked by this reply and he believed that Mr Muir had shown a complete lack of empathy and was saying that he was superior to the Claimant as a result of his race.

216. Mr Muir agreed that, in answer to the Claimant's question about his experience of racism, Mr Muir explained that he did not consider that he had been the victim of discrimination himself. The Claimant suggested that he might have been discrimination against for being Scottish, but Mr Muir felt that he had not. He had gone on to discuss with the Claimant a film Mr Muir had watched about conditions for black people in the US in the 1950s. He believed that he was engaging in a conversation with the Claimant.

217. Mr Muir also that he had had many conversations with employees, including the Claimant, along the lines of, "the best thing for career development is to be better-than-good at your job and opportunities will arise."

218. The Tribunal considered that Mr Muir's recollection about the two men's conversation when Ms Murray was not present was more accurate – he had a more detailed recall of the exchange.

219. Mr Muir told the Tribunal that he considered that the Claimant's email complaint about Mr Carr's alleged discriminatory comments and conduct was clearly not capable of informal resolution, as Mr Carr and the Claimant were in already in serious disagreement about the allegations of discrimination the Claimant had made.

220. He said that he considered, from his previous experience, that the only way the matter could be resolved was for the Claimant to follow the grievance procedure, to set out his allegations clearly in writing, and for those allegations to be independently investigated by someone outside the business unit. He said that he was more familiar with Mr Carr because he was his manager, but he believed that there were two sides to every story and that, therefore, a completely independent investigation was the appropriate way forward.

221. Mr Muir and Ms Murray denied that they told the Claimant to withdraw his email to Mr Carr, or to apologise in order to proceed with the grievance.

222. Ms Murray said that it was explained that the Claimant either needed to proceed with a formal grievance, or, if he was not prepared to do so, he should consider withdrawing the email, with a view to assisting the working relationship with Mr Carr.

223. The Tribunal found that Mr Muir and Ms Murray told the Claimant that, if he wanted to raise a grievance regarding Mr Carr, he would need to follow the formal procedure, so that there could be an independent investigation. They did say that, if he did not wish to follow the formal process, he should consider withdrawing the email. The Tribunal accepted that Mr Muir and Ms Murray believed the allegations were not capable of informal resolution - and that, in any event, the fairest and best way to address them would be through an independent, formal investigation. The Tribunal considered that that was a reasonable and logical conclusion, given the seriousness of the allegations and the fact that the Claimant and Mr Carr were already in serious disagreement about them. Given that the allegations were serious, a formal investigation was in accordance with the First Respondent's Equality, Diversity & Inclusion Policy, p 754.

224. The Claimant did not submit a formal grievance.

225. He did not submit a flexible working request.

226. Ms Murray told the Tribunal that she did not know that the Claimant was disabled. She therefore considered that he needed to submit a flexible working request. Mr Muir, who knew that the Claimant had a long-term health condition, was not familiar with the First Respondent's policy on reasonable adjustments. He told the Tribunal that he had recently undertaken a flexible working arrangement with another employee, so he was aware of that process. He told the Tribunal that the felt that the Claimant's flexible working arrangement needed to be regulated.

227. He said that he was aware that Mr Carr had been talking about the regulation of the Claimant's working week for a long time and that the reality was that Mr Carr was being extremely flexible and would continue to be so.

228. On 27 April 2017, p1542, Mr Muir told Mr Carr that, as they had heard nothing further from the Claimant regarding flexible working and grievance, he regarded the matter as closed.

229. He also commented however, that he believed that the Claimant did not want his working arrangements "regulated.. He does not want to have it written down", p1541. Ms Murray agreed, saying, "The fact is he has been allowed to rely on an old report that states he should be on an informal working arrangement." P1541.

230. The Claimant continued to work flexibly from home on a regular basis.

231. The Claimant told the Tribunal that, following this February 2017 grievance meeting, he experienced increased hostility and repeated pressure from Mr Carr and other Development Team members, including Dale Wilkins, Malcolm Carpenter and Claire Fowler. He said that he was blanked by team members and ostracised.

232. Clearly, even on Mr Carr's evidence, there was some discussion amongst the team about the Claimant's absence from the workplace and an impression that he was 'not pulling his weight'.

233. There was no evidence about the Claimant's colleagues' knowledge of his allegations against Mr Carr in his February 2017 emails.

234. The Claimant told the Tribunal that, on one occasion, Dale Wilkins and Malcolm Carpenter made excuses to leave a team meeting when the Claimant started talking, saying they had another meeting to go to. The Claimant was not able to provide further details, including the date, of this allegation.

235. The Respondents contended that, given the lack of particulars, and the fact that there were so many possible meetings, they were unable to adduce any evidence of the meeting in rebuttal.

236. It was very difficult for the Tribunal to make findings of fact about the circumstances and facts of this meeting and the reason for the Claimant's colleagues' departure. The Tribunal concluded that the fact that the colleagues left the meeting suggested that they did genuinely have somewhere else to go.

237. On 19th June 2017, the Claimant attended a further OH assessment following a referral relating to the Claimant's lung condition. He told the OH doctor at this appointment that he needed to attend physiotherapy appointments 3 times a week. The resultant report, dated 20 June 2017, p1595, said, "Mr Ibitoye will continue to benefit from the flexibility to attend his

regular hospital appointment three days per week. His appointments are up to an hour and sometimes it may take him 1-2 hours to recover from the effects. Therefore it will be advisable that consideration and flexibility is given for site visits, travels, meetings and office attendance on these days whereby later attendance or the facility to work from home should be considered. Mr Ibitoye reports that he can get a respiratory flare up 4-5 times per year at which time he tends to need antibiotics treatment and he may be too unwell to travel. The flexibility to work from home should be considered at such time as suitable means of reasonable adjustment to avoid sickness absence. He will also benefit from further flexibility and variation to his start and finish times at times of temperature extremes and to avoid commuting at busy periods during these types of weather fluctuations."

238. The Claimant accepted in evidence that he was never told by Mr Carr that he could not attend hospital appointments. He accepted in cross examination that he was never told to arrive in the office or leave the office at specific times.

239. The Tribunal accepted Mr Carr's evidence that, in a good week, the Claimant would only attend the office perhaps once. Often Mr Carr would not see him, at all, for weeks. The Claimant was never told that he could not work from home. Mr Carr did repeatedly try to encourage him to work in the office when he was well enough to do so, but never took disciplinary action when the Claimant failed to act on these requests.

240. The Tribunal found, on the evidence, that the Claimant continued to work from home on a regular basis, that the Claimant could decide for himself when to attend work and when to leave, and that Mr Carr continued to give the Claimant flexibility to attend appointments when these were scheduled.

241. However, contrary to what the Claimant told the OH doctor, the Claimant was not required to attend physiotherapy 3 times a week, either in 2017 or at any other time. He therefore did not need flexibility to attend these appointments.

242. In July 2017, the Claimant could not attend a Development Team Meeting in person due to suffering breathing difficulties, so the Claimant dialed in from home. The Claimant told the Tribunal that, when he began to speak, so as to contribute to the conversation, Mr Carr said words to the effect of "Hold on, you don't need to talk, whatever you think you want to say, it would be helpful if put in an email." The Claimant contended that Mr Carr therefore silenced the Claimant.

243. Mr Carr told the Tribunal that, during the meeting, the Claimant raised a recent legal case which he had read. He said that the Claimant spoke for around 5 minutes, when Mr Carr did interrupt him, thanked him for his input, and asked him to put the information in an email, as it would be helpful to the team.

244. The Tribunal preferred Mr Carr's evidence regarding this meeting. Mr Carr was able to describe the content of the Claimant's contribution. From the evidence in the case, the Claimant appeared impervious to advice and guidance from Mr Carr. The Tribunal considered that it was likely that the Claimant believed that his contribution was more relevant and helpful than it actually was. The Tribunal found that Mr Carr's action, in moving the meeting along according to an agenda, was normal management practice.

245. Mr Carr uploaded the June 2017 OH report to HR Direct on 18 August 2017 p1677. Richard Walmsley, an HR Business Partner, was added to the case record p1678, taking over from Maria Murray.

246. The HR records show that advice and guidance was given by Rebecca Dixon of HR Direct on 29 August 2017, p1679. Her advice was that reasonable adjustments, and not flexible working, was the appropriate route for dealing with the Claimant's needs. She advised that, if the Claimant could not work all his hours, permanently allowing him time off would not be a reasonable adjustment. She advised that Mr Carr should discuss a permanent change to the Claimant's hours with the Claimant and with his HR Business Partner.

247. On 4 September 2017, p1681, Mr Carr confirmed to HR Direct that he had taken advice from his HR Business Partner. Mr Carr felt that the Claimant would 'want to make the time up', but Mr Carr's view was that this 'can't be done as they are not the correct working hours and you being able to speak to him'. Mr Carr wanted to know if he could disagree to the Claimant making the time up.

248. It was put to Mr Carr in cross-examination that the Claimant could have worked flexibly 7am – 7pm, to make up for hours lost during normal working hours.

249. Mr Carr told the Tribunal that, in his view, it was not practical for the Claimant to be working different hours to Mr Carr, as his line manager, when there were complicated work matters to be discussed. He said that he was trying to enable the Claimant to work sensibly with him in a manager / employee relationship. In re-examination, Mr Carr said that many of the Claimant's core responsibilities in his job description, including conducting contractual negotiations, maintaining relationships with investors, local authorities and local developers and developing key contacts with internal and external clients, could only be done in normal working hours.

250. During a one-to-one meeting with Mr Carr on 7 September 2017, which was not minuted, Mr Carr told the Claimant that, acting on HR advice, it was to be recommended that the Claimant's working hours be reduced to 3.5 days per week, with a consequential variation in pay.

251. The Claimant emailed Mr Carr the same day, saying Mr Carr had undertaken to go back to HR Direct with the Claimant's comments in response, p1617.

252. Mr Carr then asked HR Direct for advice on how to reply to the Claimant's email, p1683.

253. The Claimant went off work, sick, on 11 September 2017

254. No change was, in fact, made to his contracted working hours.

255. The Claimant contended that, from his return to work in January 2013 (and on an ongoing basis), he was paid less in relation to basic salary and bonuses, compared to his colleagues, in particular, Adam Roberts and Malcolm Carpenter. The Claimant's annual bonus was £2,000 less than it had been prior to his return to work in January 2013.

256. The Respondent produced the salary and bonus figures paid to the Claimant and his fellow team members, S/B p162. There were 6 members of the ADS team. 2 were paid more than the Claimant in salary and bonuses; 3 were paid less.

257. Mr Roberts and Mr Carpenter were given the highest performance ratings in the team, S/B p26.

258. The First Respondent operates a performance related pay scheme and it was not in dispute that Mr Roberts and Mr Carpenter's pay was increased in accordance with their performance ratings.

259. The Claimant did not produce evidence to assert that these comparators were performing less well than they were assessed as performing.

260. In November 2017, the Claimant sent an invoice from RICS (Royal Institution of Chartered Surveyors), for the Claimant's registration as a Chartered Surveyor, to Mr Carr, along with his sick note for the relevant period.

261. Mr Carr did not arrange for the First Respondent to pay the invoice to RICS on the Claimant's behalf.

262. Mr Carr told the Tribunal that he did not recall receiving the invoice from the Claimant, but even if he had, he would not have been able to pay the invoice for the Claimant, or submit an expenses claim on his behalf. He said that the First Respondent reimburses its employees for their RICS invoices, which they have to submit themselves as an expenses claim.

263. The Claimant told the Tribunal that his access to the relevant IT expenses system had been stopped, p1651. However, from the documents, p1713, Mr Carr had contacted the First Respondent's IT department to ensure that this did not happen.

264. The Tribunal found that the Claimant was not therefore prevented from submitting an expenses claim for his RICS membership whilst on sick leave.

He was treated in the same way as all other surveyors by being required to pay for his membership himself and then submit an expenses claims for it.

265. In a letter dated 10 November 2017 from the Claimant's solicitor to the First Respondent, the Claimant's solicitor requested that all contact be directed to Claimant's solicitor, as direct contact was affecting the Claimant's health.

266. An OH report dated 9 November 2017, p1644, advised that the Claimant was suffering with 'severe symptoms for both anxiety and depression'. It did not advise that there should be no direct contact with the Claimant.

267. On 29 December 2017, the First Respondent's legal counsel responded to the Claimant's solicitors, saying, "Mr lbitoye Is an employee of Network Rail and is currently signed off sick. The Company owes Mr lbitoye a duty of care and, as and when required, will be liaising with him directly in order to manage his ongoing sickness absence. Respectfully, we do not consider it appropriate for us to communicate via yourselves for the day-to-day management of our employee." p1659.

268. Following that letter, on 1 March 2018, Emily Das, HR Business Partner, wrote to the Claimant, seeking to arrange a welfare meeting with him. She offered to come to his home or an alternative location, p1667.

269. On 25 April 2018, p1669, Ms Das wrote to the Claimant again. She said, " ..being out of the business for such an extended period of time, it is important for you to remain in touch to ensure you keep connections with work. It can make returning to work more difficult if no contact is maintained. Also, we, as your employers, need to keep communications with you open so that we can understand your situation, the likely length of your absence and the likelihood of a return to work, which we will do our best to facilitate. …Further, as you will be aware, the sale of the Commercial Estate is now underway and it will be important that we are sure you are receiving relevant communications and updates on this process. As the sale progresses over the coming months, It may be necessary at some point to make you aware of a TUPE transfer consultation that may affect you and your role. You may well have questions about such a situation and so it is important that you receive these messages. .. You have, so far, not responded to my letter of 1 March 2018 inviting you to a welfare meeting or the voicecom message left on your work mobile phone number on 16 March 2018. I am also aware that you have not been in contact with Nlgel Carr or responded to any of his emails, calls, or letters. I would emphasise the importance of staying in touch. Network Rall would expect there to be regular contact with an employee who is on long term sick leave. Ordinarily, you would be required to phone your line manager on a weekly basis; this is considered a reasonable management request and Is in the long term sickness policy. Also, it would be expected that a monthly welfare meeting is attended by you. To that end, I would like to agree with you what contact you would consider to be acceptable during your period of absence, this should include frequency of meetings/contact. Also, you may prefer to remain in contact with your employer by phone, text, email or written

correspondence sent to your home address. If you could also indicate who you would be happy to hear from, that would be helpful (or If there are certain people you do not want to hear from). Given that we have not met, you may prefer for a colleague in your team to be your contact rather than me. Of course, you may prefer a different point or form of contact depending on the nature of the communication, for example according to whether it Is relevant to your health and your absence or a business communication regarding a potential TUPE transfer."

270. From this letter, there were clearly a number of matters which did need to be discussed with the Claimant, including the forthcoming TUPE transfer, as well as possible arrangements for his return to work.

271. The Tribunal decided that, on the facts, there was very little direct contact with the Claimant after his solicitor's letter of 10 November 2017. However, there were some matters which did require contact, which Ms Das explained carefully in her letter of 25 April.

272. The Claimant resigned by letter dated 30 April 2018, p1671.

Diversity Data

273. The First Respondent produced at the Tribunal hearing the Diversity and Ethnicity Data which it holds for its business.

274. Its Ethnicity Pay Gap Report ("EPGR") for 2020, pSB/305, notes that BAME employees are (1) More likely that their white counterparts to:- a) Receive a poor performance rating; b) Leave R1; c) Apply for internal jobs; (2) Less likely than their white counterparts to:- a) Progress to interview and offer stage; b) Feel engaged; c) Be offered a secondment; d) Have Senior Leadership roles, especially in Band 2, pS/314.

275. The First Respondent's diversity data showed that, between 2013 and 2018: (1) Of 7-9 Band 1s, none are or have been BAME; (2) Of 29-47 Band 2s, there have been 1-4 BAME Band 2s since 2013, and only one black Band 2 -since 2017, pS/299.

276. The data for its Property Group showed that the proportion of their employees who are BAME is higher than the proportion across the First Respondent as a whole, and higher than the 13% BAME people of the population as a whole, according to the National Census figure.

277. Mr Higginson explained in his evidence that one of the challenges is the pool of talent from which BAME employees can be recruited. RICS data shows that black professionals represent 2% of RICS members who have reported their ethnic background.

Relevant Law

Discrimination

278. By *s39(2)(c)&(d) Equality Act 2010*, an employer must not discriminate against an employee by dismissing him or subjecting him to a detriment.

Direct Discrimination.

279. Direct discrimination is defined in *s13(1) EqA 2010:*
"(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

280. Race and disability are each protected characteristics, *s4 EqA 2010.*

281. In case of direct discrimination, on the comparison made between the employee and others, "there must be no material difference relating to each case," *s23 Eq A 2010.*

Victimisation

282. By *27 Eq A 2010*,
" (1) A person (A) victimises another person (B) if A subjects B to a detriment because—(*a*) B does a protected act, or (*b*) A believes that B has done, or may do, a protected act.
(2) Each of the following is a protected act—(*a*) bringing proceedings under this Act;(*b*) giving evidence or information in connection with proceedings under this A (*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."

283. There is no requirement for comparison in the same or nor materially different circumstances in the victimization provisions of the EqA 2010.

Causation

284. The test for causation in the discrimination legislation is a narrow one. The ET must establish whether or not the alleged discriminator's reason for the impugned action was the relevant protected characteristic. In *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830, Lord Nicholls said that the phrase "by reason that" requires the ET to determine why the alleged discriminator acted as he did? What, consciously or unconsciously, was his reason?." Para [29]. Lord Scott said that the real reason, the core reason, for the treatment must be identified, para [77].

285. If the Tribunal is satisfied that the protected characteristic/act is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it had a significant influence, *per* Lord Nicholls in *Nagarajan v London Regional Transport* [1999] IRLR 572, 576. "Significant" means more than trivial, *Igen v Wong, Villalba v Merrill Lynch & Co Inc* [2006] IRLR 437, EAT.

Detriment

286. In order for a disadvantage to qualify as a "detriment", it must arise in the employment field, in that ET must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. An unjustified sense of grievance cannot amount to "detriment". However, to establish a detriment, it is not necessary to demonstrate some physical or economic consequence, *Shamoon v Chief Constable of RUC [2003] UKHL 11.*

Harassment

287. *s26 Eq A* provides "
(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."

288. In *Richmond Pharmacology Ltd v Dhaliwal* [2009] IRLR 336 the EAT held that there are three elements of liability under the old provisions of *s.3A RRA 1976*: (i) whether the employer engaged in unwanted conduct; (ii) whether the conduct either had (a) the purpose or (b) the effect of either violating the claimant's dignity or creating an adverse environment for her; and (iii) whether the conduct was on the grounds of the claimant's race.Element (iii) involves an inquiry into perpetrator's grounds for acting as he did. It is logically distinct from any issue which may arise for the purpose of element (ii) about whether he intended to produce the proscribed consequences.

289. This guidance is instructive in respect of harassment claims under *s26 EqA,* albeit under the EqA, the conduct must be for a reason which relates to a relevant protected characteristic, rather than on the grounds of race. There is no requirement that harassment be "on the grounds of" the protected characteristic – *R(EOC) v Secretary of Statefor Trade and Industry* [2007] ICR 1234.

290. In *Dhaliwal* [2009] IRLR 336 Mr Justice Underhill also stated at para 22: "…not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended."

291. In *Betsi Cadwaladr University Health Board v Hughes and ors* EAT 0179/13 at para 12 the EAT, Langstaff J, said, 'The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a

word the strength of which is sometimes overlooked. The same might be said of the words "intimidating' etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.'

292. In *Pemberton v Inwood* 2018 ICR 1291, CA Lord Justice Underhill revisited *Dhaliwal,* and said, at paragraph 88: 'In order to decide whether any conduct falling with sub paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of subsection (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub section (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub section (4)(b)…The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the Claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.'

Burden of Proof

293. The shifting burden of proof applies to claims under the *Equality Act 2010, s136 EqA 2010.*

294. In approaching the evidence in a case, in making its findings regarding treatment and the reason for it, the ET should observe the guidance given by the Court of Appeal in *Igen v Wong* [2005] ICR 931 at para 76 and Annex to the judgment.

295. In *Madarassy v Nomura International plc.* Court of Appeal, 2007 EWCA Civ 33, [2007] ICR 867, Mummery LJ approved the approach of Elias J in *Network Rail Infrastructure Ltd v Griffiths-Henry* [2006] IRLR 865, and confirmed that the burden of proof does <u>not</u> simply shift where M proves a difference in sex and a difference in treatment. This would only indicate a possibility of discrimination, which is not sufficient, para [56 – 58] Mummery LJ.

296. Statistical evidence that may tend to show a discernible pattern of treatment by the employer to the claimant's racial group can lead to an inference of unlawful discrimination, *The Home Office (UK Visas & Immigration) v Kuranchie*, UKEAT/0202/16, unreported, at paragraphs [16 &17].

297. The existence of such evidence can amount to the 'something more' required by *Madarassy v Nomura International Plc* [2007] IRLR 246 at [56], so as to shift the burden of proof, *Rihal v London Borough of Ealing* [2004] EWCA Civ 623, [2004] IRLR 642 at paragraph [53]: "The sharp ethnic imbalance revealed by Ealing's own figures was enough to entitle – indeed arguably to require – the tribunal to look for a convincing non-racial reason. In a well-run organisation there will be procedures, training and monitoring data capable of reassuring a tribunal that everyone has been treated on an equal footing and that any imbalances are caused by fortuitous or extraneous

factors. When the tribunal failed to find an acceptable non-racial reason for the imbalance of which Mr Rihal's history formed part, they were entitled to infer that there was none: see *West Midlands Passenger Transport Executive v Singh* [1988] IRLR 186, 188. Their inference was supported by Mr Rihal's own history of persistent non-promotion."

298. Tribunals can take into account the conduct of the disclosure exercise by an employer in deciding whether the burden of proof should shift, *McCorry v. McKeith* [2016] IRLR 253, at paragraphs [42] and [43]. In that case, the EAT upheld the Tribunal's decision to have regard to "the reluctant, piecemeal and incomplete nature of discovery" when deciding that the burden of proof shifted.

299. 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. This means that inferences may also be drawn from any failure to comply with any relevant Code of Practice, *Barton v Investec Henderson Crosthwaite Securities Ltd* [2003] IRLR 332, *Igen v Wong.*

300. The EHRC Code of Practice on Employment provides:

"Paragraph 18.18 Employers should ensure that all workers and agents understand the equality policy, how it affects them and the plans for putting it into practice. The best way to achieve this is by providing regular training.

Paragraph 18.19 Line managers and senior management should receive detailed training on how to manage equality and diversity issues in the workplace.

Paragraph 18.22 Training on the equality policy may include the following:- □ an outline of the law covering all the protected characteristics and prohibited conduct; □ why the policy has been introduced and how it will be put into practice; □ what is and is not acceptable conduct in the workplace; □ the risk of condoning or seeming to approve inappropriate behaviour and personal liability; □ how prejudice can affect the way an employer functions and the impact that generalisations, stereotypes, bias or inappropriate language in day-to-day operations can have on people's chances of obtaining work, promotion, recognition and respect; □ the equality monitoring process (see paragraph 18.23 and Appendix 2)."

Discrimination Arising from Disability

301. *s 15 EqA 2010* provides:
"(1) A person (A) discriminates against a disabled person (B) if—
(a) A treats B unfavourably because of something arising in consequence of B's disability, and
(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability".

302. When assessing whether the treatment in question was a proportionate means of achieving a legitimate aim, the principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it, *Hardys & Hansons plc v Lax* [2005] IRLR 726 at paragraphs [19]–[34].

303. It is for the Tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer's measure and to make its own objective assessment of whether the former outweigh the latter. There is no 'range of reasonable response' test in this context, *Hardys & Hansons plc v Lax*.

Reasonable Adjustments

304. By *s39(5) EqA 2010* a duty to make adjustments applies to an employer.

305. By *s21 EqA* a person who fails to comply with a duty on him to make adjustments in respect of a disabled person discriminates against the disabled person.

306. *s20 EqA 2010* provides: that there is a requirement on an employer, where a provision, criterion or practice of the employer puts a disabled person at a substantial disadvantage in relation to a relevant matter, in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

307. *Para 20, Sch 8 EqA 2010* provides that an employer is not under a duty to make adjustments if the employer does not know and could not reasonably be expected to know that a disabled person has a disability and is likely to be placed at the substantial disadvantage.

308. A failure to make a referral to occupational health cannot be a failure to make reasonable adjustments because it is not a ‘step’ to avoid a disadvantage, *Tarbuck v Sainsbury’s Supermarkets Ltd* [2006] IRLR 664.

Discussion and Decision

309. The Tribunal took into account all its findings of fact, and the relevant law, when reaching its decision. It also took into account relevant provisions of the Code of Practice on Equality. For clarity, however, it has stated its conclusion on individual allegations separately.

310. The Tribunal looked at the whole course of conduct between the Respondents and the Claimant.

311. There were significant failings in the Respondent's training of its managers. Senior management failed to encourage Mr Carr to develop better knowledge of procedures. The training of all managers was surprisingly deficient.

312. The fact that the Tribunal ultimately decided that the Respondents did not discriminate against the Claimant, or fail to make reasonable adjustments, was due to Mr Carr having responded in a humane and sympathetic way to the Claimant. In some respects, Mr Carr failed to take a rigorous approach which allowed the Claimant to dictate his own ways of working. It is clear now that the Claimant was manipulating OH advice to his own ends, in that he misled OH on a number of occasions as to his true need to attend physiotherapy appointments. The Claimant did not need to attend physiotherapy 3 times each week. Nevertheless, he was rarely in the office. From all the evidence, therefore, the Tribunal concluded that the Claimant was evading team working and line management. When Mr Carr addressed the Claimant's attendance in the office, he was doing so in this context.

313. For the avoidance of doubt, the Tribunal considered whether the allegations of harassment, viewed together, could amount to harassment. It decided that they could not. Many of the allegations of harassment related to Mr Carr's attempts to ensure that the Claimant was attending the office, participating in teamwork, and carrying out his work.

314. **Allegation 2. In January 2013, Stuart Kirkwood (former R4) promoted R2 to a Band 2 position to lead a team without prior people management experience. R2 thereby became C's Line Manager. This was in breach of R1's Equal Opportunity, Recruitment and Promotion policy in that there was no notice of this role being advertised and thus no opportunity for C to apply for it. Allegations: Direct race discrimination; Direct disability discrimination (Bronchiectasis); Harassment related to race; Harassment related to disability (Bronchiectasis); Victimisation. Discriminator : R1**

315. The relevant position was a Band 2 position. The Claimant was employed at Band 3, so this would have represented a promotion for him. On the facts, the ADS team needed a manager who had knowledge of development procedure. Mr Carr did have that relevant knowledge and experience and was already in a Band 2 role. The Claimant had no experience in the relevant development procedure; on his own account, he had previously been involved in the management of estate and not the development of it, p1129.

316. The Tribunal did not accept the Claimant's contention that this was an allegation in relation to which the burden of proof shifted. The Claimant was not qualified to do the ADS team manager role, because he did not have the relevant knowledge. He was not in materially similar circumstances to Mr Carr.

317. The Tribunal was satisfied that the reason that Mr Carr was appointed to the secondment position and the permanent role, without advertisement, was that Mr Carr had the relevant skills and knowledge which were needed to manage the particular team. The Claimant did not. This was nothing to do with race, or disability, or the Claimant's protected act.

318. **Allegation 3. In or about January 2013, R2 said to C words to the effect of "It's no good complaining, I'm here for a reason." which C reasonably understood to mean that C was to be carefully monitored because of his complaint to the Employment Tribunal.**
Allegations: Harassment related to race; Harassment related to disability (Bronchiectasis); Victimisation. Discriminator: R2

319. The Tribunal found that Mr Carr did not say these words. He said that the team was there for a reason. In doing so, he was encouraging the Claimant to engage with the team and to learn from and share skills with the team. Mr Carr was trying to help the Claimant, who had no prior experience in the relevant work. This was nothing to do with race, or disability, or the Claimant's protected act.

320. **Allegation 4. In February/March 2013, R2 told C that, at all times, C should be sat within his sight and that, every morning, C was to discuss his progress with R2. No such condition was imposed on any other employee within the team, and the department operated a flexible working policy. No explanation was given as to why C was being singled out for such treatment. Allegations: Direct race discrimination; Direct disability discrimination (Bronchiectasis); Harassment related to race; Harassment related to disability (Bronchiectasis), Victimisation Discriminator: R2**

321. Mr Carr did not say these words. Instead, Mr Carr encouraged the Claimant to be in office, as the other team members were, and to sit with the team to help an exchange of knowledge and skills. He offered the Claimant weekly meeting to assist in his development, as the Claimant was expressing lack of confidence. This was a benefit offered to the Claimant. Other team members were not expressing lack of confidence.

322. This was nothing to do with the Claimant's race or the Claimant's protected act.

323. Insofar as Mr Carr encouraged the Claimant to attend the office and participate in the team, this might have been partly related to the Claimant's disability, because the Claimant was sometimes absent from the office for disability-related reasons. However, the Tribunal was satisfied that Mr Carr always acknowledged the Claimant's need to be absent from the workplace for genuine health reasons and that his encouragement to be in the office only related to times when the Claimant was well enough to attend. His encouragement was therefore not related to disability. Mr Carr always did acknowledge the Claimant's need to be absent for health reasons, even though he had not seen the Return to Work letter or the 2012 OH reports.

324. Even if Mr Carr's encouragement were related to disability, and even if the Claimant felt that his dignity was violated or that the prohibited environment under *s26 EqA 2010* had been created, the Tribunal concluded that it was not reasonable for him to do so. Mr Carr's encouragement to attend the office when possible, to build skills and team relationships, and his offer of weekly meetings, did not, objectively, have the effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. They were clearly not intended to do so. They were clearly, objectively, well-meaning.

325. **Allegation 6. On 3rd June 2013, C applied for the post of Estate Manager London. C's application was not even acknowledged by R1. C asserts that his application was never reviewed, considered and/or processed as reasonably expected and that R1's policies on recruitment, promotion, equality and diversity were not adhered to or were deliberately ignored and steps were not taken to rectify this for C. C asserts that R1 did not follow its own processes in respect of recruitment, promotion, diversity and equality and access to opportunity. C asserts that white male graduates that C managed and trained were promoted ahead of him and that he was deliberately overlooked for promotion.**
326. **Allegations: Direct race discrimination; Direct disability discrimination (Bronchiectasis); Harassment related to race; Harassment related to disability (Bronchiectasis); Victimisation. Discriminator: R1**

327. The First Respondent did not acknowledge the Claimant's application for the post of London Estate Manager. It was both poor management practice and disrespectful not to acknowledge it. However, the Tribunal was satisfied that the Estate Manager role was merged with the Head of Leasehold Advisory role and ceased to exist in its own right, due to a reduction in headcount. Shaun Mobsby, a white male, was given the merged role. Shaun Mobsby had already been appointed to the Head of Leasehold Advisory role, a Band 2 role, following a competitive recruitment process, in which the Claimant had participated and was unsuccessful. The Claimant makes no complaint about that competitive selection process.

328. The Tribunal was satisfied that the failure to consider the Claimant for, and to appoint the Claimant to, the London Estate Manager post was nothing to do with race, or disability, or the Claimant's protected act. The role was deleted. The person who assumed its responsibilities had already proven himself to be a better candidate than the Claimant in a non-discriminatory selection process for another Band 2 role.

329. **Allegation 10. On 19th August 2013, R2 required C to produce a sick note for less than 7 days absence, when R1's policy was that an absence of less than 7 days could be self-certified. Allegations: Direct race discrimination; Direct disability discrimination (Bronchiectasis);**

Harassment related to race; Harassment related to disability (Bronchiectasis); Victimisation. Discriminator: R2.

330. The Tribunal was satisfied that this was a mistake made by Mr Carr, a recently appointed and inexperienced man-manager, who readily acknowledged his mistake at the time. The Tribunal was satisfied that Mr Carr would have asked any other employee, who had gone off work, sick, and had told Mr Carr that they had been put on medication, to provide their GP's sick note. There was no less favourable treatment of the Claimant. Mr Carr's request was nothing to do with race or disability or the Claimant's protected act.

331. **Allegation 11. On 12th December 2013, C was asked to attend an OH appointment without a prior discussion about the referral with C so that he was clear why he was being referred. The OH report was never disclosed or discussed with C with a view to making reasonable adjustments. Allegations: Discrimination arising from disability (Bronchiectasis); Failure to make reasonable adjustments; Harassment related to race; Harassment related to disability (Bronchiectasis); Victimisation. Discriminator: R2**

332. The Claimant was not asked to attend an OH appointment without a prior discussion. At a meeting on 1 October 2013 Mr Carr mentioned that he would like to get Occupational Health involved, to ensure that they were doing as much as they could to help the Claimant with health issues, and the Claimant agreed, p 1271.

333. There was a delay in Mr Carr obtaining the relevant report. The Tribunal found that this was due to Mr Carr and Mr Kirkwood's lack of facility with the HR system. It was not related to the Claimant's race, disability, or protected act.

334. The report was discussed with the Claimant in about March 2014, when the Claimant pointed out that the details of his medication and treatment programme had not been recorded, and that he wished to apply to work from home 3 days/week. Accordingly, additional questions were submitted to OH on 14 May 2014. A further OH report was received on 20 August 2014. No formal record was made of the adjustments agreed for the Claimant arising out of it.

335. However, the Tribunal has also found that the Claimant was never required to attend the office at particular hours. He was permitted to work from home whenever he said that he needed to, because of his health. He was always permitted to attend appointments.

336. There was therefore no detrimental treatment arising from the failure to record adjustments and nothing which would amount to a violation of the Claimant's dignity, or creation of the prohibited environment under *s26 EqA.*

337. The Claimant invited the Tribunal to conclude that Mr Carr's failure to formalize the adjustments which were made for him amounted to unfavourable treatment arising from his disability. The Claimant contended that the lack of formality later allowed Maria Murray to say, on 28 April 2017 that the Claimant was 'relying on' an 'informal arrangement' and Mr Muir to say that the Claimant did not want his working arrangements 'regulated' or "written down", p1541.

338. These comments were not, however, themselves the unfavourable conduct relied on. They were alleged consequences of it.

339. The Tribunal did not find that the failure to formalize arrangements was unfavourable treatment of the Claimant. In reality, the failure to do so allowed the Claimant an enormous degree of flexibility. He chose when he attended the workplace. The Claimant misled OH on a number of occasions about his need to attend physiotherapy appointments 3 times each week. Any real scrutiny of this need, pursuant to a formal agreement of reasonable adjustments, was likely to have exposed it as bogus, resulting in the Claimant attending the workplace more often, in accordance with his true needs, but contrary to his wishes.

340. The failure to record agreed adjustments was not unfavourable treatment for the purposes of a claim of discrimination arising from disability.

341. Regarding reasonable adjustments, the PCP relied upon by the Claimant is the "requirement, practice or condition that the Claimant work at R1 's offices each working day within normal working hours and not to work flexibly and/or from home and/or attend appointments related to during to his disability and/or that the Claimant should report to R2 on arrival at work daily and that the Claimant should sit within sight of R2."

342. On the facts, the PCP was not established. The First Respondent did not require the Claimant to work each working day in its offices within working hours without provision of flexible working or working from home.

343. The Claimant did not establish that he was unable to attend appointments, or that he was required to report to Mr Carr daily and sit within this sight.

344. In any event, the Tribunal concluded that the Claimant was not placed at a substantial disadvantage by being required to attend the office. He did not have to attend physiotherapy appointments 3 times a week, so there was no disadvantage to him having to attend the office instead.

345. **Allegations 12, 13, 14, 28**
12. On 31st March 2014, R2 carried out a performance review of C and found that C had only partly achieved his objectives. This was done without any discussion with C or completion of the necessary paperwork, or without putting a support plan in place, contrary to R1's policies and procedures in respect of performance reviews.

13. On/around 31st March 2015, R2 carried out a performance review and failed to discuss the same with C, contrary to R1's policies and procedures in respect of performance reviews.
14. On 31st March 2016, R2 carried out a performance review and stated that C had only partly achieved his objectives, but failed to discuss the same with C or to put a support plan in place, contrary to R1's policies and procedures in respect of performance reviews.
28. On 31st March 2017, C's performance was assessed as "partially achieved" as part of a performance review, without any discussion with C and without a support plan being put in place, without R1's policies and procedures in respect of performance reviews being followed.
Allegations: Direct race discrimination; Direct disability discrimination (Bronchiectasis); Harassment related to race; Harassment related to disability (Bronchiectasis); Victimisation Discriminator: R2

346. The Tribunal found that Mr Carr carried out annual performance reviews on the Claimant in each of these years, conducting both mid-year and end of year reviews, in which he discussed the Claimant's performance with him.

347. Mr Carr's failure to complete the performance review documents plans was because of the Claimant's failure to complete the relevant documents and was unrelated to race, disability or the Claimant's protected disclosure.

348. On the one occasion when the Claimant did complete the performance review document, 2017, he did so after the performance review process had been completed and a grade awarded to him. The Tribunal considered that it was unsurprising that Mr Carr did not spend time reviewing the Claimant's tardy document.

349. There was no evidence from which the Tribunal could conclude that that the Claimant was performing as well as others in the team who were given better grades in these years. The Claimant did not regularly work alongside his fellow team members, so he was not in a position to give a reliable assessment of the quality or quantity of their work.

350. The Claimant contended that his ratings of 'Partially Achieved' should have triggered the institution position of a support plan, in accordance with the Performance Improvement procedure at p688 - 689.

351. The First Respondent's Performance Improvement Policy and Procedure 2013 stated that if minor shortcomings were identified in an employee's performance, the line manager would, amongst other things, make the employee aware of the standards expected of them, identify in what way the employee's performance is falling short of the standards and agree ways forward, agree SMART (specific, measurable aligned, realistic, time-specific objectives, put in place appropriate support, set timescale for review and confirm this in writing.

352. The Tribunal found that, every year, Mr Carr gave the Claimant objectives and gave him interim and year end reviews, where his performance

was assessed against his objectives. He was given one-to-one meetings with Mr Carr. The Tribunal accepted that Mr Carr went for coffee with the Claimant on a regular basis.

353. There was no evidence that Mr Carr's actions were in any way related to race or disability. There was no evidence that he treated other employees, with the same performance ratings as the Claimant, differently. Mr Carr did support the Claimant. Indeed, he offered him additional support by way of weekly meetings, which the Claimant rebuffed.

354. **15. In November 2016, at R1's Property Equality and Diversity Day, C became aware from another employee, Ms Claridge, that R2 encouraged others to talk about C behind his back, spoke in adverse terms about C, mocked C's accent and C as a person and called C a name. The name referred to by Ms Claridge was 'nigger'. Ms Claridge referred to R2's behaviour towards C during a Diversity & Inclusion meeting attended by Tom Higginson and Jo Lewington (members of the Leadership Team) and Richard Walmsley (HR), and then spoke privately to the Claimant after the meeting at which point she referred to the name detailed above**. **Allegations: Direct race discrimination; Direct disability discrimination (Bronchiectasis); Harassment related to race; Harassment related to disability (Bronchiectasis); Victimisation Discriminator: R2**

355. On the Tribunal's findings of fact, none of this happened at the Equality and Diversity Day.

356. It appears that, separately, the Claimant did come to know that his accent had been discussed by the team. Mr Carr accepted that this had happened, on one occasion. The Tribunal accepted Mr Carr's account of that discussion. The Claimant was not present during the discussion and his evidence about what Ms Claridge told him about it was not accepted by the Tribunal. The Tribunal therefore found that there was a discussion about accents generally, including the Claimant's. Team members found it difficult to understand some of the Claimant's words. It was a short conversation, which did not mock the Claimant and was not repeated.

357. This conversation was not related to the Claimant's disability. The discussion related to accents in the team. Other team members with other accents (Essex, Zimbabwean) were not disabled. The discussion was related to race. The Claimant has a Nigerian accent.

358. The Tribunal accepted that the Claimant felt that this conversation violated his dignity and/or, created an intimidating, hostile, degrading, humiliating or offensive environment for him.

359. However, applying *Pemberton v Inwood 2018* ICR 1291, CA and *Dhaliwal* [2009] IRLR 336 the Tribunal concluded that it was not reasonable for the conduct to be regarded as violating the Claimant's dignity or creating an adverse environment for him. The Tribunal noted that "…not every racially

slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended."

360. In this case, the conversation was not a mocking one and was a discussion of accents generally, rather than singling out the Claimant. It was a short conversation, on one occasion. It was genuinely transitory, therefore. From the facts, there was no intention to cause offence to the Claimant, given that the team encompassed many different accents, and was discussing all of these. The effects of such a discussion were not, objectively, serious and marked, *Betsi Cadwaladr University Health Board v Hughes and ors* EAT 0179/13. It therefore did not fulfil the definition of harassment.

361. For the same reasons it did not amount to a detriment for the purposes of a direct race discrimination claim. A reasonable person would not consider themselves disadvantaged in the workplace by such a transitory conversation which was not directed at them alone and was not mocking or hostile.

362. **Allegation 16. From November 2016 and on a continuing basis, R2 became particularly critical of C's work, there was a hostile working environment and C felt side-lined. Examples of sidelining include C being assigned fewer projects than other team members (see 23 below); R2 sending out plans in C's Railton Road project without consulting the Claimant first (January 2017); applying pressure to C in terms of timescales and cost when such matters were beyond his control (Railton Road) in March 2017 and Sept 2017; providing critical feedback on written work; instructing C not to carry out further work on his project (Cottage Grove Clapham North). C asked for a formal investigation in light of R2's behaviour described in 15 above, and nothing was done. Allegations: Direct race discrimination; Direct disability discrimination (Bronchiectasis); Harassment related to race; Harassment related to disability (Bronchiectasis); Victimisation. Discriminator: R2**

363. The Tribunal did not find, on the facts, that Mr Carr was particularly critical of the Claimant's work. It accepted his evidence that he would review all team members' draft reports and make tracked changes, or comments, on them, where there was additional information required.

364. It did not find, on the facts, that the Claimant was allocated less work than other team members. There was a Capex freeze and many projects did not progress. At the time when there had been reallocation of work, the Claimant was fully occupied. On the Claimant's Cottage Grove project, work ceased because a planning consent had been refused, the tenant was unhappy and there was therefore a difficult political situation. These were circumstances unique to that project.

365. Mr Carr sent out the Claimant's Railton Road plans because the Claimant had failed to do so himself; Mr Carr would often send documents from the First Respondent's Sharepoint to assist clients.

366. Costs/budgets were something for which the Claimant had responsibility and it was appropriate for Mr Carr to manage him, to ensure that he was controlling them appropriately.

367. None of this was anything to do with race or disability, or the Claimant's protected acts.

368. The Claimant did not ask for a formal investigation into Mr Carr's conduct. See further allegations 25 and 26 below.

369. **Allegation 17. In or about November 2016, R2 spoke to C critically about C's work on Investment Papers in respect of Herne Hill Property Investment Project. R2 told C words to the effect of "This is not good enough" but did not provide any constructive criticism or suggested improvements. C believes this was done to affect his confidence and/or manage him out of the organisation. Allegations: Direct race discrimination; Direct disability discrimination (Bronchiectasis); Harassment related to race; Harassment related to disability (Bronchiectasis); Victimisation. Discriminator: R2**

370. The Tribunal found as a fact that Mr Carr asked for revisions of papers as appropriate, as he would for all team members. This was unrelated to race, disability and protected acts.

371. **Allegation 19. In January / February 2017, C told R2 that he was suffering stress and anxiety as a result of ill- treatment at work. R2 failed to take any action. Allegations: Direct race discrimination; Direct disability discrimination (stress & anxiety); Discrimination arising from disability (stress & anxiety); Failure to make reasonable adjustments; Harassment related to race; Harassment related to disability (stress & anxiety); Victimisation. Discriminator: R2**

372. The Tribunal found that Mr Carr perceived the genesis of any problem to be the Claimant's lack of interaction with the team. He addressed that, by discussing his concerns with him and advising the Claimant to attend the office when he could and to collaborate with his team members. Mr Carr was not aware of the First Respondent's Stress Management Policies, so he did not follow them. The Tribunal found that Mr Carr would have treated a non-disabled, or a white comparator, who did not sit with their team and whom Mr Carr rarely saw in the office, but said that they were being ignored by their team, in exactly the same way. Mr Carr's treatment was not direct discrimination or victimization.

373. The Claimant contended that he was subjected to unfavourable treatment because of something arising in consequence of his disability caused by his stress and anxiety contrary to s15 EqA in the following way: (1) The unfavourable treatment was the failure of Mr Carr to take any steps to assist C, such as following stress management policies, application of which would have brought about a Stress Risk Assessment; (2) The "something

arising" relied upon by the Claimant was 'the need on the part of the Claimant to have his stress and anxiety alleviated', or put another way, to have management intervention to assist with the alleviation of stress-related symptoms. The Tribunal accepted that it was unfavourable treatment not to apply stress management policies which were introduced for the benefit of employees like the Claimant with stress conditions. It accepted that the failure to act arose out of the Claimant's expressed stress concerning his follow employees.

374. The First Respondent relied upon the legitimate aim of 'continuing appropriate line management in the workplace and dealing with allegations made in a structured and fair manner'. The Claimant accepted that this could be a legitimate aim, but said that the means were not proportionate.

375. The Tribunal considered that Mr Carr's actions were a proportionate means of achieving that legitimate aim. He addressed the true cause of problems – the Claimant's failure to engage.

376. The Stress Management Guide (SMG) advice was not relevant to the situation. The stressor identified in the Guide: "Employees may be subjected to unacceptable behaviours at work, including bullying and harassment" did not apply in this case. It would have been inappropriate and pointless to undertake the SMG's suggested measures, to address or alleged team behaviour which did not, in fact, exist.

377. **Allegation 20. In or about February 2017, R1 failed to make reasonable adjustments to cater for C's health by scheduling work appointments when R2 was aware that C was required to attend physiotherapy.**
378. **Allegations: Direct race discrimination; Direct disability discrimination (Bronchiectasis); Discrimination arising from disability (Bronchiectasis); Failure to make reasonable adjustments; Harassment related to race; Harassment related to disability (Bronchiectasis); Victimisation Discriminator: R2**

379. On the facts, this did not happen.

380. **Allegations 21 & 22**
381. **21. On 6th February 2017, during a 1-2-1 meeting, R2 told C that he could not do a good job when working from home and commented on seeing more of him in the office. During the course of the meeting, C had increasing chest pains and difficulty breathing. R2 failed to offer any support or call medical assistance. Further, on 8th February 2017, R5 informed C that his flexible working arrangement needed to be regulated as soon as possible, and on 15th February 2017, that the Claimant would need to make a flexible working request.**
382. **Allegations: Discrimination arising from disability (Bronchiectasis); Harassment related to race; Harassment related to disability (Bronchiectasis); Victimisation Discriminator: R2 R5**

383. **22. On 6th February 2017, during a 1-2-1 meeting, R2 said to C words to the effect of "I do not think your condition is that serious or unpredictable as you have been suggesting". Following the meeting, on 7th February 2017 C emailed R2 within which he reiterated this comment and told R2 that he felt humiliated by such demeaning remarks and that it was not acceptable.**
384. **Allegations: Direct disability discrimination (Bronchiectasis); Harassment. related to disability (Bronchiectasis); Discriminator: R2**

385. **The Meeting on 6 February 2017: Mr Carr's words** The Tribunal has found that Mr Carr did not say that the Claimant could not do a good job working from home. It has found that he positively encouraged the Claimant to work in office, to assist his own work and that of the team. The Tribunal did not find that Mr Carr pressurized the Claimant.

386. The Tribunal did not find that Mr Carr said that he did not think that the Claimant's condition was as serious or unpredictable as the Claimant was suggesting. Mr Carr accepted the Claimant's condition, but asked him to work in office when he could. The Tribunal found that Mr Carr's comments were related to the Claimant's disability.

387. While the Claimant said that he felt that this conversation violated his dignity and/or, created an intimidating, hostile, degrading, humiliating or offensive environment for him, the Tribunal found that it was not reasonable for the Claimant to do so. Mr Carr did not pressurize the Claimant. He simply encouraged him to attend the office as often as he was able. Mr Carr approached the matter sensitively.

388. Further, while the encouragement to attend the office did arise from the Claimant's disability and his need for reasonable adjustments, the Tribunal found that Mr Carr's sensitive approach was not unfavourable treatment.

389. Mr Carr's conduct was nothing to do with race or the Claimant's protected act. There was no evidence that Mr Carr would have treated a white comparator, or an employee who had not brought a Tribunal claim, any differently.

390. **Mr Carr not offering medical support.**

391. The Tribunal decided, on the evidence, that there was no obvious need for medical intervention in this meeting. The Claimant did not indicate that he needed help. There was no evidence that Mr Carr would have treated a non-disabled, or white, colleague, differently.

392. **R5 informed C that his flexible working arrangement needed to be regulated as soon as possible, and on 15th February 2017, that the Claimant would need to make a flexible working request**.

393. The Tribunal decided that Mr Muir proposed that the Claimant's working arrangements were reviewed and regularized. The flexible working procedure

was not, in fact, followed. A referral was later made to Occupational Health, in order to obtain advice regarding the Claimant's needs, as would be appropriate when considering reasonable adjustments.

394. The Tribunal found that this proposed review and regularization of the Claimant's working arrangement, along with the referral to OH, did not amount to a detriment, or unfavourable treatment. A reasonable employee would not consider themselves disadvantaged by a proposal to clarify flexible working arrangements. Nor did it amount to harassment. A reasonable employer may wish to review the suitability and efficacy of reasonable adjustments, from time to time. A reasonable employee would accept this. Objectively, it would not have the effect of creating the prohibited environment.

395. **Allegation 23. By about February 2017 and on an ongoing basis, C was only allocated one project, namely Railton Road, whereas C's colleagues all had five to six projects. C was being disadvantaged and deskilled and there was an unfair allocation of work. C raised this with R2 and R5 in an email on 8 February 2017, together with other concerns including the information raised at the Property Diversity Day, his stress at work and R2's comments on 6th February 2017.**

396. **Allegations: Direct race discrimination; Direct disability discrimination (stress & anxiety); Harassment related to race; Harassment related to disability (stress & anxiety); Victimisation. Discriminator: R2**

397. The Tribunal refers to its findings in relation to allegation 16. The Claimant's Railton Road project was a substantial project in any event, which would have kept him occupied. There was no extra work to give the Claimant around February 2017. This was nothing to do with race, disability or protected acts.

398. **Allegations 24. C asserts that the allegations contained within his emails to R2 and R5 on 7 and 8 February 2017 constituted a grievance. R5 acknowledged that C's emails contained serious allegations and he asked Maria Murray (former R3), to become involved and suggested Ms Murray meet with C and R2. On 15th February 2017, Ms Murray copied R2 into an email to C regarding his grievance against R2. C asserts that this was inappropriate as his grievance involved R2.**

399. **Allegations: Direct race discrimination; Direct disability discrimination (stress & anxiety); Harassment related to race; Harassment related to disability (stress & anxiety); Victimisation. R1 via Maria Murray**.

400. Maria Murray was simply responding to an email chain, which had been initiated by the Claimant, and was replying to all the people involved in the email chain. The Tribunal found that Ms Murray would have "replied to all" in relation to any email chain which had evolved in the same way. This was nothing to do with race, disability or protected acts.

401. **Allegations 25. And 26.**

402. **25. In her email of 15th February 2017, Ms Murray did not automatically take steps to address the grievance that had arisen, informally or otherwise, despite the allegations being serious (and despite this being acknowledged by R5). Instead Ms Murray put the burden on C to progress a formal grievance and make a formal flexible working request. Allegations: Direct race discrimination; Direct disability discrimination (Bronchiectasis); Harassment related to race; Direct disability discrimination (stress & anxiety); Failure to make reasonable adjustments; Harassment related to disability (Bronchiectasis); Harassment related to disability (stress & anxiety); Victimisation. R1 via Maria Murray.**

403. **26. In February 2017, C attended a grievance investigation meeting. At the meeting, R5 required C to withdraw the email C sent to R2 on 8 February 2017 setting out his complaints and to apologise to R2 in order for C's grievance to proceed to the next stage. C declined, and the grievance did not proceed and R1, Ms Murray and R5 took no further action in respect of the Claimant's grievance and request for flexible working.**

404. **Allegations: Direct race discrimination; Direct disability discrimination (Bronchiectasis); Direct disability discrimination (stress & anxiety); Failure to make reasonable adjustments; Harassment related to race; Harassment related to disability (Bronchiectasis); Harassment related to disability (stress & anxiety); VictimisationR5 and/or R1 and/or R1 via Maria Murray**

405. It is correct that Ms Murray did not automatically take steps to investigate the Claimant's grievance informally.

406. The meeting with Mr Muir and Ms Murray followed the Claimant's protected acts of 7th and 8th February 2017. The Claimant contended that Mr Muir and Ms Murray's response to the emails and the conduct of the meeting was materially influenced by the fact that the emails raised allegations of discrimination. He contended that the tone of the Respondents' communications suggested a level of hostility towards the Claimant in light of his discrimination complaint. He contended that the burden of proof shifted to the Respondents to show that the Claimant's protected acts and/or race and/or disability had nothing whatsoever to do with the insistence on a formal procedure.

407. Even if the burden of proof did shift to the Respondent, the Tribunal concluded that the Respondents had shown that the Claimant's race, disability and protected acts were not part of the reason for this insistence. The Tribunal found that Mr Muir and Ms Murray genuinely believed that the fairest and best way to address the Claimant's serious allegations was by an independent, formal investigation.

408. Mr Muir and Ms Murray therefore told the Claimant that, if he wanted to raise a grievance regarding Mr Carr, he would need to follow the formal procedure, so that there could be an independent investigation. They did say

that, if he did not wish to follow the formal process, he should consider withdrawing the email.

409. The Tribunal found that this was a reasonable and logical approach, given the seriousness of the allegations and the fact that the Claimant and Mr Carr were already in serious disagreement about them. Given that the allegations were serious, a formal investigation was in accordance with the First Respondent's Equality, Diversity & Inclusion Policy, p 754.

410. The Claimant contended that the meeting had the effect of creating a hostile and degrading environment for the Claimant, which was related to his disability (lung and stress) and race. He relied on his emotional state in the meeting and the lack of follow up in terms of his welfare after the meeting. He contended that it was reasonable, on the objective test, for the Claimant to have felt degraded by the conduct of this meeting.

411. The Tribunal disagreed. It found that Mr Muir and Ms Murray explained their reasoning to the Claimant. Ms Murray tactfully left the meeting when the Claimant became distressed, to allow him time to recover. Mr Muir also respectfully engaged with the Claimant's questions about Mr Muir's personal experience of discrimination. He gave the Claimant well-intended advice about his career development.

412. This was a professional and respectful meeting which dealt with some emotive matters. It was not reasonable for the Claimant consider that it had the effect of creating a hostile and degrading environment for him.

413. **Allegation 27. Following the grievance investigation meeting, in February 2017 (and on an on-going basis), C experienced increased hostility and repeated pressure from R2 and other Development Team members, including Dale Wilkins, Malcolm Carpenter and Claire Fowler. C was blanked by team members when he said hello to them and C was ostracised.**

414. **Allegations: Direct race discrimination; Direct disability discrimination (stress & anxiety); Harassment related to race; Harassment related to disability (stress & anxiety); Victimisation. R1and/or R2**

415. The Claimant gave one example of this occurring: when colleagues left a meeting as he started to speak. The Tribunal did not accept the Claimant's evidence. His allegation lacked any detail or context. The fact that the colleagues left the meeting suggested that they did genuinely have somewhere else to go.

416. The Claimant relied on Mr Carr's evidence that that the team were 'frustrated' with his lack of attendance and felt that the Claimant was 'not pulling his weight'.

417. These concerns were not direct race or disability discrimination in that they were "because of" race or disability – they specifically related to

attendance. However, they may have "arisen from disability" insofar as they related to the Claimant's attendance.

418. The Tribunal concluded that the team raising these concerns did not, objectively, have the effect of creating a hostile and degrading environment for the Claimant, which was related to his disability (lung and stress) or race. There were a couple of brief conversations, to which the Claimant was not a party. Mr Carr explained that the Claimant needed to work from home because of his condition. There was no intention to offend.

419. The Tribunal did not find, as the Claimant alleged, that the was ostracised and blanked.

420. **Allegation 29. On 19th June 2017, C attended a further OH assessment following a referral from R2/R1 relating to C's lung condition. Four reasonable adjustments were recommended in the report (dated 20 June 2017 and sent to R2/R1) as follows:(i) flexibility to attend hospital appointments;(ii) working from home;(iii) avoiding travelling in adverse conditions; and (iv) ongoing management support and understanding to accommodate him at work with his [lung] condition. None of the recommended reasonable adjustments were implemented by R1 or R2, either following receipt of the report on 20 June 2017 or on an ongoing basis. Allegations: Discrimination arising from disability (Bronchiectasis); Failure to make reasonable adjustments; Harassment related to race; Harassment related to disability (Bronchiectasis); Victimisation. R1 and/or R2**

421. The Claimant was always permitted to work flexibly to attend hospital appointments; to work from home when his condition required this; to arrive at and leave work avoiding travelling in adverse conditions. Mr Carr made clear that any absences from the workplace which related to disability were permitted. This allegation was not made out on the facts. In any event, the Claimant did not need to attend hospital appointments as regularly as he claimed.

422. **30. In July 2017, C could not be present at a Development Team Meeting in person due to suffering breathing difficulties, so C dialed in from home. During the meeting, the cost of development was discussed and C began to speak so as to contribute to the conversation. R2 said words to the effect of "Hold on, you don't need to talk, whatever you think you want to say, it would be helpful if put in an email." R2 therefore silenced C and prevented C from speaking at the meeting.**

423. **Allegations: Direct race discrimination; Direct disability discrimination (Bronchiectasis); Harassment related to race; Harassment related to disability (Bronchiectasis);Victimisation. R2.**

424. Mr Carr's evidence regarding this allegation was accepted by the Tribunal. During the meeting, the Claimant raised a recent legal case which he had read. The Claimant spoke for around 5 minutes, when Mr Carr did

interrupt him, thanked him for his input, and asked him to put the information in an email, as it would be helpful to the team.

425. Mr Carr's action, in moving the meeting along according to an agenda, was normal management practice. It was nothing to do with race, disability or the Claimant's protected acts.

426. **Allegation 31. During a 1-2-1 meeting with R2 on 7th September 2017, R2 told C that, acting on the advice of Ms Murray, it was to be recommended that C's working hours would be reduced to 3.5 days per week with a consequential reduction in pay. C was told that a letter would be sent to him to that effect. C considers that this recommendation was made because of/related to his disability caused by his bronchiectasis condition in that C could not physically attend the office 5 days a week.**

427. **Allegations: Direct race discrimination; Direct disability discrimination (Bronchiectasis); Discrimination arising from disability (Bronchiectasis); Harassment related to race; Harassment related to disability (Bronchiectasis); Victimisation. R2 and/or R1 via Maria Murray**

428. The Claimant relies on the recommendation that his hours be reduced to 3.5 days a week. The recommendation was, in fact, never put into practice.

429. The Tribunal accepted that a proposal to reduce an employee's working hours might be unfavourable treatment. An employee would feel anxious about a proposed reduction in pay.

430. The Tribunal decided that the unfavourable treatment did not arise from the Claimant's disability. The Claimant did not, in fact, need to attend physiotherapy appointments 3 times each week. He had misled the OH adviser about this.

431. Even if the proposal did arise out of his disability, the Tribunal found that engaging in a dialogue with the Claimant about a potential reduction in working hours, where it had been advised that he could only attend 2 full days, and 3 half days per week, was a proportionate means of achieving the legitimate aim of "ensuring that reasonable adjustments are being made, such adjustments including reducing working hours for an employee who reports that he is unable to commit to full time working, and allowing both employee and employer input into workable solutions to accommodate both the employee and business needs".

432. The Claimant contended that the Respondents had failed to discharge the burden of proof because they did not explore the possibility of the Claimant making up his hours outside normal working hours, or working compressed hours. The Tribunal disagreed. It accepted Mr Carr's evidence that it was not practical for the Claimant to be working different hours to Mr Carr, as his line manager, when there were complicated work matters to be discussed. It accepted that many of the Claimant's core responsibilities in his job description, including conducting contractual negotiations, maintaining

relationships with investors, local authorities and local developers and developing key contacts with internal and external clients, could only be done in normal working hours.

433. The Tribunal considered that Mr Carr needed to manage the Claimant. Mr Carr was already having difficulty locating the Claimant and managing his work. Mr Carr was reasonable in concluding that the situation would be unworkable if the Claimant was not even working in normal working hours.

434. The Tribunal also concluded that having a single discussion about reducing the Claimant's hours did not amount to harassment. It was not objectively reasonable for such a conversation to be regarded as violating the Claimant's dignity or creating an adverse environment for him. There was no intention to offend. This was a proposal which was not, in fact, put into practice. While it might arguably have amounted to unfavourable treatment, it did not violate dignity or create an oppressive or hostile environment.

435. Nor was this direct race or disability discrimination. There was no evidence that a white, or non-disabled employee, in respect of whom an OH report had advised that only 3.5 days' attendance each week could be maintained, would have been treated any differently.

436. **Allegation 32 From C's return to work in January 2013 (and on an ongoing basis), C was paid less in relation to basic salary and bonuses, compared to his colleagues, in particular, Adam Roberts and Malcolm Carpenter. C's annual bonus was £2,000 less than it had been prior to his return to work in January 2013. Allegations: Direct race discrimination; Direct disability discrimination (Bronchiectasis); Harassment related to race; Harassment related to disability (Bronchiectasis); Victimisation**

437. The Claimant was paid according to his performance. Adam Roberts and Malcolm Carpenter performed better and were accordingly paid higher bonuses. This was nothing to do with race or disability or protected acts.

438. **Allegation 33. In November 2017, an invoice for C's registration as a Chartered Surveyor was sent to R2, but R1/R2 never paid the invoice (at the time C was employed and on sick leave). Therefore, C was required to pay the invoice in order to stay on the register of Chartered Surveyors.**

439. **Allegations: Direct race discrimination, Direct disability discrimination (stress & anxiety), Harassment related to race, Harassment related to disability (stress & anxiety), Victimisation**

440. The Claimant was treated in the same way as all other employees in this regard.

441. Mr Carr could not pay the invoice for the Claimant, or submit an expenses claim on his behalf. The First Respondent pays the RICS invoices for its employees who are surveyors, but only when they make an expenses

claim to be reimbursed, having paid the invoice themselves. The Claimant's access to the expenses system had not been stopped, p 1713. He was not prevented from submitting an expenses claim whilst on sick leave.

442. The Respondents' failure to pay the invoice was nothing to do with disability or race.

443. **Allegation 34. Contacting the Claimant by letter on 25th April 2018, when in a letter dated 10 November 2017 from the Claimant's solicitor to the Respondent the Claimant's solicitor had requested that any contact be directed to the Claimant's solicitor, as direct contact was affecting the Claimant's health.**
444. **Allegations: Harassment related to race, Harassment related to disability (Bronchiectasis), Harassment related to disability (stress & anxiety), Victimisation**
445. **Allegation 35. By its letter of 25th April 2018, requiring the Claimant to maintain direct regular contact with the Respondent, when such contact would impede his recovery. Allegations: Harassment related to race; Harassment related to disability (Bronchiectasis); Harassment related to disability (stress & anxiety); Victimisation**

446. The letter about which the Claimant complains is from Emily Das, Interim HR Business Partner, pp 1669 – 1670. Ms Das explained in her letter why it was important for the Claimant to maintain contact with his employer during a lengthy absence. She explained that a sale of the Commercial Estate was now underway and that it may be necessary inform the Claimant of a TUPE transfer consultation. Ms Das had already invited the Claimant to a welfare meeting, to which he had not responded. Ms Das offered a range of methods of communication to the Claimant.

447. The Respondents had obtained an OH report on 9 November 2017, p1644 – 1646. It had not advised that it was inappropriate to maintain contact with the Claimant whilst he was on sick leave.

448. The Tribunal found that this was a sensitive and responsible approach by Ms Das. She explained why it was necessary to contact the Claimant. The Respondent had sent comparatively few letters to the Claimant after he had asked not to be contacted directly. Some contact between an employee and his employer during a lengthy period of sick leave was appropriate. This was minimal contact, tactfully expressed. It was nothing to do with his protected disclosures.

449. It was not reasonable to regard such correspondence as having the effect of violating the Claimant's dignity or creating the prohibited environment for him. The Claimant had been in receipt of full sick pay during his absence, his sick pay had recently been reduced. It was not unreasonable, or unusual, for an employer to maintain some direct contact with their employee as part of day to day management.

Constructive Dismissal

450. The Claimant has not succeeded in his claims of discrimination, harassment, victimization and failure to make reasonable adjustments. In respect of each claim, the Tribunal has found for the Respondents. For the reasons given in respect of each allegation, the Tribunal finds that the Respondents did not conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence or trust between employer and employee. The Respondents acted with reasonable and proper cause in respect of each allegation.

451. The letter of 25 April 2018 was unimpeachable and incapable of amounting either to a fundamental breach of contract, or a 'last straw', entitling the Claimant to resign and treat himself as constructively dismissed.

452. There was no fundamental breach of contract. The Claimant was not entitled to resign and claim constructive dismissal.

453. The Claimants claims fail and are dismissed. A remedy hearing will not take place.

Employment Judge Brown

Dated: ……17 March 2021

Judgment and Reasons sent to the parties on:

17th March 2021.

For the Tribunal Office