



# EMPLOYMENT TRIBUNALS

**Claimant**

**Respondent**

**Mr S Khan**

**v**

**Slough Borough Council**

**Heard at:** Reading

**On:** 15 to 17 January, 13 to 15 March 2024.

**Before:** Employment Judge George  
Dr C Whitehouse  
Mrs M Thorne

## **Appearances**

**For the Claimant:** in person

**For the Respondent:** Mr B Amunwa, counsel

## **RESERVED JUDGMENT**

1. The claim of race discrimination is not well founded and is dismissed.
2. The claim of discrimination on grounds of religion is not well founded and is dismissed.
3. By a majority (Dr Whitehouse and Mrs Thorne – Employment Judge George dissenting), the claim of victimisation succeeds in part.
  - 3.1. The respondent, by Mrs Hothi, victimised the claimant by exerting pressure on him to withdraw his support for a colleague's grievance.
  - 3.2. By a majority (Dr Whitehouse and Mrs Thorne – Judge George dissenting), the complaint of victimisation at List of Issues 4.2.1 was not presented within the applicable time limit, but it is just and equitable to extend the time limit.
4. The minority view (Judge George) is that the Tribunal does not have jurisdiction to consider that part of the victimisation claim which is otherwise well founded because it was presented outside the applicable time limit.
5. Save as set out above, the claim of victimisation is not well founded and is dismissed.
6. The claimant was unfairly dismissed.

7. Compensation for unfair dismissal and for the successful victimisation claim will be assessed at a separate remedy hearing on a date to be fixed with a time estimate of 1 day to be conducted by CVP.

## REASONS

1. Following a period of conciliation which lasted from 4 August 2021 to 19 August 2021 the claimant presented his claim on 18 September 2021. A response was received on 19 November 2021 but the respondent applied for permission to substitute a more detailed version that was sent on 23 November 2021 and that was granted.
2. The complaints arise out of the claimant's employment by the respondent between 26 April 2004 and 30 July 2021 most recently as an Assistant Engineer. The respondent alleges that the reason for his dismissal was redundancy.
3. The claim originally included complaints of harassment and sex discrimination which were withdrawn at a preliminary hearing conducted on 17 February 2023. At that hearing the claim was case managed and a list of issues drawn up. The claimant confirmed at the start of the final hearing on 15 January 2024 that all of the complaints he was pursuing had been set out in the order of Employment Judge A Matthews following the preliminary hearing on 17 February 2023 and that he was not pursuing a sex discrimination complaint. He brought the following complaints:
  - 3.1 Unfair dismissal,
  - 3.2 Discrimination on the grounds of race,
  - 3.3 Discrimination on the grounds of religion or belief,
  - 3.4 Victimisation.
4. There were particular challenges for this Tribunal in case managing the final hearing in the present case and in the fact finding as is explained below.
5. A hearing file of 543 pages was produced which contained the documents in the index and page numbers in that hearing file are referred to as pages 1 to 543 in these reasons. The matter was originally listed for a liability hearing on 12 to 15 September 2023 but was postponed, and on 11 January 2024, four days before the resumed hearing, an application was made by the respondent for permission to add approximately 50 pages of additional documentation to the hearing file. These were found in a second bundle where the pages were numbered S1 to S50. Originally the claimant objected to the late disclosure of documents but, after consideration, he withdrew his objection and those documents were admitted by consent.
6. The tribunal was also provided with three not agreed documents: a cast list; a reading list; and a respondent's chronology. The last of these was updated with a new proposed non-agreed chronology on Day 5 before closing

submissions. We heard oral evidence from the claimant and his witness and former colleague – Renato Mapembe; from Kam Hothi – Network Lead within Highways and the claimant’s line manager at the relevant time; from Savio De Cruz – at the relevant time Service Lead for Major Infrastructure Projects to whom Mrs Hothi reported; and from Garry Tallett – who made the formal decision to dismiss the claimant, ostensibly for redundancy.

7. One of the issues in the case was a complaint by the claimant of victimisation on grounds of his support for a grievance brought by a former colleague, Mr Abbas. It is worded in the list of issues as being based upon an alleged protected act of “providing a statement and/or other support.” No written statement appeared in the hearing file and although the claimant consistently described it as a statement, at the start of the hearing before us, it was not clear which specific statement had been identified as the alleged protected act.
8. Mr Umunwa made enquiries and, at the start of Day 3, when the claimant was approximately 30 minutes away from the end of cross-examination by Mr Umunwa, the respondent’s counsel, provided a copy to the claimant and to the Tribunal of an interview record. These were apparently notes taken by a minute taker of a grievance investigation meeting held with the claimant by the investigator investigating Mr Abbas’s grievance. In this Mr Umunwa acted quite properly, given his professional obligations to the Tribunal, which are separate to his obligations to his client.
9. The factual background to the present claim is that it is one of three employment tribunal claims brought by the claimant, Mr Abbas and Mr Mapembe whom the claimant called as a supporting witness in the present case.<sup>1</sup> Both Mr Abbas and Mr Mapembe had presented grievances during 2020. The claimant had been interviewed on conditions of anonymity by the investigator looking into Mr Abbas’s grievance.
10. Following an appeal, an internal investigator had reinvestigated part of Mr Mapembe’s grievance and carried out an investigation into recruitment practices in the department more generally. The claimant had also been interviewed in that separate internal investigation and it was his interview with the Strategy and Partnership Manager, in that second investigation, that was disclosed by counsel at the start of Day 3. In this judgment the Strategy and Partnership Manager is referred to as the SPM.
11. The three separate employment tribunal claims involved allegations by three separate individuals in respect of the same line manager and overlap to some extent, so far as we understand the position; we have not been taken to the

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<sup>1</sup> We record here that on 15 April 2024, between the date on which we concluded deliberations and finalising the reserved judgment, the respondent submitted for the attention of this Tribunal a copy of the Reserved Judgment in Case 3309972/2021 by the separate Tribunal considering the claim brought by Mr Mapembe. The Judge directed that the following response be sent to the parties, “The decision in Mr Khan’s claim will be made solely on the basis of evidence presented to the Tribunal hearing his case. For whatever reason, the parties did not apply for consolidation of Mr Khan’s claim with Mr Mapembe’s and the findings of a separate first instance tribunal are not relevant to the decision taken by Employment Judge George, Mrs Thorne and Dr Whitehouse in Mr Khan’s claim. The respondent’s email will be disregarded.”

issues in the other claims. We accept that there is, therefore, a risk that the relevance of documentation in one claim or grievance to the issues in another claim might be overlooked. However, that does not, in our view, provide a full explanation for the failings on the part of the respondent to comply with their disclosure obligations within the timescale directed by the Tribunal. Those obligations were to send to the claimant all relevant documentation and include in that any that assisted his case and not merely documents that assisted their own.

12. There is no criticism of Mr Umunwa in this. He was put in the position where he, quite properly, had to accept on Day 3 of the hearing, that he could not state with confidence that his client had complied with their disclosure obligations. As will become apparent from the following reasons, the late disclosed interview with the SPM contained information that was patently extremely relevant to the dispute in the present claim.
13. The Tribunal was extremely concerned that the circumstances in which that document had come to light might indicate that there were yet further material documents which it was necessary to have in order for a fair hearing to take place. Despite the obvious disadvantage of the delay caused by doing so, we decided that it was necessary to adjourn part heard in order that we could be sure that all documents relevant and necessary for a fair determination of the issues had been disclosed. That is the reason why there were two hearing sessions separated by approximately two months in the present case. The claimant on more than one occasion expressed his view that he was disadvantaged as a self-representing party by what appeared to him to be selective disclosure only of documents supportive to the respondent. Given these events, the Tribunal is unsurprised that he holds that view.
14. A revised second volume of the hearing file was produced at the resumed hearing on Day 4. It now contained additional documents which are numbered pages T1 to T51. As a result of the additional documents it was necessary to recall the claimant, Mrs Hothi and Mr De Cruz.
15. The claimant's witness statement was redacted from the form which had been disclosed to remove paragraph 14 in its entirety because it contained without prejudice material.
16. Another challenge was that some of the witness statements gave incomplete accounts of the evidence to be given by the relevant witness. This was particularly true of the claimant whose witness statement omitted very relevant sections from his claim form but it was also true of Mrs Hothi.
17. When giving his evidence in chief the claimant therefore not only adopted in evidence the witness statement (which ran to 7 pages and 27 paragraphs) but also the document attached to the claim form that starts at page 17 and the document at page 94 which set out the further information that Mr Khan had provided to questions he had been directed to answer by Judge A Matthews. Those three documents were adopted in evidence as his evidence in chief.

18. Mrs Hothi was able to read and confirm the truth of a number of paragraphs in the grounds of response in order to make good some of the gaps in the respondent's witness evidence. The paragraphs that she confirmed to be true and accurate to the best of her knowledge and belief started at page 103 and were paragraphs 10 to 12, 14 (subject to confirming that the appointment referred to on that paragraph had been in 2017 or 2018), paragraph 19, 23, 24, 43, 60-64 inclusive, 67 and 68.
19. We have set out above the piecemeal disclosure of documents. Regrettably, it was apparent that the respondent's disclosure was still incomplete and inconsistent at the end of the hearing. For example, there had been disclosure of the outcome letter sent by the respondent to Mrs Hothi notifying her of the outcome of Mr Mapembe's grievance but no disclosure of any similar letter notifying her of the outcome of Mr Abbas's grievance. She gave oral evidence that she would have received one and said that she thought that HR would have been responsible for locating relevant documents of that nature. Whatever the reason may be, that is a document that one would reasonably expect to have been disclosed in the case. It has not been, even though Mrs Hothi's knowledge about the investigations made into Mr Abbas's grievance was of obvious relevance to the victimisation complaint. What she was told about the outcome would clearly have been relevant to our decision on that complaint. To disclose what she was told about the Mapembe grievance but not what she was told about the Abbas grievance shows an inconsistent approach and, at the very least, lack of rigour in preparation despite the circumstances in which the final hearing was adjourned part heard.
20. On Day 4, the claimant made an application for specific disclosure which was contested by the respondent. The specific documents sought were that the claimant had been sent page T1 - an exchange of correspondence regarding working from home that he had had with Mrs Hothi in 2019. His oral evidence was that there had been another set of e-mails prior to that in which Mrs Hothi had refused his request and used what he described as harsh words. He also asked for disclosure of an exit interview record dating from 2008 and for an email that he had sent to the respondent prior to 2015.
21. When, in due course, Mrs Hothi was asked about the emails concerning working from home said that she had made a search for emails on that topic and those disclosed had been the only ones she had located. Those were part of the respondent's instructions in refuting the disclosure application which we rejected for reasons which were given orally at the time and are not now repeated.
22. However, the point made by the claimant that the respondent appears to have disclosed documents that were helpful to themselves has some force. The claimant states that he considers that documents helpful to him have not been disclosed although there is no strong evidence that specific documents are missing which are likely to be in his favour.
23. Mr Umunwa apologised on behalf of the respondent for the disruption to the hearing that had been caused by the original partial disclosure. That situation

makes it all the more disappointing that there remained some very obvious omissions. We have reflected very carefully upon the extent to which we can draw adverse inferences from those failings because we are mindful that failure of the organisation does not necessarily lead to an inference that a particular individual witness is dissembling. Where we have considered whether or not to draw an adverse inference from the respondent's failings in relation to its disclosure obligations, our findings are set out below as part of our fact finding.

## The issues

24. Judge A Matthews had directed the claimant to provide some clarification and further information about his claim (see para.9 page 84). This was provided in the document at page 94. During the preliminary case management at the start of Day 1, we suggested that it would assist the Tribunal in our decision making if we had reference to a single document. We suggested some amendments to the list of issues (hereafter the LOI) to incorporate the further information in summary form. The proposed amended list of issues was provided in hardcopy to the parties (with the suggested additions in bold) and their comments were asked for. There were none and we take the amended LOI as our decision making template.

25. The amended LOI is as follows:

### “1. Time limits

1.1 The claim form was presented on 18 September 2021. The claimant commenced the Early Conciliation process with ACAS on 4 August 2021 (Day A). The Early Conciliation Certificate was issued on 19 August 2021 (Day B).

1.2 The unfair dismissal claim is in time.

1.3 Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010 (the “EA”)? The Tribunal will decide:

1.3.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?

1.3.2 If not, was there conduct extending over a period?

1.3.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.3.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.3.4.1 Why were the complaints not made to the Tribunal in time?

1.3.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. **Unfair dismissal**

- 2.1 The Respondent dismissed the Claimant.
- 2.2 What was the reason for dismissal? The Respondent asserts that it was a reason related to redundancy or some other substantial reason, which is a potentially fair reason for dismissal under section 98(2) of the Employment Rights Act 1996.
- 2.3 Did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. The Tribunal will usually decide whether:
  - 2.3.1 The Respondent adequately warned and consulted the Claimant.
  - 2.3.2 The Respondent adopted a reasonable selection decision, including its approach to a selection pool.
  - 2.3.3 The Respondent took reasonable steps to find the Claimant suitable alternative employment.
- 2.4 Whilst the Tribunal may decide the issues set out in 2.3.1- 2.3.3 above, the Claimant's complaint, in short, is that Ms Hothi manipulated the process to ensure the Claimant was selected for redundancy and was not able to consider alternative employment until it was too late.
- 2.5 Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts?
- 2.6 Did the Respondent adopt a fair procedure? The Claimant challenges the fairness of the procedure as set out in 2.4 above.
- 2.7 If it did not use a fair procedure, would the Claimant have been fairly dismissed in any event and/or to what extent and when?

3. **Direct race and/or religion or belief discrimination (EA 2010 section 13)**

- 3.1 The Claimant describes himself as of "Pakistani ethnic origin" and of the "Muslim faith".
- 3.2 Did the Respondent do the following things:
  - 3.2.1 Through Ms Hothi manipulate the process to ensure the Claimant was selected for redundancy and was not able to consider alternative employment until it was too late. **By**
    - **taking the opportunity of the restructuring to put at risk the roles occupied by team members who either had brought a grievance against her or were witnesses in that process,**
    - **by failing to appoint the claimant to the ringfenced position of Assistant Engineer and**
    - **delaying the announcement of that decision so that he would**

miss the deadline for two other jobs.

3.2.2 **In October 2020, during a discussion about the progress of a road adoption project, shout and swear at the claimant using foul language;**

3.2.3 **Refuse the claimant's application in June 2018 for an adjustment to work from home 2 days a week to care for his special needs children whereas a colleague was allowed without question to work from home;**

3.2.4 **In 2020, refuse the claimant permission to carry forward 5 days unused annual leave despite there being exceptional circumstances which justified his request to do so.**

3.3 Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.

3.4 If so, was it because the Claimant was of "Pakistani ethnic origin" and/or of the "Muslim faith"?

3.5 Is the Respondent able to prove a reason for the treatment occurred for a non-discriminatory reason not connected to race and/or religion or belief?

#### 4. **Victimisation (EA 2010 section 27)**

4.1 Did the Claimant do a protected act as follows:

4.1.1 In or around September 2020, support Mr Waqar Abbas in Mr Abbas's grievance about discrimination, by providing a statement and/or other support.

4.2 Did the Respondent do the following things:

4.2.1 Through Ms Hothi, exert pressure on the Claimant to withdraw his support **or the consequences would be that he would lose his job;**

**4.2.2 fail to appoint the claimant to the Assistant Engineer role.**

4.3 By doing so, did the Respondent subject the Claimant to detriment?

4.4 If so, was it because the Claimant had done the protected acts?

#### 5. **Remedy**

##### Unfair dismissal

5.1 If the Claimant wishes to be reinstated to his previous employment or re-engaged to comparable employment or other suitable employment, should the Tribunal order reinstatement? The Tribunal will consider



whether such an order is practicable and, if the Claimant caused or contributed to the dismissal, whether it would be just to make it and upon what terms it ought to be made.

- 5.2 What basic award is payable to the Claimant, if any?
- 5.3 Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?
- 5.4 If there is a compensatory award, how much should it be? The Tribunal will decide:
  - 5.4.1 What financial losses has the dismissal caused the Claimant?
  - 5.4.2 Has the Claimant taken reasonable steps to replace his lost earnings, for example by looking for another job?
  - 5.4.3 If not, for what period of loss should the Claimant be compensated?
  - 5.4.4 Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
  - 5.4.5 If so, should the Claimant's compensation be reduced? By how much?
  - 5.4.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did the Respondent or the Claimant unreasonably fail to comply with it? If so, is it just and equitable to increase or decrease any award payable to the Claimant and, if so, by what proportion up to 25%?
  - 5.4.7 If the Claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce his compensatory award? By what proportion?
  - 5.4.8 Does the statutory cap of fifty-two weeks' pay apply?

Discrimination or victimisation

- 5.5 Should the Tribunal recommend that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?
- 5.6 What financial losses has the discrimination caused the Claimant?
- 5.7 Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?
- 5.8 If not, for what period of loss should the Claimant be compensated for?
- 5.9 What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?
- 5.10 Is there a chance that the Claimant's employment would have ended in Any event? Should their compensation be reduced as a result?

5.11 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did either party unreasonably fail to comply with it? If so, is it just and equitable to increase or decrease any award payable to the Claimant and, if so, by what proportion up to 25%?

5.12 Should interest be awarded? How much?"

### **The law applicable to the issues**

26. In the present case it is common ground that the claimant was dismissed. The tribunal must then consider whether it was fair or unfair in accordance with s.98 Employment Rights Act 1996 (hereafter referred to as the ERA).

“Section 98 Employment Rights Act 1996

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it-

(a) Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) Relates to the conduct of the employee,

(c) Is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) “qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer)-

- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
  - (b) shall be determined in accordance with equity and the substantial merits of the case."
- 27. It is for the respondent to prove that the reason for dismissal was one of the potentially fair reasons set out in s. 98(1) which include redundancy and what is often referred to as "some other substantial reason"; the comparatively flexible residual provision that it is potentially fair to dismiss for some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the claimant held. It is well established that a business re-organisation which does not involve a redundancy situation can, potentially, be such a reason.
- 28. An employee shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to a broad range of situations set out in s.139(1) ERA which include a diminishing need on the part of the business for employees to carry out work of a particular kind (s.139(1)(b)(i) ERA). The questions for us to determine therefore are first, whether the requirements of the respondent's business for employees to carry out work of a particular kind ceased or diminished or were expected to cease or diminish and secondly, whether the claimant's dismissal was caused wholly or mainly by that cessation or diminution. The *work* may not have ceased or diminished; the question is whether the *need for employees* to carry out the work has ceased or diminished.
- 29. The starting point is therefore to look at the overall requirements of the business and decide whether there was a diminishing need for employees of a particular kind. If we are satisfied of that, it is then a question of fact for us to decide, taking into account the various arguments raised by the parties including about the reason for the dismissal, the nature of the work which the claimant was doing and was contracted to do and the attempts made to redeploy him, whether his dismissal was attributable to that diminished need.
- 30. If the redundancy situation exists, the employment tribunal has limited scope to investigate the business decision to make the claimant redundant. That must be qualified by the tribunal's jurisdiction to determine whether the redundancy situation is in fact the reason for the claimant's dismissal and whether it was fair within the meaning of s.98(4) ERA. There is a distinction between the tribunal not being entitled to go behind an apparently reasonable business decision to make redundancies and being directed to consider the reasons for selecting the claimant to be made redundant.
- 31. If the respondent proves that the dismissal was because of the potentially fair reason then the tribunal must go on to consider whether the dismissal was procedurally fair. Did the respondent use objectively fair and justifiable selection criteria? Did they give sufficient warning and engage in meaningful consultation? Were alternatives to redundancy actively considered?

32. If the tribunal finds that the dismissal was unfair and has to go on to consider whether there should be deductions from compensation then, on the authority of Polkey v A E Dayton Services Limited [1987] IRLR 503, compensation may be reduced on the basis that had the employer taken the appropriate procedural steps which they did not take then that would not have affected the outcome.
33. For the purposes of the claims of discrimination and victimization under consideration in the present case, the relevant sections of the Equality Act 2010 (hereafter the EQA) include the following (so far as material),

13 Direct discrimination

(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.

23 Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

27 Victimisation

(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 Act;
- (c) doing any other thing for the purposes of or in connection with this Act;
- (d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

39 Employees and applicants

...

(2) An employer (A) must not discriminate against an employee of A's (B)—

- (a) as to B's terms of employment;
- (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
- (c) by dismissing B;
- (d) by subjecting B to any other detriment.

...

(4) An employer (A) must not victimize an employee of A's (B) -

- (a) as to B's terms of employment;
- (b) in the way A affords B access ... to opportunities for promotion, transfer or training ...;
- (c) by dismissing B;
- (d) by subjecting B to any other detriment."

34. In relation to direct discrimination on grounds of race of religion and belief, although the structure of the EQA invites us to consider whether there was less favourable treatment of the claimant compared with another employee in materially identical circumstances, and also whether that treatment was because of the protected characteristic concerned, those two issues are often factually and evidentially linked (Shamoon v Chief Constable of the RUC [2003] IRLR 285 HL). This is particularly the case where the claimant relies upon a hypothetical comparator. If we find that the reason for the treatment complained of was not that of race (or religion), but some other reason, then that is likely to be a strong indicator as to whether or not that treatment was less favourable than an appropriate comparator would have been subjected to.
35. The application of the burden of proof in direct discrimination claims has been explained in a number of cases, most notably in the guidelines annexed to the judgment of the CA in Igen Ltd v Wong [2005] ICR 931 CA.
36. When deciding whether or not the claimant has been the victim of direct race discrimination (or religious discrimination as the case may be), the Employment Tribunal must consider whether he has satisfied us, on the balance of probabilities, of facts from which we could decide, in the absence of any other explanation, that the incidents occurred as alleged, that they amounted to less favourable treatment than an actual or hypothetical comparator did or would have received and that the reason for the treatment was race or, separately, religion. If we are so satisfied, we must find that

discrimination has occurred unless the respondent proves by cogent evidence that the reason for their action was not that of race or religion.

37. The law anticipates a two-stage test to the issue of direct discrimination. Nevertheless, it is not necessary artificially to separate the evidence adduced by the two parties when making findings of fact (Madarassy v Nomura International plc [2007] ICR 867 CA). We should consider the whole of the evidence when making our findings of fact and if the reason for the treatment is unclear following those findings then we will need to apply the provisions of s.136 in order to reach a conclusion on that issue.
38. Victimization is defined in s.27 EQA to be where a person (A) subjects (B) to a detriment because B does a protected act, or A believes that B has done, or may do, a protected act. In the present case, the respondent accepts that in supporting Mr Abbas's grievance the claimant carried out a protected act. The question for this Tribunal is whether the acts complained of were done because the claimant gave support to or was interviewed in relation to that grievance.
39. The then applicable provision of the Race Relations Act 1976 was considered by the House of Lords in The Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48, HL. The wording of the applicable definition has changed somewhat between the RRA and the Equality Act. However Khan is still of relevance in considering what is meant by the requirement that the act complained of be done "because of" a prohibited act. Lord Nicholls said this, at paragraph 29 of the report,

"The phrases 'on racial grounds' and 'by reason that' denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact"
40. Therefore when deciding whether or not the claimant suffered victimization, the tribunal first needs to decide whether or not he did a protected act (something which is admitted in this case by the respondent). Next the tribunal needs to go on to consider whether he suffered a detriment and finally we should look at the mental element. What, subjectively, was the reason that the respondents acted as they did.
41. The provisions of s.136 have been considered by the Supreme Court in Hewage v Grampian Health Board [2012] ICR 1054 UKSC – and also in Efobi v Royal Mail Group Ltd [2021] ICR 1263 UKSC. Where the Tribunal is in a position to make positive findings on the evidence one way or the other, the burden of proof provisions are unlikely to have a bearing upon the outcome. However, it is recognized that the task of identifying whether the reason for the treatment requires the Tribunal to look into the mind of the alleged perpetrator. This contrasts with the intention of the perpetrator, they may not have intended to discriminate but still may have been materially influenced by considerations of, in the present case, race or religion. The burden of proof provisions may be of assistance if there are considerations

of subconscious wrongdoing but the Tribunal needs to take care that findings of subconscious wrongdoing are evidence based.

42. More recently, in Field v Steve Pye & Co (KL) Ltd [2022] EAT 68; [2022] IRLR 948 EAT, HHJ James Tayler addressed the question of whether it is permissible to move directly to the second stage of the test for discrimination. He pointed out that where there is significant evidence that could establish that there has been discrimination, it cannot be ignored and a decision to move directly to the question of the reason for a particular act that should be explained. In effect, the basis for doing so would be that the Tribunal had assumed that the claimant had passed the stage one igen test. He recommended that where there is evidence that could indicate discrimination, there was much to be said for properly grappling with the evidence and deciding whether it is or is not sufficient to switch the burden of disproving discrimination to the respondent.
43. The tribunal may not consider a complaint under ss.39 EQA which was presented more than 3 months after the act complained of unless it considers that it is just and equitable to do so. This is a broad discretion and the factors which are relevant for us to take into account depend on the facts of the particular case.
44. In British Coal Corporation v Keeble [1997] IRLR 336 the EAT advised that tribunals should consider, in particular, the following factors:
  - 44.1 the length of and reasons for the delay;
  - 44.2 the extent to which the cogency of the evidence is likely to be affected by the delay;
  - 44.3 the extent to which the party sued had cooperated with any requests for information;
  - 44.4 the promptness with which the claimant had acted once he or she had known of the facts giving rise to the cause of action; and
  - 44.5 the steps taken by the plaintiff to obtain appropriate professional advice once he or she had known of the possibility of taking action.
45. This was reiterated more recently by the Court of Appeal in Southwark London Borough Council v Afolabi [2003] I.R.L.R. 220 CA. However, the factors to be taken into account depend upon the facts of a particular case and should not be considered mechanistically when exercising what is a broad general discretion: Adedeji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23, CA.
46. It is not necessary that the Tribunal should be satisfied that there is a good reason for the delay before finding that it is just and equitable to extend time although the explanation will always be relevant: Abertawe Bro Morgannwg

University v Morgan [2018] I.C.R. 1194 CA. Furthermore, one of the most significant factors to be taken into account when deciding whether to set aside the time limit is whether a fair trial of the issue is still possible (Director of Public Prosecutions v Marshall [1998] ICR 518). In Baynton v South West Trains Ltd [2005] ICR 1730 EAT, it was observed that a tribunal will err if, when refusing to exercise its discretion to extend time, it fails to recognise the absence of any real prejudice to an employer. This is part of considering the balance of prejudice and in doing so, the Tribunal may have regard to the potential merits of the claim: Rathakrishman v Pizza Express (Restaurants) Ltd [2016] I.R.L.R. 278.

### Findings of fact

47. We make our findings of fact on the balance of probabilities taking into account all of the evidence both documentary and oral which was admitted at the hearing. We do not set out in this judgment all of the evidence which we have heard but only our principal findings of fact, those necessary to enable us to reach conclusions on the remaining issues. Where it was necessary to resolve conflicting factual accounts we have done so by making a judgment about the credibility or otherwise of the witnesses we have heard based upon their overall consistency and the consistency of accounts given on different occasions when set against contemporaneous documents where they exist.
48. The claimant began his employment with the respondent council on 12 November 2010 in the role of Assistant Engineer-Highways Maintenance (page 119). He gave evidence that he had been contracted to work at the council before that but this was the start of his formal employment. In July 2015, the claimant reduced his hours from 37 per week to 25 hours per week. He is married with four children and the oldest two have special needs. He reduced his working hours in order to support his wife in caring for the family.
49. According to the claimant, in 2018 he requested an adjustment of being able to work from home for two days in a week (page 95 in his further information). He alleges that a female Sikh comparator was allowed to work from home without question and he had needed to work from home in order to support his family.
50. One of the items which was disclosed belatedly in the gap between the two hearings was correspondence dated from March 2019 (page T1) which was an exchange between the claimant and Kam Hothi about working from home. On 7 March 2019 Ms Hothi mailed the claimant and said that any new arrangements must be formally signed off before allowing any further working from home. Ultimately, the claimant was granted one day working from home out of the 25 hours a week working week.
51. We do note that Ms Hothi in her paragraph 4 accepts that the claimant had made an application for working from home in 2018 as an ad hoc request rather than a formal flexible working request. Regrettably, we had not remembered this statement evidence when Ms Hothi was recalled to give evidence about the documents in the updated supplementary bundle and it was not drawn to our attention - so she was not asked about the apparent



inconsistency on dates. We make our findings of fact about whether or not the 2018 request was made – which is pursued as an alleged act of race and/or religious discrimination below (see paragraph 179 below).

52. As we remark above, it is a feature of this case that three individuals, including the claimant, over the course of 12 months brought grievances against Ms Hothi. Mr Mapembe's was the first in time and was brought on 20 April 2020. It was investigated by an external investigator and the claimant was not interviewed for that grievance. The confidential investigation report is at page 471. It is dated 30 June 2020 and the outcome provided to Mr Mapembe was dated 7 July 2020. It is possible that Mr Mapembe told the external investigator that the claimant was a potential witness in relation to his complaints about recruitment practices although the scope of Mr Mapembe's grievance was much broader than that (see paragraph 4.104 on page 488). The external investigator decided that allegations in respect of recruitment practices were outside the remit of his investigation.
53. In the meantime, by 11 June 2020, Mr Abbas had presented his own grievance – that being the date on which he was interviewed by the same external investigator who was appointed to carry out an independent investigation in relation to the Abbas grievance also. Mrs Hothi had been interviewed in relation to the Mapembe grievance on 19 May 2020 (page T14). During his investigation of the Abbas grievance, the external investigator carried interviews including with the claimant on 17 July 2020 (RSB page T31). On the face of it this is described as an interview with a person who wished to remain anonymous but the claimant confirmed that that had in fact been himself. The participation in that interview was admitted by the respondent to be a protected act within the meaning of s.27 Equality Act 2010 ("EQA").
54. Mrs Hothi was interviewed only once by the external investigator in relation to the Abbas grievance and that was more than a month before the claimant's interview on 11 June 2020 (RSB page T26). Particular allegations made by the claimant were not therefore put to Mrs Hothi in interview.
55. Mrs Hothi started a period of sickness absence on 20 July 2020 (RSB page S49). This coincided with a bereavement and her absence lasted until 5 October 2020.
56. While she was on sick leave, on 5 August 2020, she received a letter informing her of the outcome of Mr Mapembe's grievance (RSB page T19). She told us, and we accept, that she had had to chase for that outcome and likewise had to chase for the outcome of Mr Abbas's grievance.
57. Mr Mapembe appealed against the outcome of his grievance and the appeal recommended an investigation into recruitment practices in the department (paragraph 4 on page 423 refers to this).
58. While this was going on, between approximately July and October 2020 according to Ms Hothi (her paragraph 6), the restructure of the council was being designed by an organisation called Gate One together with the Director

of Transformation and the Chief Executive Officer. Phase 1 must have been completed by the end of that period but since the subject matter of the claim has principally concerned Phase 2 we do not have the details of the dates of Phase 1.

59. One of the claimant's central allegations is that Mrs Hothi manipulated the redundancy process to put the claimant at risk. The credible evidence about who was responsible for the design of the new structure is completely inconsistent with such an inference.
60. Mr De Cruz (to whom Mrs Hothi reported prior to the reorganisation) explained the limits of the consultation with him about restructure in his para.3. His thoughts on which services should be within which directorate were sought but not about which posts should be retained. We accept that Service Leads like Mr De Cruz, officers working at a senior level to Mrs Hothi, had this limited consultation only. Mrs Hothi gave oral evidence that she had a 30 minute conversation but was not asked what the structure should be in the future. We accept that she found it a surprise when she found what the structure was to be. None of the documents show any more extensive consultation with Mr De Cruz than he gave evidence about, let alone consultation with someone at Mrs Hothi's level.
61. Both Mr De Cruz and Mrs Hothi were put at risk. Mr De Cruz ended up being successful in his application for an Associate Director post and was then notified which portfolio he would be assigned to. He was not assigned to Transport & Highways, despite a number of years in senior positions in that directorate. A different Associate Director was assigned to Networks, the new service area into which Highways was placed, who himself did not have any input into staff changes in that area. His lack of prior knowledge of the individuals and the outstanding grievances is patent from correspondence concerning the claimant's grievance which we analyse in due course. It also appears that the lack of involvement with those delivering services led to the removal from the structure of all of the staff dealing with the Bus Lane Appeals because of the nature of their contracts.
62. These factors – which are consequences of the restructure entirely separate to its impact on the claimant – suggest a degree of disruption caused by the new design. We think that is inconsistent with the allegation that Mr De Cruz or Mrs Hothi manipulated the exercise and is consistent with their evidence that they had little input into it. There is no evidence of substance to support the inferences the claimant urges us to draw that Mrs Hothi designed or influenced the post-transformation structure to put him at risk.
63. The claimant's broader allegation is that the managers supported one another; he suggested that Mrs Hothi made a request of Mr De Cruz who made a request of the Director of Transformation that particular posts be made redundant. Mr De Cruz's own experience makes that highly unlikely. He had been *Acting* Head of Transport and had therefore been put down to the Team Leader position and had to apply externally for the role of Associate Director. The allegation that he, on Mrs Hothi's behalf, engineered a new structure that put the claimant and his ringfenced colleague at risk but did

nothing about the fact that the structure potentially disadvantaged himself is highly improbable.

64. The external investigator's report into Mr Abbas's grievance is dated 7 September 2020 and Mr Abbas received his outcome letter dated 10 September. It is clear from page 465 that the grievance included allegations of discrimination against Mrs Hothi. We are therefore satisfied, had the matter been in dispute, that the claimant's participation and support of the grievance by being investigated was a protected act. The recommendations included, at Recommendation Three - page 468, that further investigation be carried out into recruitment practices in the department. Ultimately this was done by the SPM in the Commissioning and Transformation Team; a separate team within the respondent council to that in which the claimant and Ms Hothi are located.
65. We are unaware of the date on which Mrs Hothi was informed of this outcome but it is unlikely to have been sooner than the date on which Mr Abbas was informed. His outcome letter (page 463) lists the individuals with whom the investigator had met and describes the claimant as "a member of staff who wished to remain anonymous".
66. The outcome communicated to Ms Hothi in relation to Mr Mapembe's grievance (RSM page T19) does not include any information about who was interviewed as part of that process and was written by the same individual who wrote the outcome letter to Mr Abbas. Given that the claimant is not named in the outcome letter to Mr Abbas and that no individuals are named as being involved in the investigation when Mrs Hothi was told of the outcome of Mr Mapembe's grievance, we are quite satisfied, even in the absence of the outcome letter to Mrs Hothi, that it can be inferred that she was not told through that outcome letter that the claimant had been interviewed as part of the Abbas grievance investigation.
67. Mrs Hothi returned to work on a phased return on 5 October 2020.
68. It is alleged by the claimant that, later that month, there was an incident during which she swore at him and we will make more detailed findings about that contested incident below.
69. Meanwhile, there were briefing meetings in relation to the restructure in particular on 2 November 2020 when briefing meetings on Phase 2 took place. Mrs Hothi's oral evidence was that meetings with managers took place on 2 and 3 November 2020 and she thought it probable that hers was on 3<sup>rd</sup>. All those affected got the proposed restructure on 4 November 2020 at about 4.00 pm. This was in the form of the consultation document at page 148 which explains that a consultation period was starting and would last from that date to 21 December 2020 (see page 151).
70. The impact on the staff can be gauged from the Phase 2 Equality Impact Assessment (at page 141) which states that 1263 positions were "in scope for impacts", 202 positions were described as being at risk of significant impact and 93 positions were in the category of being at risk with ring-fenced

competition. The timetable to be followed is at page 171 and the process – including the right to appeal – at page 172. There is no allegation by the claimant that this timetable or process was not followed and there had been union consultation prior to it being set out.

71. It is clear that this was a wide ranging reorganisation affecting the full structure of the respondent council simply from the visualisation at Appendix A (page 176) to the visualisation at Appendix B (page 177). Posts were matched between the old structure and the proposed new structure in terms of duties, responsibilities and grades. All directly affected staff received a letter on 4 November setting out the impact of the proposed changes on them as individuals.
72. These letters would specify one of four possible outcomes:
  - 72.1 Where the post was considered matched, namely a post in the new structure was broadly the same as opposed to in the current structure;
  - 72.2 Ring fenced if more than one post matched a post in the new structure – there were 93 positions in this category;
  - 72.3 Restricted competition where posts in the current structure were neither matched nor ringfenced but alternative roles had been identified (there were 63 in this category), and
  - 72.4 No match where the employee was at risk of redundancy and redeployment would be considered (there were 46 in this category).
73. The situation described as ringfenced was, as we say, where more than one post in the current structure had been identified as broadly the same as a post that would exist in the new structure and staff in that category would be required to go through a selection process. Mr De Cruz described this as being where the posts were about 70% the same as between the old structure and the new structure.
74. It is common ground that Mrs Hothi and her fellow interviewers conducting a selection process for a ringfenced post approached it in the same way as they would have done a recruitment interview where they were looking for a minimum appointable standard of at least a mark of 2 in every category. It is also common ground that this was the incorrect way to approach the exercise and this was made clear to them between the date of the interviews and them making their decision. The advice from HR was that in this ringfenced situation the interviewers had to choose a preferred candidate as between those who were going through the selection process.
75. The claimant's letter is at page 179 and it makes clear that his post in the old structure had been placed in a ringfenced category and would be required to undergo a selection process. The post that he was matched to in the new structure would be described as the Assistant Highways Engineer. There were two Assistant Engineers in the old structure, the claimant and a colleague.

76. One of the disputed issues of fact concerns an alleged telephone conversation the claimant states happened on 4 November 2020.
77. Before we set out our detailed findings about that telephone conversation, it is worth noting that on 9 and 10 November 2020 the SPM investigating recruitment practices in the department interviewed the claimant's colleague (with whom he was ringfenced) as can be seen in the notes of interview at page 451. In this reserved judgment that colleague is referred to as the 'ringfenced colleague'. Ms Hothi was interviewed on 10 November (RSB page 40). The claimant was interviewed by the SPM in the investigation into recruitment practices on 16 November 2020 (RSB page T51) – after 4 November 2020.
78. The claimant's account of what happened on 4 November 2020 forms the basis of the allegation in LOI 4.2.1, namely that Mrs Hothi exerted pressure on the claimant to withdraw his support for Mr Abbas's grievance or the consequences would be that he would lose his job.
79. Mrs Hothi did not specifically recall a conversation on 4 November about the claimant's participation in the grievance. She thought it probable that she had called on that day as a welfare check as she was doing for all of her direct reports given the information that they had just received about the restructure. She said she did recall having a conversation at some point in which the claimant expressed the view that he had got himself involved in something that he did not wish to be involved in and she counselled him to distance himself from that.
80. One of the subsidiary matters which seems to us to be relevant to our findings about the primary allegation that Mrs Hothi made the comments alleged during a telephone conversation on 4 November is what she did or did not know by that date about the claimant's involvement in Mr Abbas's grievance. When asked whether she had known by 4 November, the date the consultation document was distributed, that the claimant was a witness to one or both of the grievances against her, Mrs Hothi distinguished between not knowing if the claimant was a witness and knowing that he was involved in some capacity. When cross examined about her participation in the subsequent interview on 17 March 2021, Mrs Hothi confirmed that she knew the claimant was involved in the grievance of Mr Abbas or Mr Mapembe to some extent by then. She denied the claimant's version of the conversation said to have taken place on 4 November where he put to her that she had wanted him "either to back up from his witness statement or reveal the contents of his witness statement".
81. It is clear from Mr De Cruz's evidence that he was confident that Mrs Hothi knew the claimant had been interviewed in connection with the grievance by the date of the selection process. He did not give relevant evidence about her knowledge at the earlier date of 4 November 2020.
82. As we explain above, the letter written by the council to Mrs Hothi notifying her of the outcome of the grievance brought against her by Mr Abbas was not one of the documents disclosed by the respondent either in the first round of

disclosure or when the hearing was adjourned in order for a full disclosure to take place. We do not think that there is a good reason why the outcome letter to Mrs Hothi in Mr Abbas's grievance has not been disclosed to the claimant when that in Mr Mapembe's grievance was disclosed. If the latter was a potentially relevant document in the present case then the former surely must be. Mrs Hothi's explanation was that the outcome letter would have been provided by HR and not by her personally although it was clear from other parts of her evidence that she had personally located some emails that the claimant had asked for.

83. Nevertheless, notwithstanding the apparent lack of full disclosure in relation to this and the claimant's fair point that the respondent appears to have disclosed documents that assist them but does not appear to have disclosed all relevant documents, it seems to us to be highly unlikely that the claimant was named in Mr Abbas's grievance letter that was sent to Ms Hothi (see paragraph 66 above). We base that finding on the wording of the documents we do have, principally the Mapembe outcome. Mrs Hothi may still have been on sick leave at the time of the Abbas outcome. It is unlikely to be dated earlier than the outcome to Mr Abbas himself on 10 September 2020 and she did not return until 5 October. To judge by Mr Mapembe's outcome letter, it is probable that there was no official communication to Mrs Hothi about the named or un-named individuals who had been interviewed in connection with the Abbas grievance.
84. Her evidence was that sometime after her return from sick leave she had a conversation with the claimant in which he explained that he had got himself involved in something he should not have and she advised him to remove himself from the situation if he was uncomfortable. It seems probable to us, based on Mrs Hothi's recollection, that this was part of the same conversation initiated by her to discuss the restructuring consultation. The key difference between her account and the claimant's is that Mrs Hothi's evidence is that the subject of Mr Abbas's grievance was initiated by the claimant and only referred to obliquely.
85. There are aspects of Mrs Hothi's evidence which seem implausible to us: for instance, her evidence that she could not have known on 4 November 2020 that she would have to interview the claimant. If she had addressed her mind to it the knowledge that the claimant and his ringfenced colleague were both in positions that were ringfenced to a single position in the new structure should have led to the presumption on her part that she would be on the interview panel because it appears to be standard practice that the line manager in the relevant area will be on that panel. Her evidence that she could not have known she would be involved in the interview we therefore do not accept.
86. She denied the claimant's accusation about the threats alleged to have been made on 4 November. On his account those were more impolite than overtly worded. We remind ourselves that when Mrs Hothi was asked whether she had been influenced by the grievance in what she said on 4 November, her immediate reaction was that the grievance was over. This was during her evidence given before the break for full disclosure to take place and we now

know that that conversation happened six days before Mrs Hothi met with the SPM. This seems to us to have been a convenient answer rather than one given in a genuine attempt to remember. She could not give a clear answer about how long in advance she would have known about the interview with the SPM.

87. She accepted that when, on her version, the topic was raised, she advised him to remove himself from the situation. She seems to have understood the claimant to be referring to the grievance. We consider that it was inadvisable for Mrs Hothi to comment in any way about the claimant's participation in a grievance against her. She did at one point appear to say that in March she had still not known but on this point we prefer the evidence of Mr De Cruz. He was clear that by the time of the March 2021 interview Mrs Hothi had known that both interviewees had been witnesses in the investigation into recruitment practices arising out of the grievances including that of Mr Abbas because he had had that discussion with Mrs Hothi himself.
88. Set against that analysis we need to consider what are argued to be differences between the way the relevant incidents have been described in the claimant's different statements. It was strongly argued by Mr Umunwa that the extent of the differences and the lack of plausible explanation by the claimant for a failure to mention some alleged incidents contemporaneously coupled with what the respondent alleges to be the inherent implausibility of some of the allegations, mean that the claimant is not a reliable witness of fact.
89. The first record of the claimant's account of the conversation on 4 November 2020 is that in the interview with the SPM on 16 November 2020 (RSB page T51). In section 3 on RSB page T52, the claimant was asked if he had any other issues he wanted to raise and the third bullet point on the following page records the following:

“Shahzad stated KH contacted him a number of times and called him on 4<sup>th</sup> November to discuss the consultation process. He said as part of the conversation, KH discussed the grievance. He said [sic] KH asked him if he thinks she is more close to Sheikh colleagues in the team rather Muslims. Shahzad said he responded to her that it does seem like it is the case and she agreed. He said that she mentioned the two people who have raised a grievance against her and that one of them isn't matched to a position in the new structure and that one is on a fixed term contract so will leave anyway. He said KH said to him “We are good friends” and told him not to discuss it with anyone. He then said that he needs to tell her what he has said in relation to the grievance previously as he is ringfenced against the position and needs to reapply for the job. He said KH mentioned to him that the two people who raised the grievance will leave and he will be left. Shahzad he feels KH tried to say to him not to say anything as a witness – he feels this was a threat as he wouldn't get his position if he said something and did not cooperate.”
90. We do note that when the claimant had been interviewed anonymously by the independent investigator on 17 July 2020, (RSB page T31 penultimate bullet point) he had relayed a conversation in which it is said that Mrs Hothi had called him to ask him if she was “off with Muslims”. This raises a question about whether the claimant conflated more than one conversation in his

account to the SPM in November 2020 or whether his account is that Mrs Hothi asked the same question on two occasions.

91. The next account in time is that in the claimant's own grievance raised on 15 April 2021 (RSB page S28). In that, he records the 4 November 2020 conversation in the following way:

“I am witness in more than one ongoing grievances [sic] against Kam, she called me on 4 November 2020 from her private phone number to my private phone number and discussed the outcome of the consultation Phase 2. She told me that two officers who launched grievances against [sic] her one of them is on fixed term contract and other did not have his job matched so both of them are leaving soon she laughed and accused me what I got being the witness in these two grievances, she also told me that my post is ringfenced and in the new structure I am still your line manager which means my job is at risk.”

92. This account is broadly similar in respect of key aspects in that it raises an accusation that Mrs Hothi said that there were two officers who had brought grievances, one of whom was on a fixed term contract and one of whom was not matched. The accounts also both state that she commented that she was still the claimant's line manager and asked him to reveal what he had said in his witness statement (see final paragraph on page S28). Other information is added on RSB page S29 that Mrs Hothi told the claimant on 4 November 2020 that, as she was accused of malpractice during recruitment in one of the ongoing grievances, she would not be sitting in any interview panel in the future. That is not a detail that was provided to the SPM nor was the allegation that Mrs Hothi had laughed and asked what the claimant had got out of being a witness. So, there are several important similarities between the two accounts and two important differences.

93. The claimant was ultimately dismissed and in his appeal against dismissal (RSB page S38) there appears to be a reference to the 4 November 2020 conversation four paragraphs from the bottom of the page. In that paragraph there is an accusation which is novel that Mrs Hothi had:

“acted in the same manner last year and was labelled as an intimidation to the witness. Basically she tried to bribe me by unofficially offering me the job and in return she expected me to back off from my witness statement or reveal the content to her.”

94. The feeling the claimant describes that he had of being warned to cease involvement in the grievance is consistent with the earlier accounts but the feeling that he is threatened is now being described as a bribe to offer him the job. We would describe these as the beginnings of an embellishment of the account.

95. The claim form appears to refer to this three paragraphs down on page 19 where he refers to more than one phone call. Had there been more than one then it is difficult to understand why he limited his description to the SPM to that which had happened on 4 November. The claimant has not produced his phone records within these proceedings to substantiate the allegation that during Mr Abbas's grievance and during his own grievance there were



multiple calls. In this we consider that the claimant has taken the grain of what he told the SPM and added to it so that the truth has grown in the telling.

96. The further information provided in response to tribunal orders includes, at page 96, in the second paragraph down, an account of 4 November 2020. We take this into account in its entirety as evidence in the case – which is not to say we find it wholly reliable. The allegation of Mrs Hothi laughing is present and in those further particulars, in the first paragraph, the accusation is made that several phone calls had taken place during Mrs Hothi's sickness absence in September 2020 during which she was shouting at him and harassing him to reveal the content of his witness statement. Again, this does not appear to have been relayed to the SPM because there is no mention of it in the interview she had with the claimant. So we consider that to be additional to and embellishment of the original account but the details of the original account relating to 4 November 2020 and the second paragraph are broadly consistent with earlier accounts save that the accusation that Mrs Hothi had laughed appears for the first time in the grievance. It is this version from the further information that is most similar to the claimant's oral evidence.
97. We have decided that the best evidence is the account the claimant provided to the SPM a short period of time (12 days) after the telephone conversation. We find that Mrs Hothi contacted the claimant and initially discussed the Phase 2 consultation but then:
  - 97.1 Mrs Hothi raised the grievance – it was not the claimant who raised the grievance with her;
  - 97.2 Mrs Hothi told the claimant of the likely consequence of the consultation proposals to Mr Mapembe and Mr Abbas, namely that the latter as a fixed term contract was in a post that was being deleted and Mr Mapembe's role did not match to a post in the new structure;
  - 97.3 Mrs Hothi tried to get the claimant to tell her what he had told the independent, external investigator of Mr Abbas's grievance.
98. We think that Mrs Hothi may well have known at the time she spoke to the claimant on 4 November that she was going to be interviewed by the SPM on 11 November – at the very least she probably knew she would be interviewed in the future.
99. The claimant's account in interview to the SPM at RSB page T53 does not, carefully analysed, amount to a direct threat that if he did not withdraw his support for Mr Abbas he would lose his job but it does record a suggestion by Mrs Hothi that he should not discuss their present conversation with anyone. He clearly understood her to be linking a request for him to reveal what he had said in relation to the grievance to the fact that he must apply for the equivalent posts in the new structure. Furthermore, his feeling that she had tried to tell him not to say anything as a witness has some similarities with Mrs Hothi's own account that she counselled him not to be involved in something he felt uncomfortable with.

100. It is quite understandable that the claimant felt under threat because of the conversation as a whole, although his first account does not record a threat having explicitly been made by Mrs Hothi. We find that the findings we set out in these paragraphs mean that the factual allegation at LOI 4.2.1 is made out in part in that Mrs Hothi tried to get the claimant to withdraw his support for Mr Abbas's grievance but did not explicitly threaten him with the consequences of losing his job although this was an entirely understandable inference that the claimant made in the context of the conversation. It took place on the day he had been told he was at risk of redundancy and Mrs Hothi had called the claimant to discuss the impact of the restructure upon him.
101. We think it relevant that it was Mrs Hothi who raised first the question of the grievances and the claimant's involvement with them. There was no need to do that and she should have known that it was improper to refer to something confidential. We think it is fair to say that the findings set out above amount to her exerting pressure on the claimant to reveal what he had said to the investigator. This left him feeling under threat.
102. The redundancy consultation continued with a one-to-one between the claimant and Mrs Hothi on 11 November 2020. There are two versions of the document recording this at pages 182 to 200. The claimant did not say that the notes were inaccurate even if they recorded what appears to have been a script to ensure that he was provided with standard information. He agreed that Mrs Hothi had said that if he had had any queries or concerns he should bring them to her.
103. The next relevant event is the interview of the claimant and a separate interview with Mr De Cruz by the SPM on 16 November 2020. Mr De Cruz's record of interview is at page 201.
104. On 2 December 2020 there was an exchange between the claimant and Mrs Hothi at RSB pages T54 to 55 where he asked for permission to carry over 10 days' unused annual leave from one year to the next and was granted three days.
105. The SPM's report on the outstanding element of Mr Mapembe's grievance and the recruitment practices in the department is dated 3 December 2020 (page 423). In a number of places the investigator explains that she was unable to speak directly with Mrs Hothi about particular allegations because the witnesses wished to remain anonymous (see for example paragraph 6 at the top of page 430). Consistent with this, there is no interview with Mrs Hothi after the claimant's interview on 16 November and his allegations about the telephone conversation on 4 November 2020 were not put to Mrs Hothi at that time. This was despite what he said as a whole being potentially relevant to whether or not there was manipulation of recruitment practices.
106. The council responded to the input received during the consultation by a document dated January 2021 (page 217). During the recruitment stage there were to be interviews for the one full time equivalent Assistant Highways Engineer role. On 15 February 2021 instructions were given to Mr De Cruz about preparation for those interviews which were to be carried out with the

claimant and his ringfenced colleague (page 289). Those include some instructions that interview questions should be prepared. All of the relevant witnesses from the respondent concurred that Mrs Hothi wrote the questions for those interviews.

107. The claimant submitted an expression of interest for the role on 2 March 2021 (page 247). Of the two people ringfenced for the one post both are Muslim, both are of Pakistani origin and both are approximately equally involved in the grievances brought by Mr Mapembe and Mr Abbas; both were interviewed by the SPM and we would describe their levels of involvement as approximately equivalent.
108. The claimant and his ringfenced colleague were interviewed for the post on 17 March 2021. There was a panel of three: Mrs Hothi, the Business Improvement and Operations Manager, and a Traffic Engineer from Major Infrastructure. Notes produced of the interview by Mrs Hothi and one other are at pages 262 to 287 with Mrs Hothi's record of the interview with the claimant at page 274. A member of HR was also on the interview panel. This was apparently because it had been identified that for Mrs Hothi to conduct the selection - albeit as a member of a panel of three, two of whom were from outside the department - was sensitive or even controversial given the recent investigation into her recruitment practices.
109. When the claimant raised a grievance including about her involvement in the interview, the investigation of the grievance was allocated to the incoming Associate Director – Mr De Cruz having been moved to the new Directorate of "Place." Mr De Cruz wrote to the Associate Director in relation to the grievance and said this:

“In terms of the interviews I instructed Kam initially not to be involved in the interviews however on reflection I felt this would have been in appropriate as the officer would be reporting in to her so on advice from [a member of HR] I suggested to Kam to involve someone neutral from HR. I think [HR panel member] was on the panel and stated that both candidates were not appointable in reality but advice from HR was to select one.”
110. We find that Mr De Cruz initially told Mrs Hothi not to be involved and then changed his mind and told her that it was inappropriate for her not to be on the selection panel as she would be the line manager of the individual who was appointed. We accept that HR advice was that an HR panel member should observe the proceedings which is described as being to ensure impartiality. Mrs Hothi said that she took advice from Mr De Cruz and HR when agreeing to carry out the selection.
111. The documentary evidence supports the respondent's case that all three interviewers agreed that neither candidate was appointable judged by their performance in interview in that both candidates scored lower than two in a number of different responses. This is confirmed by emails from the external panel members at page 285 and 286.

112. The situation appears to be that two longstanding employees both apparently scored poorly in answering some questions. We have had access to the job description for the new post and questions that were asked were relevant to the skills required and the duties on the person specification. There is no reason for us to think that the answers given by the claimant or his ringfenced colleague had been inaccurately recorded in the transcripts of the interviews. We do not think that the scores are unreasonably low for the answers recorded so far as we are able to judge. None of these are matters that the claimant has challenged about the interview.
113. It appears that selection was made on the basis of the interview alone and an explanation of the process was given to the claimant in his one to one as recorded at page 182.
114. In our view there are ways in which this process could have been improved. There could have been interview coaching. In all probability, neither the claimant nor his ringfenced colleague had done a competitive interview for a very long time given the length that the claimant, certainly, had been in post. They may not have done a competitive, competency-based interview previously. The only guidance provided in the one-to-one, so far as we are aware, appears somewhat perfunctory. On the other hand this is part of a widespread consultation and redeployment exercise affecting hundreds of individuals. In that context, our view is that - although there was more that could have been done - the process in itself was not outside the range of reasonable responses. However, there was no exploration and no sensitivity to the lack of trust between the claimant and his ringfenced colleague on the one hand and Mrs Hothi on the other in the provision of information and support.
115. When assessing whether Mrs Hothi should have been excluded from the selection panel we remind ourselves that, in February or March 2021, when the panel was set up and the arrangements for the interviews were made, Mr Mapembe's grievance (in respect of which the claimant was not a witness) had progressed to a concluded appeal and the subsequent reinvestigation by the SPM had been concluded in a report dated 3 December 2020. That investigation had included a broad challenge to Mrs Hothi's recruitment practices as had Mr Abbas's grievance and that aspect had also been dealt with in the SPM's investigation. We have not heard evidence about whether there was an ongoing appeal in Mr Abbas's case. Broadly speaking the grievances had not been upheld: see page 434 at paragraph 5, page 435 at paragraph 2 and page 436. There was no suggestion in the report or in the evidence before us that action points arising from the investigations impacted on Mrs Hothi's ability to carry out recruitment exercises in the future in any way. There were no recommendations for specific training for her or specific actions by her or restrictions on her. There was no suggestion that she should not be involved in recruitment generally because there was no conclusion that she had improperly influenced the outcome of recruitment processes in the past. On the other hand, the instant selection exercise was a specific situation involving witnesses to the grievance who fell into the category – namely Muslims - which it was alleged Mrs Hothi does not favour.

116. Having made findings about Mrs Hothi's probable knowledge about the claimant's involvement in the grievances at the time of the conversation on 4 November 2020, we consider more precisely what it was that Mrs Hothi knew about the claimant and his ringfenced colleague's involvement by the time of the interviews.
117. Mr De Cruz gave clear evidence that Mrs Hothi knew that both were involved in Mr Mapembe's grievance. We take him to mean that she knew that they were involved in the follow up investigation by SPM that resulted in the report at page 423. His evidence was that it was necessary for Mrs Hothi to be on the interview panel as she was going to be the line manager of the successful candidate. We accept his evidence that this was the standard practice at Slough Borough Council; he had previous experience of the practice being deviated from and it not working out. In that situation he had been the line manager who had not been involved in recruitment.
118. We find that the purpose of the presence of the HR panel member was as an observer to safeguard that there were no inappropriate conversations of the kind which might involve Mrs Hothi seeking to influence the views of the panel members. They would also provide a safeguard that scores were not tampered with afterwards and, up to a point, would be able to assess whether the scoring was fair in the sense that it was not grossly different to what appeared reasonable to an uninformed bystander. The HR panel member was not themselves marking the interviewees and would presumably defer to the knowledge of the officers about whether particular answers evidenced the skills or strengths that they were looking for since the HR panel member was not themselves specialist in those particular fields.
119. Apparently none of Mr De Cruz, Mrs Hothi nor the HR panel member approached the selection day with the mindset that one of the two candidates had to be appointed.
120. There is no evidence that Mrs Hothi knew exactly what the claimant or, for that matter, his ringfenced colleague, had said in interview. The SPM had taken steps to preserve anonymity. However there is no reason to reject the evidence of Mr De Cruz that by February or March Mrs Hothi knew that both had been interviewed and were witnesses in that concluded investigation. We have not been provided with any evidence to show what Mrs Hothi was told as a result of the outcome to the SPM's investigation or when.
121. As we state above, the claimant has not challenged the accuracy of the records of what he said in response to the questions in interview. He did not cross examine Mrs Hothi to suggest that individual scores recorded by her or by the other interviewer whose record we have, grossly undervalued the answers that were apparent on the face of the documents. In the absence of those challenges there is no evidential basis to conclude that Mrs Hothi influenced the scoring by the others on the panel in order that the scores of both candidates should be unfairly low and unrepresentative of the value of the answers they provided.

122. The claimant's argument is that Mrs Hothi saw an opportunity to get rid of both himself and his ringfenced colleague. We have found no evidence to support this argument that she caused or influenced the scores by her fellow panel members to be unfairly low in some way that was not apparent to the HR panel member who was observing. We find that Mrs Hothi did not inaccurately record the claimant or his colleague's answers and did not influence the assessment of her fellow panel members; there are no primary facts from which to draw that inference.
123. Those findings do not answer the question about whether this process was within the range of reasonable responses. In all of the circumstances outlined above - including both the background of the history of grievances and the circumstances of the other panel members and the HR observer – we ask ourselves whether no reasonable employer would have tasked Mrs Hothi with writing the questions for this selection exercise and being the panel member at interview.
124. There is no challenge to the appropriateness of the questions. Mrs Hothi, as line manager for the post in the new position, was the logical person to write them. It is possible objectively to see that they relate to strengths and qualities necessary for someone to fulfil the person specification for the post. Our view is that it is not outside the range of reasonable responses for Mrs Hothi to have drafted the questions for interview.
125. Although there are no outcomes to the SPM report that specifically implicate Mrs Hothi there are some relevant recommendations (page 436). We note the following acknowledgement "That there is serious culture of mistrust and difficult working relationships. In my view unless some immediate actions is taken this is likely to continue to perpetuate."
126. The SPM recommended team building, a review of the career grade structure (by which individuals including the claimant and his ringfenced colleague should have been preparing portfolios which would evidence accumulation of skills designed to lead to promotion) and a review of recruitment practices to "ensure they actively promote equal opportunities including interviews."
127. The timing of these events coming as they did in the middle of the restructuring meant there had been no time available for these recommendations to be implemented. It clearly crossed Mr De Cruz and Mrs Hothi's minds as to whether it was appropriate for her to be involved. We also are mindful of the perception of the interviewees. They were being interviewed by someone whom they considered, rightly or wrongly, to be biased against their religion or race. They were sufficiently convinced of this that they had given support to grievances on that issue. There does not appear to have been any discussion with them about why the HR panel member would made a difference and no thought given as to whether this would impact on their performance in interview.
128. The requirement that a line manager be among those making the selection seems to us to have less force when the two candidates are already being managed by the person who would be the line manager in the future. The

practice of including the incoming line manager on the panel cannot be immutable because there will be occasions when someone is on long-term sick leave or maternity or other parental leave. Given the seriousness of the allegations against Mrs Hothi, the recent conclusion of the investigation and the lack of time available to address what is described as the culture of mistrust and put in place the recommendations, we conclude that, at that juncture, no reasonable employer would have included Mrs Hothi on the panel interviewing the claimant and his ringfenced colleagues for the one remaining post in the new structure because they had both been witnesses in a recent grievance alleging discriminatory practices by her. However, there is no evidence that Mrs Hothi in fact misused that opportunity.

129. The claimant does state that he considered his interview to have been an excellent one in which he answered all questions correctly. However, he accepted in cross-examination that the notes of his answers were broadly accurate.
130. The scores for the two candidates are set out in the table within an email from Mr De Cruz to HR on 29 March 2021 (page 288). One panel member scored both candidates with only one point for each of the nine questions and therefore they were tied on nine points in his view. Mrs Hothi had given the claimant two points for one answer and his colleague two points for two answers meaning that the colleague was ahead by one point, in her view. The third panel member had scored the claimant two points for three of his questions and his colleague two points for two of his questions meaning that the claimant was ahead by one point in his view.
131. The misunderstanding by the panel that they did not have to select one candidate meant that they did not reach a conclusion on the day as to whom to appoint. It can be seen in Mrs Hothi's email of 24 March to Mr De Cruz that overall the scores were tied but she says "You can see that there is a one point difference and [the ringfenced colleague] has scored higher for me". She asked for Mr De Cruz's guidance. By this stage it appears that she is aware that they need to make a choice between the two candidates. She had apparently had a call with the claimant and the colleague, or at least attempted one, on 19 March 2021 (page 292). Mrs Hothi clearly wished to have the guidance of Mr De Cruz but he was on leave at that time. On 29 March Mr De Cruz informed HR that "We have decided to go with [the ringfenced colleague] as he just edged the interview."
132. The claimant was informed that he had been unsuccessful the following day (page 298) and complained that the delay in notifying him of the decision meant that he missed the application deadline for another post (page 306). He requested a one to one meeting with Mr De Cruz and on the same day the respondent provided the claimant with the internal vacancy list and granted an extension of time to the claimant to apply to 6 April, seven days after the date of the email (RSB page S19 and 21).
133. We accept that there was a genuine belief on the part of the panel members including HR that the normal practice for recruitment of needing the candidates to be appointable applied and that is the reason why there was a

delay in selecting a candidate. The delay was entirely down to a misunderstanding of their own processes. This was coupled with Mr De Cruz being away on leave at the crucial time.

134. We do need to consider how it was that the ringfenced colleague came to be preferred over the claimant and here there is an absence of documentation to support Mrs Hothi's evidence. She accepted that there was nothing in the hearing file to reflect any further discussions between her and the other panel members which led to a conclusion by them that the ringfenced colleague should be appointed. Her oral evidence was a recollection that at the time they had been in lockdown. She thought there was a discussion online where they had gone through the matter in detail and it was a joint decision as to who the role would be offered to.
135. This detail is not in Mrs Hothi's witness statement which, as we have already remarked, is lacking in some of the evidence core to the respondent's defence which one would expect to be present. It may be that her oral evidence was the first occasion when she had been asked to explain the mechanism by which the ringfenced colleague was chosen. The email from Mr De Cruz that "we" decided to go with the ringfenced colleague because he had edged it in interview is a strange turn of phrase given Mrs Hothi's evidence that the panel had made the decision. Mrs Hothi would be the line manager for the successful candidate. It is speculation on our part as to whether the fact she would be the line manager swayed the other panel members so that her assessment that the ringfenced colleague had edged it in interview carried the day. Nevertheless, we come back to our finding that she did not unreasonably or unfairly influence the recording of the questions or the assessment of the other panel members. In the light of our conclusion that including Mrs Hothi was outside the range of reasonable responses, the degree of likelihood that, had she not been on the panel, the claimant would nonetheless have failed to be appointed will need to be considered at a remedy hearing.
136. On 6 April, the claimant applied for a number of other positions ultimately without success. On 15 April 2021 he raised a grievance (page 333 with the grievance at RSB page S28). His criticism of the handling of this grievance within the proceedings before us were that there was no external investigator appointed and that the grievance policy requires a section 9 meeting to be convened. He complains that none was convened in his case. On the face of it, he is right on these points. On 27 May 2021, Mr De Cruz wrote to HR and to the Associate Director who had taken over his previous responsibilities for Highway, and stated that either the latter would need to say an investigation was required or that it had already been investigated and the matters were historic (page 333).
137. He recommended a form of words which appears to have been adopted by the incoming Associate Director in an email sent to the claimant on 24 June 2021. Among the points highlighted as being the claimant's allegations (points 1 to 10 on page 337) is one that Mrs Hothi had contacted the claimant with regard to another grievance was intimidating him as a witness (point 3). The Associate Director tasked with the claimant's grievance stated that he



concluded (first bullet point at page 337) that that point was among those investigated as part of the independent investigation and the appeal investigation.

138. Although the allegation was made by the claimant during his interview with the SPM, she did not investigate the claimant's allegation that Mrs Hothi had contacted the claimant and intimidated him as a witness on 4 November 2020. Mr De Cruz's email (page 324) suggests that this answer was instigated by him but he was not asked about this by the claimant. The Associate Director who conducted the grievance did not give evidence before us. We are mindful that the respondent can only be expected to reply to allegations that are directed to it. There are no specific allegations on the list of issues criticising the grievance and, as Mr Umunwa argued, the respondent has not therefore come prepared to meet criticisms of the handling of the grievance to the extent that it is not within the scope of the existing list of issues.
139. The claimant was given notice of his redundancy on 6 May 2021 and was told that the post would be made redundant with effect from 30 July 2021. This happened during a dismissal meeting with Mr Tullett, who was asked to conduct the dismissal meeting about two weeks beforehand to cover for another senior manager who was unavailable. The process he followed was that he was provided with a bundle of documents which he needed to read but had no knowledge of the claimant or the department he had worked in. He was not tasked with judging whether the actions prior to the selection of the claimant for redundancy were appropriate or not; he explained that he was simply asked to read the dismissal notice as the decision had already been made and this was a legal duty that a senior manager had to carry out. He had been asked to carry out three or four dismissal notices but was aware that three had been cancelled because the individuals found other employment in the authority. The process of redeployment was evidently ongoing at the time of the meeting he conducted.
140. The claimant appealed against his redundancy (RSB page S36 with the details of the reasons for his appeal at S38). There was a call between Mr De Cruz and the claimant about his appeal and his grievance which was recognised to cover some of the same issues (see HR email to Mr Tullett, Mr De Cruz and the incoming Associate Director on pages 327 to 328). Mr De Cruz was asked about the email dated 21 May 2021 (page 326) in which an HR officer asking him to agree a date with the claimant "to arrange a meeting in line with section 9 of the grievance policy". Mr De Cruz, while remembering having a call with the claimant stated that he had informed the incoming Associate Director that he had to undertake the process and had no part in nominating who would be the investigating officer.
141. On 1 July 2021 (RSB page S42) the claimant emailed the Associate Director with criticisms of the handling of the grievance and this was responded to on 22 July 2021 where comments on the claimant's email appear to have been inserted by the Associate Director. On the same date, an official grievance outcome letter was sent (page 343). In many instances the Associate Director simply referred the claimant to that outcome letter to deal with points

raised in the latter's email. That official outcome letter also appears to presume that the allegation about Mrs Hothi intimidating the claimant as a witness to another grievance had been dealt with within the independent investigation.

142. The sixth point raised within the grievance is also relevant to the appeal against redundancy and is the allegation that Mrs Hothi should not have chaired the interview panel. The answer provided (page 344) is:

“As the positions fall within the area of KH it is required that the line manager to be on the panel, it would not have been appropriate to exclude the line manager from the interview process, hence there are other individuals on the panel to ensure a fair approach is undertaken in line with our Dignity at Work policy.”

143. We have concluded that no reasonable employer would have included Mrs Hothi on the panel as we explain elsewhere but that is an answer provided to the point raised by the claimant during the grievance.

144. The claimant's effective date of termination was 30 July 2021 and it was not until 19 August 2021 that he received an appeal outcome which is at RSB page S46. It is signed by the Executive Director for Transformation. The criticism of the arrangements for the interview are dealt with in ground 2 in almost identical words to the response by the Associate Director to the equivalent point on the grievance. The appeal response repeats, in the first paragraph under the sub heading “Response” on RSB page S46, that concerns about Mrs Hothi had been investigated in the independent investigation. It is worth reminding ourselves that the allegation about the call on 4 November 2020 is obliquely referred to in the appeal (RSB page S38 third paragraph under reason 1). However, the claimant's allegation was not limited to this but included - as it has before us - the much broader allegation against Mrs Hothi that she had “used her personal links and influence during restricting process at Slough Borough Council,”. That is an allegation which is completely unsubstantiated.

145. Given the breadth of that wider – and, frankly, implausible - allegation, the specific complaint about the telephone call on 4 November 2020 appears to have fallen through the gaps between the overlapping grievance of the claimant and the appeal procedure. Without having heard from the grievance decision maker we do not make an express finding about this. What would have happened had the claimant had an appeal which considered all relevant points and whether there was an unreasonable failure to comply with the ACAS Code of Conduct on grievances may be relevant issues at the remedy stage. However, the broader allegation against Mrs Hothi having used the interview process to dismiss the claimant was considered and decided by the grievance and appeal officers.

146. There are, therefore, criticisms that can be made about the treatment of the points raised by the claimant, and the timescales outlined in this chronology do show some fairly long periods of time between action.

147. We return to some specific allegations and consider the reliability of the evidence on them informed by our findings about evidence given by the witnesses in the case on other disputed matters, in particular the telephone call of 4 November 2020.
148. The allegation about refusal of the working from home request is that it occurred in 2018, not in 2019 when a formal request to work from home for two days was refused but the claimant was permitted to work from home one day a week. The claimant alleges that he was in a comparable situation with two colleagues, both of whom are Sikh. We accept Mrs Hothi's evidence that one had requested to work from home in order to carry out particular tasks that were difficult for her to do in an open plan office and therefore that there was a business efficiency reason which means her case is not comparable.
149. The claimant alleges that there are missing documents and that the emails at RSB page T1, lately disclosed in response to his specific request, are not all of the relevant emails. He says that there was an earlier email trail which showed a response using harsh words. Mrs Hothi said that she did not find it when looking. The claimant did not complain contemporaneously either about the wording of the alleged email or about a refusal in 2018 to 2020. We do not think the claimant was aware of his colleague's circumstances – namely that she found it hard to work effectively in an open plan office so that the arrangement was to the council's benefit and not hers. The limitation of the claimant to working from home one day a week was reasonable in the circumstances of a 25 hour working week.
150. So far as the other comparator is concerned we are not satisfied that he was in materially the same circumstances as the claimant because the evidence is that it was unclear whether his absences from the office were, as the claimant alleges, due to being permitted to work from home, or because his role required him to work out of the office on site. The claimant has not shown that either of those two individuals were in materially the same circumstances and we do not find they were comparators. The claimant's request was ultimately granted and, if there was an earlier request made informally, the wording of the email at RSB page T1 suggests that a formal process needed to be followed for the request to be acceptable. There are therefore no grounds to conclude that if there had been an earlier 2018 request the claimant was treated less favourably on grounds of race or religion in relation to it.
151. The claimant alleges that in October 2020 he was subjected to abusive language by Mrs Hothi in the office (LOI 3.2.2). His evidence on this has not been consistent. In paragraph 15 of his witness statement he stated that it was her general and common practice but, in cross examination, restricted this to an allegation of shouting and swearing on one occasion in October 2020. Although he called Mr Mapembe to give evidence in support, the latter did not provide evidence of having heard Mrs Hothi shouting and swearing at the claimant in October 2020. Furthermore, in his witness statement (paragraph 1) Mr Mapembe alleged that Mrs Hothi normally shouted at those "who are not her favourites". He includes not only the claimant and Mr Abbas but also himself in that. This does not suggest that being Muslim or Pakistani

is a reason behind any difference in treatment he does give evidence about. Ultimately, Mr Mapembe did not provide evidence to support the specific allegation made by the claimant.

152. As this allegation was put to Mrs Hothi in cross-examination, it was said to relate to an exchange about a private street adoption project. She recalled there being a conversation about this project on her return from sick leave which would have been approximately October 2020, when she was on a phased return. The claimant took the opportunity when asked if there was anything that he wanted to say to the SPM on 16 November 2020 to explain about the telephone conversation on 4 November 2020. He did not make an allegation about abusive less favourable treatment the previous month. There is no good or sufficient explanation for his failure to do so if, as he now alleges, the treatment had occurred at that time.
153. Although we have found the claimant to be broadly credible in relation to his account to the PSM, we are also concerned that in some later accounts he has embellished and expanded upon his account adding details which are not reliable. These concerns about the reliability of his evidence and the lack of support from Mr Mapembe means that the claimant has not satisfied us on the balance of probabilities that Mrs Hothi shouted and swore during a conversation with him in October 2020 as alleged. There is no contemporaneous account or reference to it in any documents and this is not an area where the claimant alleges that documents have been withheld by the respondent. Our concerns about the reliability of the full extent of the evidence of the claimant means that without contemporaneous complaints or other supporting documentation we are cautious about relying solely on his oral testimony.
154. There is then the allegation at LOI 3.2.4 that Mrs Hothi refused permission to the claimant to carry leave over from one leave year to the next. She became his line manager in the summer of 2018 and her evidence was that she thought it possible that she had allowed him to carry over leave from the previous year. Working from home had been put in place from approximately 2019 and we accept her oral evidence that she permitted him to flex his hours on working from home days in order to accommodate the hospital visits and caring responsibilities he had, in particular for his two older sons. We note and accept her evidence that she told him that he could phone her later about work related matters even when that was outside her own working hours in order to facilitate him flexing his working day.
155. We also accept that the corporate stance became that it was beneficial for officers to use leave. The claimant was upset at the limiting of him to carry forward three days because he considered that the exceptional circumstances situations should apply in his case. The fact that he was allowed to carry forward some leave (RSB page T54) suggests that the reason why it was limited was, as Mrs Hothi has explained, the corporate stance that leave should be used. There is no comparator information put forward for us to consider. In those circumstances, there is no evidential basis for an inference that to limit him to three days carry forward of leave was less favourable treatment on grounds of race or religion.

## Conclusions on the issues

156. We now set out our conclusions on the issues applying the law as set out above to the facts which we have found. We do not repeat all of the facts here since that would add unnecessarily to the length of the judgement, but we have them all in mind in reaching those conclusions.
157. We start with our conclusions on the unfair dismissal claim at list of issues 2.1 to 2.7. The claimant was dismissed and his effective date of termination was 30 July 2021. The reason for his dismissal was to give effect to a reorganisation which involved loss of a number of posts in order to save £5 million per annum in operating costs. This is primarily argued by the respondent as a reason relating to redundancy or, alternatively, as some other substantial reason, namely a reorganisation short of redundancy. The principal reason for the reduction in posts was costs saving but the need for the respondent for employees to carry out that work did reduce, or was expected to reduce, because the work was to be carried out by a smaller number of people. This amounted to a redundancy situation which was a potentially fair reason for dismissal under s.98(2) ERA.
158. We then consider whether the respondent acted reasonably in all the circumstances.
159. In a redundancy exercise it is important to consider the warning and consultation provided to the claimant and his colleagues; whether there was a reasonable selection decision and whether reasonable steps were taken to find the claimant suitable alternative employment.
160. Consultation on the restructuring project involved the trade union and input at a collective level was therefore sought at an early stage. Planning for the restructure appears also to have done so. The claimant had the level of consultation that was in the plan, namely a single, one-to-one meeting with his line manager. There was the potential for those consulted with to complete a form with suggestions on the consultation although the claimant was not asked about this during the hearing and there is no evidence that he considered completing it.
161. The claimant has not raised any challenge to the sufficiency of the consultation. The consultation document sent to the affected employees is at page 151 and explained that a consultation period between 4 November 2020 and 21 December was to take place. We are satisfied that the consultation and the time at which the claimant was warned of the steps to be taken was within the range of reasonable responses.
162. We refer to but do not repeat paras. 108 to 128 above about the selection process. We explained in those paragraphs the full reasons for our conclusion that no reasonable employer would have included Mrs Hothi on the panel. It is true that, as the line manager to whom the successful candidate would have reported, she was a logical person to include and, we have found that it was standard practice of the respondent to include the line manager. She had recently been investigated in respect of allegations that

recruitment practices had been manipulated and that she favoured particular groups. She knew that both of the candidates had supported the complaints against her and had been interviewed in respect of them. The claimant, at least, knew that she was aware of that and the respondent should have anticipated that. The claimant did not object to Mrs Hothi's inclusion but no one consulted with him about that or explained why an HR panel member was being included. There had been insufficient time to address the recommendations of the internal investigation into recruitment practices. Confidentiality meant that the claimant was not named in the report and his specific allegation about the telephone call on 4 November was apparently not investigated. However, the high level of mistrust in the department was explained in the report. That should have caused any reasonable employer to remove Mrs Hothi from interviewing these candidates until the recommendations could be implemented. We consider that the a fair process would be one where reasonable steps are taken to ensure that the candidates have trust in the process and the respondent does not appear to have considered this perspective, despite the findings of the SPM's report. It is part of ensuring that the candidates have a fair chance to do themselves justice in interview.

163. That is the extent to which we consider that the selection process was not within the range of reasonable responses. The questions asked and the process followed in principle were those open to the reasonable employer.
164. The delay of some nine days in notifying the candidates of the person who had been successful in interview was unfortunate but there is no evidence that it operated to the disadvantage of the claimant. There were reasons for the delay one of which was that all of those on the selection panel, including the HR member, appeared to misunderstand their own process. While we accept that genuinely to be the non-discriminatory reason for the delay, it is at least open to question whether that was the act of the reasonably competent employer. Nevertheless, the employer extended the deadline for the claimant to apply for posts and there is no evidence that this was not genuinely done or that the claimant's other applications were not considered on an equal footing with those who had applied before the deadline that he had missed.
165. This is also an important factor in our conclusions that the respondent did take reasonable steps to find the claimant suitable alternative employment. In ordinary circumstances the redeployment guidelines on this are at page 402. This document was at the relevant time the respondent's organisational change policy and toolkit. Mrs Hothi said, and we accept, that she offered assistance in skills matching and in compiling a skills matching profile. The claimant accepted that she offered but he relied on his own attempts and also stated that he had lost trust in her by this time. There are a number of strategies for avoiding compulsory redundancies set out in paragraph 3.9 on page 406 but they are not replicated in the consultation document and it seems that many of them are irrelevant to a trade union consulted policy for this particular restructure.

166. The timeline to be followed is at page 171 and it includes a right of appeal which the claimant exercised.

167. Paragraph 7.14 on page 417 makes clear that:

“For posts that have not substantially changed and are largely the same but their numbers have decreased in the new structure, the applicants that score the highest ratings will be appointed to the post. Where there are close scores, the manager may wish to review the exercise to ensure they have acted fairly.”

168. There were close scores as between the claimant and the ringfenced colleague in their respective interviews for the Assistant Highways Engineer post in the new structure. This part of the process is not fully documented but we have accepted that, in effect, Mrs Hothi did carry out a review exercise with the other panel members. This was partly because on the interview day they were under the mistaken impression that they did not need to appoint any candidate if both scored less than 2 on one or more questions; such a candidate would not be appointable. It was only after the event that they were told that they had to make a choice and, in effect, some sort of review happened at that stage. There is no email trail about this and Mrs Hothi was vague about how they had met. The ringfenced colleague scored identical marks overall with the claimant when all three interviewers scores were included. Mrs Hothi scored him one point higher than the claimant and a different interviewer scored the claimant one point higher. The precise reason why the ringfenced colleague was adjudged to have ‘edged it’ in the interview has not been documented. Paragraph 7.14 suggests that the overall closeness of those scores means that the exercise should have been reviewed in that way in any event.

169. The redeployment opportunities were made available to the claimant and a vacancy list was given to him. He did use it.

170. We have come to the conclusion that the section process and the attempts to find the claimant alternative employment were those open to the reasonable employer save in the one respect of the presence of Mrs Hothi on the interview panel and her involvement in the decision making as between the claimant and his ringfenced colleague.

171. It is noted in the List of Issues 2.4 that the claimant’s core complaint was that Mrs Hothi manipulated the process to ensure that he was selected for redundancy and was not able to consider alternative employment until it was too late. That allegation is not made out. The delay was due to a genuine misunderstanding of the process to be followed in that the panel thought that the scores meant that neither candidate was appointable and that this was a pre-condition to making an appointment. It was taking advice on this matter and then reviewing the two candidates’ performances before making a choice that caused the delay. The claimant was permitted to consider alternative employment because the deadlines were extended.

172. We reject the allegation that Mrs Hothi manipulated the redundancy process to ensure that the claimant was put at risk. She had no involvement beyond

a brief 30-minute meeting with the consultants who designed the new structure. It was them together with the Chief Executive Officer and the Director for Transformation who decided that the 1.6 FTE Assistant Engineer posts should be reduced to 1 FTE Assistant Highways Engineer post.

173. Considering LOI 2.5 and 2.6 our conclusion is that the respondent did not adopt a fair procedure and because the ringfenced colleague was in exactly the same position as the claimant (namely that he was a witness to the wide ranging grievance about Mrs Hothi's recruitment practices) it was not a fair procedure for either of them. For this reason we conclude that the dismissal was unfair. Question 2.7 will need to be considered at a remedy hearing. It raises the question whether the claimant would have been fairly dismissed in any event and, if so, when. If a fair process had been followed and the panel had been chaired by a different person than Mrs Hothi, there is no reason to think that the other panel members would not have been the same. We have found that it was within the range of reasonable responses for Mrs Hothi to word the questions so there is no reason to think the questions would have been different. There were two candidates for one post and the identity of the candidates and that fact would not change had a fair process been followed.

Conclusions on the direct race or religion or belief discrimination

174. The first allegation at list of issues 3.2.1 is that Mrs Hothi manipulated the redundancy process to ensure the claimant was selected for redundancy and was not able to consider alternative employment until it was too late. The specific ways in which she was alleged to manipulate the process were clarified during case management before evidence to be, first, an allegation that she took the opportunity of the restructuring to put at risk roles occupied by team members who either had brought a grievance against her or were witnesses in that process.
175. This first allegation we find was not proved. Mrs Hothi did not have any hand in deciding which roles would be put at risk and she did not put at risk roles occupied by particular individuals because she was not involved in that part of the exercise. The restructure was done to Mrs Hothi in the same way as it was done to the claimant and his ringfenced colleague.
176. The second way in which it was alleged Mrs Hothi manipulated the process was by failing to appoint the claimant to the ringfenced position of Assistant Engineer. It is true that he was not appointed but we are satisfied that, given the lack of challenge by the claimant to the record of answers he gave, Mrs Hothi did not interfere with the fair process of selection. She wrote the questions but the questions are appropriate to seek to identify a candidate with the strengths and qualities needed to fulfil the post. So far as we have been told, the answers by both the claimant and his ringfenced colleague were accurately recorded in the transcripts of the interview. There is no evidence that the scores are inappropriate for the answers given. The other panel members were not from the same department and no accusation has been made that Mrs Hothi chose people who could or would be influenced by her or that this in fact happened. One of the two panel members was even



more critical of the claimant and his ringfenced colleague's performance in interview than was Mrs Hothi. The claimant has shown no more than that Mrs Hothi had the opportunity to influence the interviews but no credible evidence that she did so.

177. Although there was a nine day delay between the date of the interview and the claimant and his ringfenced colleague being told of the outcome, that is wholly explained by the genuine if unfortunate misunderstanding on the part of those concerned that the candidates needed to be appointable; we are persuaded by the respondent that the interviewers believed that the candidates needed to have scored at least two in respect of all questions before they could be appointed. This led to the need for further consultation, first with Mr De Cruz - who was on holiday - and then amongst the panel members before deciding upon the successful candidate. We accept that this is genuinely the non-discriminatory reason for that delay.
178. The next factual matter alleged in the List of Issues 3.2.2 is that in October 2020 Mrs Hothi shouted and swore at the claimant using foul language. The claimant has not shown that this happened and the core facts underpinning this allegation have not been made out. This allegation fails for that reason.
179. By List of Issues 3.2.3 it is alleged that Mrs Hothi refused the claimant's application in June 2018 for an adjustment to work from home two days a week. Our findings are that working from home one day a week was permitted from 2019 onwards. The claimant has not shown that there was a previous formal application which was rejected. His ultimate application for two days a week was limited to one day because of his working pattern of 25 hours a week. The claimant has not shown that the alleged comparators were in materially the same circumstances as him and therefore, to the extent that there may have been an earlier 2018 informal request for two days a week working from home, there is no evidential basis from which it might be inferred that this was rejected as less favourable treatment on grounds of race or religion.
180. The allegation in the List of Issues 3.2.4 is established to have happened in that the claimant requested to carry forward 10 days unused annual leave from the leave year 2020 and was limited to carry forward 3 days.
181. The next question in the List of Issues at 3.3 requires us to consider whether in any of those factual matters that were made out the claimant was treated worse than someone else was treated or would have been treated. As we explain above, the claimant has not shown that the alleged comparators for the working from home application were in materially the same circumstances. This allegation fails either because the specific facts alleged did not happen or because the claimant has not proved facts from which less favourable treatment on grounds of race or religion might be inferred.
182. In relation to the failure to appoint him to the ringfenced position of Assistant Engineer, he was treated less favourably than the ringfenced colleague but they are not a suitable comparator because they, like the claimant, are Muslim and of Pakistani origin. Choosing him over the claimant does not, therefore,

provide evidence from which it might be inferred that the reason for doing so was the claimant's race or religion.

183. We consider questions 3.3 and 3.4 together in relation to the failure to appoint to the ringfenced position and ask whether there is evidence that might lead to an inference of less favourable treatment on grounds of race or religion. The claimant alleges that Mrs Hothi manipulated those at risk in order to be able to make both himself and his ringfenced colleague redundant but we have found that that was not something within her capability and did not happen.
184. The claimant also alleges that by choosing his ringfenced colleague Mrs Hothi would, in time, have had both of them removed from the department because the claimant would be made redundant in short order and his ringfenced colleague is, allegedly, nearing retirement. This is an allegation that has no substance to it and no facts to support it. We consider that the handling of the selection process was appropriate - with the exception of the presence of Mrs Hothi on the selection panel. Given that the questions were appropriate for the selection and that there is nothing from which to infer that the answers were inaccurately recorded or unfairly scored, it appears simply to have been a situation where two individuals performed badly in interview, notwithstanding the fact they had both been carrying out substantially the same role for a large number of years.
185. The background to the specific issues in the List of Issues included allegations of recruitment practices by Mrs Hothi where she is said to have favoured those who are Sikh but such evidence as we have heard does not support a finding of anti-Muslim or anti-Pakistani animus on the part of Mrs Hothi. The allegations of favouritism do not have a credible evidential basis and are not consistently based solely upon race or religion but include complaints about nepotism. We do not say they are well founded but those explored before us point to many different reasons for particular actions and no clear pattern such as would support a finding of bias against a particular group.
186. In all those circumstances there is no evidence from which to draw the inference that choosing the claimant to be made redundant and choosing his ringfenced colleague to appoint was less favourable treatment of the claimant. The successful candidate was also Muslim and Pakistani and there is no credible evidence of anti-Muslim or anti-Pakistani animus on the part of Mrs Hothi.
187. The context of the claimant being limited in relation to the days' annual leave which could be carried forward from one leave year to the next are set out in para.155 above. For reasons we explain there, there is no evidential basis for an inference that that decision was less favourable treatment on grounds of race or religion.
188. The direct discrimination on grounds of race and/religion and belief claims are not well founded and are dismissed.

Victimisation

189. It is accepted by the respondent that Mr Khan did a protected act by supporting Mr Abbas's grievance about discrimination. This was actually in an interview on 17 July 2020 rather than in or around September 2020 as in the List of Issues but that is not a material deviation from the pleaded case.
190. The facts alleged in the List of Issues 4.2.1 are made out in part in that we have found that Mrs Hothi on 4 November 2020 exerted pressure on the claimant to withdraw his support for Mr Abbas's grievance through our particular findings set out in paragraph 97 to 101 above. However, we do not find that she expressly threatened him that the consequences of not withdrawing the support would be that he would lose his job. This was a fear that the claimant had and we think it an understandable fear. However, we note that he did not complain about Mrs Hothi's presence on the panel until after he was told he was unsuccessful.
191. It is also true that Mrs Hothi did not appoint the claimant to the Assistant Highways Engineer role. The factual basis of the allegation in the List of Issues 4.2.2 is made out.
192. Both of these acts amounted to a detriment to the claimant.
193. We then need to go on to consider whether the claimant has shown facts from which it might be inferred that these detrimental acts were done because he had done the protected act of supporting Mr Abbas in his grievance.
194. In relation to the telephone conversation of 4 November 2020 and the statements which exerted pressure on the claimant to withdraw his support, expressly trying to get him to tell her what he had told the independent investigator and, on her account, by advising him not to be involved. The claimant understood her to be telling him not to be a witness (see para.99 above). The findings of fact that we have made about the conversation on 4 November expressly make the link between that grievance and the suggestion that the claimant should reveal what he had said to the investigator and the insinuation that he should withdraw his support. We find that the statement was made because of the claimant's protected act.
195. In relation to the failure to appoint the claimant to the Assistant Highways Engineer role our finding of Mrs Hothi's intervention on 4 November 2020 are facts from which it could, in the absence of any other explanation, be inferred that Mrs Hothi had failed to appoint the claimant to the role because of his protected act and the burden of disproving victimisation passes to the respondent under s.136 EQA.
196. The respondent therefore has to show by cogent evidence that when they failed to appoint the claimant to the Assistant Highway Engineer role it had nothing to do with his support for Mr Abbas's grievance or Mrs Hothi's perception that he had supported Mr Abbas in his grievance.

197. We come back to some of the facts about this selection exercise. There was no manipulation of the scores for either the claimant or his ringfenced colleague. The panel members genuinely mistakenly believed that the candidates had to be appointable. The ringfenced colleague was in exactly the same position as the claimant in that he also was known by Mrs Hothi to have supported Mr Abbas in his grievance.
198. The claimant's scores are objectively low. Those scores were not challenged by him at the time or during the hearing before us. We accept that Mrs Hothi did not interfere with the process or the scoring. She knew that both had been involved in the grievance. There is an element of uncertainty about why the claimant rather than his ringfenced colleague was the one who was unsuccessful when the two were tied on scores taking the panel as a whole. However, the claimant scored one point less in the scores of the individual who was going to be his line manager. This does justify a statement that the ringfenced colleague "just edged the interview" as explained by Mr De Cruz.
199. Overall notwithstanding the comments made by Mrs Hothi on 4 November and the opportunity presented by the interview, we have come to the unanimous conclusion that the respondent has shown that the failure to appoint the claimant had nothing to do with his support for Mr Abbas's grievance but was a consequence of his poor performance in interview.
200. Our conclusions therefore are that the claimant has made out the basis of one victimisation complaint, namely that because of his support for Mr Abbas's discrimination grievance Mrs Hothi, on 4 November 2020, telephoned him and exerted pressure on him to withdraw that support. This is a single act of detriment which occurred on 4 November 2020. Mr Khan contacted ACAS on 4 August 2021. He therefore does not benefit from any extension of time by going through the early conciliation proceedings because he did not contact ACAS within three months of the date of the act complained of. The claim form was presented on 17 September 2021 and a claim form based upon an act on 4 November 2020 should have been presented no later than 3 February 2021. The claim form was therefore more than seven months late.
201. The claimant gave evidence about finding out about the ACAS procedure. He stated that some time after he had failed to be appointed in interview, colleagues who were also preparing to bring claims informed him that he needed to contact ACAS before bringing an employment tribunal claim and that he had to get a certificate. He stated that his belief was that he could not contact ACAS while he was still employed. His employment ended on 30 July 2021 (page 320).
202. In the intervening period, he was going through the selection process. The notification of the redundancy consultation period was on the same date as the telephone call complained of. That consultation finished shortly before Christmas 2020. Then there was the selection process. He applied for other posts with the respondent between notification that he was unsuccessful in his application for the Assistant Highways Engineer position at the end of March 2021 and 6 April 2021. He then brought a grievance. Although there

does not seem to have been much activity in relation to the grievance, that was outstanding until an informal notification of the conclusions of the grievance officer in June 2021 and then a formal response on 22 July 2021. Notwithstanding the date of that formal response, he knew by 24 June 2021 that the outcome of his grievance would be negative. It might be said that there was an obligation on him to act quickly once he knew that the grievance had not been upheld in relation to this incident.

203. There is therefore some basis for him to say that he was concerned with internal processes between 6 May 2021, when he was given notice of redundancy and appealed against it, and 19 August 2021 (RSB page S46), when the appeal outcome was notified to him.
204. Mrs Hothi does not appear to have been asked about the incident on 4 November 2020 until after the claim form was presented. The SPM did not revert to her to ask questions about specific evidence given to her by Mr Khan. This was because of requests by those involved, including Mr Khan, that their involvement should be confidential.
205. The incident was also part of the claimant's grievance brought on 15 April 2021 and Mrs Hothi was not asked about it by the grievance officer who appears to have thought, as Mr De Cruz appears to have thought, that it had been covered by the SPM. Mrs Hothi's recollection of a conversation concerning the grievance was hazy and there is some prejudice to the respondent in terms of the effect on her evidence about that conversation because of the fact that she was not asked about it until after the claim form was presented.
206. There is clearly prejudice to the claimant if he is unable to proceed with a claim that has been found to be well founded on the basis that the tribunal does not have jurisdiction to consider it because it was not presented within three months. We need to consider whether the claim based on this act was brought within such other period as we think just and equitable; if it was then the tribunal has jurisdiction to consider the complaint under s.123(1)(b) EQA.
207. By a majority (Dr Whitehouse and Mrs Thorne, the non-legal members), it is just and equitable that time for presentation of the complaint based upon the telephone conversation of 4 November 2020 should be extended to 17 September 2021. They have sympathy with someone in the claimant's position who does not know what the early conciliation process is. They consider that the claimant may not have fully understood that time would start to run in respect of each act individually unless he was successful in a number of complaints and in an argument that there were a series of acts extending over time which ended with the act of dismissal. For any self-representing claimant it is a steep learning curve to access the procedures of the employment tribunal. They accept as genuine his evidence that it was only after his failure in interview that he found out that he needed to contact ACAS before bringing a claim and that he genuinely believed – as he has explained to us - that he was not permitted to do so while his employment was ongoing. Since his employment ended on 31 July and he contacted ACAS on 4 August 2021, his evidence on that point is consistent with what he actually did.

208. The majority note that the SPM did not investigate the claimant's allegations of the contents of the telephone conversation on 4 November 2020 for reasons of confidentiality. However, the Associate Director tasked with investigating the claimant's grievance did not investigate it because his apparent belief was that it had been already dealt with when it had not. The majority acknowledge the prospect of prejudice to the respondent caused by the delay in Mrs Hothi becoming aware of what the claimant alleged had happened on 4 November 2020 but are of the view that that prejudice, in part, is self-inflicted.
209. Balancing that against the prejudice to the claimant of being unable to proceed in the claim, despite the length of delay in this case, the majority consider it is just and equitable to extend time for presentation to the date on which the claim form was in fact presented.
210. The minority (Employment Judge George) considers that it is not just and equitable to extend time. The only explanation relied on by the claimant was that he thought he could not go to ACAS during his employment. Although there were ongoing internal processes, these did not occupy the claimant's time very much because the respondent was not very active in dealing with them. In any event, they are not matters the claimant relies on. Judge George does not think the claimant's apparent ignorance that he could go to ACAS during employment was reasonable given the availability of sources of information about bringing an employment tribunal claim. Once a litigant is alerted to the existence of ACAS, they can reasonably be expected to look for independent sources of advice – such as the ACAS website – where they would see it is possible to bring a claim during employment because of acts alleged to have taken place during the currency of employment.
211. Judge George considers that the explanation relied on is not a reasonable one and weighs that together with the length of the delay against the prejudice to the claimant of not being able to pursue the claim. She considers that had the incident been of importance the claimant would have acted sooner and considers that there is probably some forensic prejudice to the respondent in the delay in it coming to their attention. Even by the time of the claimant's grievance he was more than three months after the date on which the incident occurred. The reason why it was not investigated by the SPM was to do with confidentiality and this was an appropriate response by the respondent although Judge George recognises that the respondent should not benefit from delay in investigating something which should have been dealt with within the grievance.
212. For those reasons, by a majority, (Dr Whitehouse and Mrs Thorn, Employment Judge George dissenting) the employment tribunal does have jurisdiction to consider the complaint of victimisation based upon the act of detriment of the telephone conversation of 4 November 2020.
213. The compensation to be awarded for the successful victimisation claim and the successful unfair dismissal claim will be assessed at a remedy hearing and separate directions are made in relation to that.

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Employment Judge George

Date: ...3 June 2024.....

Sent to the parties on: 4 June 2024

For the Tribunal Office

**Recording and Transcription**

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