JJE

EMPLOYMENT TRIBUNALS

Claimant: **Mr Adekunle Adewale**

Respondent: **London Borough of Barking & Dagenham**

Heard at: **East London Hearing Centre**

On: **20, 21, 22 & 26 June 2018 and (In Chambers) on 27 June 2018**

Before: **Employment Judge C Hyde**
Ms M Long, Member
Mr D Ross, Member

Representation
Claimant: **In Person**
Respondent: **Mr S T Cheves, Counsel**

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that:-

1. **The complaints of direct age, sex and race discrimination, age, sex and race harassment, and victimisation under the Equality Act 2010 were not well founded and were dismissed.**

2. **The complaint alleging breach of contract/unlawful deduction of wages in respect of unpaid holiday pay was not well founded and was dismissed.**

3. **The notice pay claim was dismissed on withdrawal forthwith.**

REASONS

Preliminaries

1. The Claimant was born on 10 February 1957. He described himself as a black male who was British, and of Nigerian origin.

2. He first worked for the Respondent engaged as an agency worker from 12 February 2014 in the role of Parking Appeals Officer ("PAO") in the Parking Office in Barking Essex. He applied for a more senior post as a Debt Recovery Officer and after a successful application process, he commenced employment directly with the Respondent on 1 October 2104. The relevant Head of Service at all material times was Ms Sharon Harrington (white British). Her responsibilities included other Enforcement and Operational Services. Below her in the Parking Department was a manager, a post occupied by approximately 5 people from 2014 to 2016, and about 14 other employees.

3. The Claimant was dismissed at an absence hearing on 24 August 2016 before Mr Hakeem Osinaike, Operational Director, Housing Management (pp205 - 207), on the basis that his last day of service was 23 August 2016. Mr Osinaike was black male British, and of Nigerian racial/ethnic origin. On 9 September 2016 the Claimant lodged an appeal against the dismissal. It was considered by the Respondent's Personnel Board on 8 December 2016 in the absence of the Claimant or his representative. The appeal was not upheld (pp223 – 237).

4. The Claimant presented his claim to the Tribunal on 1 December 2016 (pp41 – 74). He set out some 22 pages of Particulars of his complaints. In a response and grounds of resistance submitted on 20 January 2017, the Respondents set out the grounds on which they intended to resist the claim. Following amendment of the claim and four Preliminary Hearings in which the claim and issues were considered, including an Open Preliminary Hearing on 6 and 7 June 2017, the Issues in the List of Issues reproduced below were defined and agreed.

5. On all the hearing days, Mr Adewale was supported by a representative of the PSU organisation.

The Issues

6. The Claimant made various allegations of victimisation; race, age and/or sex harassment; direct race, sex and/or age discrimination; and a complaint of unlawful deduction of wages in respect of unpaid holiday pay.

7. The Tribunal copied into these reasons below, the List of Issues which we used during the hearing. This was marked [R4] and dated 20 June 2018. It superseded the document which had been agreed at the hearing on 15 November 2017 (pp 107(40) – 43)), as it included more detail of the cases being put and what was not disputed. For ease of reference, the numbering from the List of Issues is retained in these Reasons.

8. Both representatives followed the list of issues in their closing submissions.

Relevant Law

9. Although neither side referred to any case law or statute during the course of the hearing or submissions, the Tribunal raised a few matters with the parties. One of the issues was confirming that the effects of the case of *Rowstock v Jessemey* [2014] EWCA Civ 185 was that victimisation post termination could be complained of, as well as direct discrimination under section 13. There was therefore no impediment to the Claimant bringing his claims under the Equality Act after the date of termination. This applied to issues 8 and 12 in which victimisation was complained about in relation to post termination events. This was not controversial as between the parties.

10. The Tribunal also outlined to the parties and in particular to the Claimant at the end of proceedings on Friday before the Tribunal resumed on the following Tuesday, the basics of the discrimination claims in relation to the burden of proof. In particular, the Tribunal referred the Claimant to the cases of *Igen Ltd v Wong* [2005] IRLR 258, CA; and *Madarassy v Nomura International plc* [2007] EWCA Civ. 33, CA.

11. There was no dispute either as to the applicable statutory provisions.

"List of Issues

2. Protected Acts

For the purposes of the victimisation claims set out below, the Claimant relies in each instance on the following protected acts:

(a) A letter dated 10 November 2014 from himself to the Second Respondent (R2); and

(b) The Claimant's previous Employment Tribunal Claim submitted on 6 May 2015.

The Respondents did not dispute that the above documents constituted protected acts.

3.1 In or about August 2016, did the First Respondent (R1) inform the Claimant (C) that his post was being deleted and that he was at risk of redundancy?
If so, did that decision constitute victimisation?

For the purposes of this issue the Claimant relied upon both protected acts.

3.2 In or about August 2016, in the course of the redundancy process, did R1 unjustifiably fail to investigate what, if any, alternative roles might be available to C and/or unjustifiably fail to notify him of any such roles that were identified?
If so, did such failures constitute victimisation?

For the purposes of this issue the Claimant relied upon both protected acts.

3.3 Did R1 unjustifiably fail to investigate/deal with C's grievance lodged on 16 August 2016?
If so, did such failure constitute race, age and/or sex harassment, victimisation and/or direct race discrimination?

For the purposes of this list of issues, the C's relevant protected characteristics are:

1) black Nigerian in respect of race;
2) Male in respect of sex; and
3) People below the age of 50 in respect of age

3.4 Was there an unjustifiable disparity in R1's treatment of C's grievance lodged on 16 August 2016 when compared to the grievances raised against C by Ruth Johnson and Brenda Grant in March 2015?
If so, did such disparity of treatment constitute race, sex and/or age harassment, victimisation and/or direct race, sex or age discrimination?

3.5 Did R1 unjustifiably require C to attend an Absence Hearing on 24 August 2016 when he was signed off sick?
If so, did such requirement constitute race, age and/or sex harassment and/or victimisation?

3.6 Did R2 and/or Siobhan Davies provide inaccurate or "manipulated" information to Hakeem Osinaike in advance of the Absence Hearing which took place on 24 August 2016?
If so, did this constitute victimisation and/or direct race discrimination?

3.7 Did R1 unjustifiably require C to take annual leave for the days when he was attending the Employment Tribunal for the final hearing of his first claim on 13-14 & 19-21 July 2016?
If so, did such requirement constitute victimisation and/or direct race, sex and/or age discrimination?

3.8 Did R1 unjustifiably fail to provide to C Occupational Health data in response to requests made by him on 17 and 18 October 2016?
If so, did such failure constitute race, age and/or sex harassment, victimisation and/or direct race, sex and/or age discrimination?

3.9 Did R1 unjustifiably delay providing C with copies of the notes of the Absence Hearing on 24 August 2016?
If so, did such delay constitute race, age and/or sex harassment, victimisation and/or direct race, sex and/or age discrimination?

3.10 Did Hakeem Osinaike's decision to dismiss C at the Absence Hearing on 24 August 2016 constitute victimisation and/or direct race, sex and/or age discrimination?
C relies as comparators on Corrine Rudd in respect of sex and race, and on Christopher Beasley in respect of age and race.

3.11 Did Hakeem Osinaike and/or R1 unjustifiably disregard C's Fit Note dated 15 August 2016 and ignore C's e-mail dated 17 August 2016 requesting a

postponement when deciding not to postpone the Absence Hearing until 31 August 2016?
If so, did such decision constitute victimisation and/or direct race, sex and/or age discrimination?

3.12 Did R1's decision on appeal to uphold C's dismissal constitute victimisation and/or direct race, sex and/or age discrimination?

3.13 Did R1 unjustifiably fail to postpone the appeal hearing from 8. December 2016?
If so, did such failure constitute direct race, sex and/or age discrimination?

3.14 Post termination, has R1 accounted to C for all sums properly due to him by way of pay, holiday pay and/or sick pay?"

Findings of Fact and Conclusions

12. The allegations were not set out in chronological order in the List of Issues, but are dealt with in these Reasons in broadly chronological order. Further, where it was appropriate to do so, allegations covering the same or closely related facts were dealt with together.

Issue 7

13. Issue 7 was a complaint that the Respondent unjustifiably required the Claimant to take annual leave for the days when he was attending the Employment Tribunal for the final hearing of his first claim on 6 days between 13-21 July 2016.

14. Ms Harrington did not dispute that she had told the Claimant that the Respondent's policy was to require employees to take annual leave if they wished to be paid during the duration of an Employment Tribunal hearing. There was no reference to any procedure or any examples of anyone who was a claimant in a complaint against the Respondent who had been granted special leave. The Tribunal also could understand that it was a decision which was made as a common sense response to the issue of being sued in the Tribunal and having a member of staff away from the office. Importantly also, there was no evidence that the Respondent took a different view about the requirements that the time should be taken as annual leave, depending on the circumstances or protected characteristics of the member of staff. In those circumstances therefore, the Tribunal did not consider that the Claimant had established even a prima face case which led to the burden shifting in relation to either the victimisation and/or the direct race discrimination or the sex discrimination and/or the direct age discrimination.

15. For the avoidance of doubt, the relevant witnesses were Ms O'Brien and Ms Davies.

Issues 1 and 2

16. Issues 1 and 2, in August 2016, alleged victimisation only. It had also been agreed that the Claimant's challenge was in relation to the actions of Julia Claydon only and in relation to the redundancy/re-deployment process. At the material times, Ms Claydon was Head of Quality and Business Performance. The Claimant's case was that Ms Claydon knew about the protected act in November 2014 and about the Tribunal claim submitted

on 6 May 2015; and because of that knowledge, she acted in a way which was detrimental to him.

17. The chronology in relation to the redundancy started with the letter which was sent by the Chief Executive of the First Respondent, Mr Chris Naylor, to all employees (pp457-459) dated 1 February 2016. This letter outlined that the Council was facing unprecedented budget cuts over the coming years and that they had set up a process to explore how they could continue to meet their obligations as a Council within a much-reduced budget. He indicated that they would publish the proposals in mid April and at that juncture staff would be able to see what the changes may mean for them and their Service. He stated however, that it was clear that the Council would need to be significantly smaller in terms of the number of people it employed.

18. We were next taken to an email dated 23 June 2016 and sent by Sharon Harrington who was at the time, Group Manager of Parking, Traffic, Network Management and Road Safety, Customer Commercial and Service Delivery in the Environmental Services Department. She addressed the email to the three people who made up the complement of debt recovery officers in the department at the time. They were Shyamali Perera, the Claimant and Charles Cobbinah. The email was also copied to their supervisor at the time, John Wild and to Mr Peter Watson, the HR lead on this issue.

19. Ms Harrington informed the members of staff that the consultation on the review of the Service had been completed and that there was to be a reduction of one of the debt recovery posts. The proposal was that the affected staff would have to follow a formal competitive process and that this may involve a test to support the interview process. However, she gave the three members of staff the option of contacting her to apply for voluntary severance so that she could seek to have this approved before the interviews were due to take place.

20. On 4 July 2016, Tamsin Marriot the Senior Business Support Officer – Parking Services, wrote to the Claimant advising that due to the departmental restructure, it was necessary to hold a competitive interview for the role of debt recovery officer. She offered him two possible dates for attendance at a test and interview on 25 and 26 July 2016. She asked for confirmation of his intention to attend both the test and the interview.

21. It was not in dispute that the Claimant attended a 6-day Tribunal hearing in a claim brought against the Respondent and various members of the staff. This hearing took place on 13-14 and 19-21 July 2016. The Claimant had booked to be on annual leave from 4 July to 22 July 2016 including therefore, the period when the case was to be dealt with. This is also specifically relevant to issue 14.

22. There was no evidence adduced about anyone applying for voluntary severance. The next relevant undisputed evidence was correspondence about the competitive interviews for the two ring-fenced debt recovery officer posts. This was set out in a letter dated 26 July 2016 from Ms Harrington to the Claimant (p154).

23. There was no dispute that the Claimant had received this correspondence.

24. Despite the letter from Tamsin Marriot of 4 July 2016, the Claimant neither attended the interview and test nor did he confirm whether he intended to attend, nor did he indeed respond to that letter.

25. Ten days later, in a letter dated 14 July 2016 [p473], Ms Marriott sent a letter chasing a response from the Claimant. Although the Respondent had not heard from the Claimant, it appeared that arrangements were in place for the Claimant to have attended for the test on 25 July and for the interview on 26 July 2016. Ms Harrington in her letter to the Claimant of 26 July 2016, stated "*as you are aware, you were invited to undertake a test on Monday 25 July and an interview on Tuesday 26 July, for which you neither accepted nor declined; On calling John [Wild] who reminded you of your interview on the morning of Monday 25 July 2016; you stated you cannot attend due to your shoulder pain. However, I note that you were able to attend a 6 day hearing over the previous two weeks*."

26. She then informed him in the letter that she was proposing two further dates for the interview for the post on 8 August or 12 August 2016. She asked him to let her know by midday on Tuesday 2 August 2016, which of the above dates he wished to go ahead with. She gave him both a landline number and an email address for contacting her. She then made it clear that if she did not hear from him by this date, the Respondent would treat this as an indication that the Claimant did not wish to take up the offer of an interview for this post. She further explained that the restructure had to be completed and that it was not reasonable for the first Respondent to hold it in abeyance as other colleagues would be placed at risk of stress and uncertainty during what the Respondent acknowledged was a difficult time. She also explained to him that if they went ahead, the Claimant would then become subject to the re-deployment and recruitment process, as he aware that one of the three debt recovery officer posts was to be deleted in the restructure.

27. There was still by now, no correspondence from the Claimant addressing the issue of this re-deployment or restructuring process. He wrote other letters covering other issues.

28. From the end of the period of the annual leave, the Claimant sent in a further sick note. This was dated 1 August 2016 (p475 & p241).

29. Ms Harrington then wrote by email to the Claimant on 2 August 2016 (p166) inviting the Claimant to provide a response to her as to whether he was going to be taking up the further dates that had been provided to him, thereby extending the deadline for communication to 3 August 2016.

30. The Claimant did not respond to this communication.

31. Then a letter was sent dated 5 August 2016 by Julia Claydon to the Claimant (p170) inviting the Claimant to attend a meeting to discuss the re-deployment process and also the impact of the Claimant not taking part in the recruitment process. The meeting was due to take place on 12 August 2016. He was invited to have a union representative present, although it was his responsibility to arrange for the attendance of any such representative.

32. He was told by Ms Claydon that if he was unable to attend this meeting, he should telephone her immediately to arrange another date. If he did not attend however, he was told that the Respondent would write to him in respect of the process.

33. Mr Adewale sent a letter in reply to Ms Claydon and copied it to Ms Siobhan Davies

dated 10 August 2016 in response to Ms Claydon's letter to him of 5 August 2016 (pp185a & b & pp188-189). The Claimant in that letter, among other matters, denied that he had *"refused to take part in any recruitment process as alleged or at all*". The Tribunal considered that the Claimant was taking a very technical approach to the words 'refusing to attend'. He had provided no explanation to the Respondent up to this point as to why he had not attended, despite the Respondent making the point that he had been able to attend a Tribunal hearing over a number of days, an exercise which they, with some justification, saw as more taxing than attending the interview and test for the restructuring process. In addition, there was no suggestion that there was any medical evidence or certification that the Claimant was unfit to attend the meetings during this timeframe.

34. In this letter however, for the first time, the Claimant indicated in advance of the meeting which had been suggested for 12 August 2016, that he would not be able to attend. He asked for the meeting to be postponed because he was currently on sickness absence because of his "disability".

35. There was an on-going dispute between the Claimant and Ms Harrington as to whether he was indeed disabled. This is matter which had been the subject of an open preliminary hearing in this litigation before Employment Judge Barrowclough, which took place on 6-7 July 2017. The Reserved Judgment was sent to the parties on 5 September 2017. The Tribunal found that the Claimant did not have a qualifying disability as defined in Section 6 of the Equality Act 2010. Accordingly, all his complaints of disability discrimination in this claim were dismissed (pp107(1) and 107(2)). The Claimant had relied on a physical impairment namely an injury to or longstanding problem with his left shoulder. It had apparently first arisen in about 2006.

36. Ms Claydon then responded to the Claimant's email of 10 August (p188) and agreed promptly to his request for postponement and told him that this had been re-arranged for Monday 22 August. She asked however to be informed by Tuesday 16 August if he was still unable to attend and that the Respondent would look at alternative ways in which they could engage with him to explain the options, if that were the position.

37. The Claimant then responded in an email sent on 17 August to Ms Claydon (p495) apologising for not reverting to her sooner and indicating that he would not be able to attend "*the proposed absence review hearing on 22 August 2016".* In the second paragraph of the letter which Ms Claydon sent to the Claimant on 10 August 2016 (p186), she explained that the meeting to which she was calling him had nothing to do with the on-going Employment Tribunal claim which he had referred to in his letter. She continued "*this is an entirely distinct and separate process and I have called the meeting in line with the managing organisational change (a copy of which I attach) because you have not engaged with the assimilation process and are therefore a re-deployee*". The Claimant disputed in the Tribunal hearing before us, that he had received a copy of the attachment. The Respondent produced a print out of the original email which showed that the attachment had been sent (p485a). It is correct that the attachment was not on the copy printed out which appeared in the bundle initially at page 186. However, the Tribunal also balanced against this the fact that the Claimant in replying to this email from Ms Claydon, did not indicate that he had not received the attachment. We accepted in the circumstances that the attachment had been sent to the Claimant as alleged by the Respondent.

38. Also, in Ms Claydon's email to the Claimant of 10 August 2016, in answer to his

point about not having refused to take part in any recruitment process, she referred back to the correspondence that had been sent to the Claimant by Sharon Harrington regarding recruitment, namely the email and letter of 26 July and 2 August 2016.

39. In the Claimant's email of 17 August (p495), he asked for the postponement to be until the end of the month when "*hopefully, my health would have improved to embark on the long journey".*

40. In the same letter, he also referred to not having been supplied with any information about redeployment opportunities. He continued "*if there is no opportunity of redeployment, I would consider it pointless and further detriment simply going through the motion of having a meeting about a non existent opportunity*". Although the Claimant denied when it was put to him, that this was an indication of his attitude towards the process, the Tribunal considered that this supported the Respondent's contention that it was evidence of the Claimant going through the motions, and that he had no intention of attending these meetings. The Tribunal noted that although he apologised for not having reverted to Ms Claydon as she requested by 16 August, he gave no explanation for not having done so.

41. Ms Claydon asked Ms Jackie Cleary, Human Resources Business Partner, to respond to the email sent by the Claimant to Ms Claydon dated 17 August 2016 (p495). Ms Cleary responded by an email of 17 August (p190). The Claimant raised during the hearing questions to why Ms Claydon herself had not responded. The Tribunal considered that taking into account Ms Claydon's seniority and her responsibilities at this time, it was not only reasonable but sensible for her to delegate this matter to Ms Cleary, Human Resources Business Partner.

42. The Tribunal noted as set out above, that the Claimant gave no explanation for not having responded to Ms Claydon about the meeting on 22 August by 16 August as she had requested. We noted also that on 16 August, the Claimant was not incapacitated from writing a letter because that was the day on which he presented a grievance about Ms Harrington (p484-493). The Claimant sent a copy to Ms Claydon, Ms Davies and Ms Coleman.

43. In Ms Cleary's response to the Claimant, she expressly clarified that the meeting scheduled for 22 August 2016 was not an absence review meeting as the Claimant had indicated in his letter, but had been arranged to support the Claimant in the redeployment process and discuss with him his options, which were outlined in Ms Claydon's email of 10 August 2016. She also reiterated that this was a second opportunity that Ms Claydon had given him to attend a meeting to discuss his options and that as a result, she had no choice but to issue him with his "at risk" which was attached by email. She indicated that she was using email in response to the Claimant as this seemed his preferred method of communication with Ms Claydon. She then stated: "*we have an obligatory duty to follow process with you; however, we can only do so much without your input".*

44. In fact, the documents that were available to the Tribunal formally notifying the Claimant that he was at risk were dated 19 August 2016 (pp194 and 497). The explanation for this appears to be that Ms Claydon sent the response from Jackie Cleary referred to above and her own formal "at risk" letter dated 19 August to the Claimant together on 19 August 2016 (p497 refers).

45. It appeared to the Tribunal from the chronology that the Claimant was only at risk of redundancy because he had failed to participate in the redeployment exercise about which he was initially informed by Tamsin Marriott as set out above. It was also clear from the correspondence cited above, that Julia Claydon became involved at a later stage but that indeed she was the one who wrote the letter to the Claimant formally informing him that he was at risk of redundancy (p194).

46. The issue therefore for the Tribunal in relation to *Issue 1* was one of causation, namely, whether he was informed that his post was being deleted and that he was at risk of redundancy because of having done the protected acts.

47. There was no evidence before the Tribunal that Julia Claydon was aware of the first protected act (10 November 2014, letter from Claimant to Sharon Harrington) and the Claimant did not suggest that this was the case. That protected act was therefore removed from our consideration.

48. As to the second protected act, there was evidence that Ms Claydon knew about an Employment Tribunal hearing simply because the Claimant himself had referred to it in a letter sent to her, when the Clamant referred to his recent Employment Tribunal hearing in his letter to Ms Claydon of 10 August 2016 (p188). He did not indicate what the subject matter of the Employment Tribunal hearing was. The Tribunal considers that if thought had been given to this, it would have been likely that it was thought to be a discrimination complaint as broadly speaking that was the most likely reason for an employee to bring a complaint to the Tribunal during the course of their employment.

49. The Tribunal also heard evidence from Ms Claydon about what, if any thought she gave to this and whether she knew anything about the Tribunal hearing before this matter was flagged up by the Claimant himself in his letter of 10 August 2016. We considered her evidence was credible, that she was not concerned with that matter as she had a considerable amount on her plate. We considered that Ms Claydon was quite 'relaxed' and was not distracted by the reference to Employment Tribunal proceedings because as she herself described, the bringing of grievances within an employer like the local authority is common place and that indeed, until an adverse conclusion has been reached, nothing can be implied about the bringing of a complaint or a grievance.

50. We also considered her evidence convincing that her concern was to follow through the process of the restructure and redeployment correctly with the Claimant and not to be distracted from that. We considered that it was noticeable that the Claimant did not refer to any aspect of the Respondent's redeployment policy in order to support a contention that there had been any breach of that process by the Respondent. It was also not in dispute that Ms Claydon was not in any way involved or complained about in the Employment Tribunal claim which was submitted on 6 May 2015 and which was the subject of the hearing in July 2016.

51. On the other hand, we had the chronology as outlined above and also the plain terms of the correspondence from Ms Claydon and indeed others about the reason why the Claimant was facing being placed on the at risk register and also why the post was deleted. We considered that these events happened because of a genuine restructure. The Claimant's post was one of three within the Parking Department that was being put at risk but it was part of a much larger exercise across the whole Council.

52. Further, we noted that the Claimant failed to avail himself of the opportunities of securing one of the two remaining recovery officers and also that he failed to take up the opportunity to look at other assimilation opportunities. We considered that these factors were what led to his placement on the formal at risk register. We noted that even in the letter of 19 August, although the Respondent made it clear that the Claimant's assimilation options had been exhausted because he had not taken part in the interviews for the debt recovery officer posts, they would still try and help him avoid redundancy by finding suitable alternative employment and that he would be placed on the redeployment register and given priority consideration for any suitable vacancies that arose. We noted that even after this notification, the Claimant declined to engage with that procedure also.

53. The termination of his employment happened some five days later and brought to an end the redundancy/redeployment process for him.

54. One of the issues the Claimant raised during the hearing was that he had not been sent lists of vacancies by the Respondent or the Human Resources Department. We accepted Ms Claydon's responses on this, namely that it was a matter for the employee themselves to review the vacancies that were available and to identify the ones that he thought were suitable. There was again no reference to the Respondent's written procedure to undermine this evidence, so we accepted it and, it also appeared likely to be the position. The Claimant was the person best placed to identify what vacancies might be suitable for himself. As Ms Claydon said, she had no idea what his background was in terms of education and work experience and indeed, what his preferences were. The Tribunal considered that this was another example of the Claimant simply sitting back at the time and then subsequently complaining about the way events unfolded when he had declined the invitation to help forge them.

55. It was not in dispute that there was no criticism of the Claimant's work performance. The reason for dismissal relied upon by the Respondent and the process which was followed which led ultimately to the termination of his employment, was related to his attendance. The Tribunal therefore had no reason to reject the contention by the Respondent, that it was likely that if the Claimant had engaged with this process, he would more than likely have found another suitable position. There was also a pay protection process whereby if the alternative post was at a lower rate of pay, the employee's pay was protected for a year within the Council during which he or she would be free to make applications for other posts, at higher substantive rates of pay.

56. We concluded therefore in relation to issue 1, that the charge of victimisation was not well founded and was dismissed.

57. At the end of Ms Claydon's letter of 19 August, she invited the Claimant to let her know if there were any issues that he wished to discuss or if he needed further information. She also referred him to the Council's comprehensive support package for potentially redundant staff which could be accessed through the HR portal of the Council's intranet. The Tribunal noted that Mr Adewale argued towards the end, that he had not had access to the Respondent's intranet during this period. The Tribunal considered that this was unlikely. First the Claimant did not complain about this in any of his letters or communications to the Respondent at the time. Further, the Tribunal noted that the Claimant presented a grievance using the grievance pro forma on 16 August 2016 against Sharon Harrington. If he had not been able to obtain this himself from the intranet, the Tribunal would have expected that he would have made reference to this. Alternatively,

he could have used whatever method he used to obtain that copy to also obtain the information that he needed about the restructuring and redeployment process.

58. Although in his letter addressed to "Dear All" dated Monday 22 August, Mr Adewale made reference to the redeployment process (p198, 2nd paragraph from the top), he described the fact that Sharon Harrington had referred him to Julia Claydon as no more than a side issue. In his view, the referral flowed from what he called 'the root cause of the dispute'. This was a dispute between himself and Sharon Harrington as to whether his condition amounted to a disability under the Equality Act (p197). He refuted the contention that he had not engaged but did not set anything out in the letter which took matters any further forward in relation to the redeployment process. He concluded his letter by asking for information about various matters including information on the redeployment options raised by Julia Claydon.

59. That was the end of any evidence before us about contact between the Claimant and those members of the Respondent's staff who were dealing with redeployment issues.

60. We considered the allegations in *Issue 2* against our findings above. We did not consider that the primary responsibility on the evidence before us for investigating alternative roles lay on the Respondent. The Claimant described the Respondent as having "unjustifiably" failed to investigate what alternative roles might be available for him and "unjustifiably" having failed to notify him of any such roles that were identified. He produced no basis for the contention that the Respondent's actions were unjustified. As set out above, the Tribunal accepted the evidence of Ms Claydon that the burden was on the employee to take this matter forward at this stage.

61. Our primary finding however, was that we did not consider that the Respondent had treated the Claimant unfavourably in any way by reason of the two protected acts relied upon. In relation to the first protected act, there was no evidence that anyone within this case other than Ms Harrington and the Claimant were aware of that letter. In relation to the second matter, we accepted Ms Claydon's evidence about this. She also explained that the Council treats matters of Employment Tribunal claims and grievances as confidential and that no one apart from those directly involved are told about these unless they need to know. The Tribunal considered that this evidence of Ms Claydon was corroborated by the evidence of Ms Harrington which was confirmed by contemporaneous documents, that Ms Johnson was not told that she was a Respondent to the Claimant's May 2015 case until a month or two before the hearing. There were contemporaneous emails in which Ms Harrington put Mr Adewale on notice that she was going to tell Ms Johnson that she was a named Respondent, in order that Mr Adewale would be aware that this was happening. The email which Sharon Harrington wrote to the Claimant about the fact that she was going to tell Ruth Johnson that she was also a Respondent in the Tribunal case, was sent on 2 June 2016 (p774). The Claimant did not receive this news well.

Issues 3 and 4

62. It was convenient to deal with these issues together as they both arose out of the complaint about the Respondent's response to the Claimant's grievance against Ms Harrington lodged on 16 August 2016, which has been referred to briefly above. These allegations were said to constitute harassment in relation to the protected

characteristics of race, age and/or sex, victimisation because of the two protected acts relied upon and/or direct race discrimination in relation to issue 3 only but also direct race, sex and/or age discrimination in relation to issue 4.

63. The grievance which the Claimant presented against Ms Harrington was responded to by Ms Davies on 17 August 2016. She rejected the grievance and in her two page letter to the Claimant of 17 August 2016 (pp191-192), Ms Davies explained why she had taken the decision that the formal grievance could not be progressed. She explained that the Respondent's grievance procedure was intended to resolve genuine workplace issues as quickly and fairly as possible however, by necessity, some circumstances were specifically excluded from the grievance process and this included any issue from which there was a separate appeals procedure and in this case, she referred to the formal absence management procedure.

64. The Tribunal was referred to the procedure for grievance resolution (pp546-562). It had come into force in June 2013 and was current at the time we were concerned with. At (p549) the section headed 'Matters Outside the Scope of the Procedure', the fourth bullet point stated "*…any issues for which there is a separate appeals procedure for example grading, disciplinary or redundancy"* were excluded from the scope of that procedure. Ms Davies confirmed that there was a separate process in relation to absence monitoring. We were satisfied that the managing attendance at work (sickness absence) procedure (pp243-262) provided an appeal process. This therefore fell outside the grievance procedure as the Respondent argued.

65. We also accepted the second ground on which Ms Davies indicated that the formal grievance could not be progressed and that was because under the grievance procedure, the formal resolution was only available on completion of the informal resolution process at section 3. She summarised that it was her understanding that the Claimant's grievance was about failure to make reasonable adjustments, contrary to the Equality Act 2010. She told the Claimant that it was her view that this matter was relevant to the formal absence hearing which, at that point was scheduled to take place on 19 August 2016 and to be chaired by Mr Hakeem Osinaike, Operations Director, Housing. Ms Davies also stated that Ms Harrington had dealt with this matter in her report for that hearing and that if the Claimant did not agree with management's position, the appropriate forum to raise this was at the forthcoming formal hearing.

66. The Claimant relied on comparators to argue that this treatment was unjustified. The comparators were a former colleague, Ruth Johnson, who raised a grievance against the Claimant; and Brenda Grant who also raised a similar grievance against him. Both were raised in March 2015. Although it was not an agreed issue, the Claimant added during the course of the hearing, a further comparator in this respect. This was the grievance that he himself had brought against his line manager, Maxwell Acheampong. The Respondent did not object to this addition although the Tribunal had regard to the fact that it was not a matter which had been highlighted by the Claimant in advance. There were witnesses however, who were able to deal with this matter and therefore we accepted that it could be referred to.

67. The Tribunal agreed with Ms Davies's perception that the grievance (pp485-493) the Claimant presented on 16 August, related almost exclusively to issues relating to his physical condition and the assertion that he was disabled. The Claimant was already subject to the sickness absence procedure in relation to his attendance (p168). Further,

as Ms Davies sets out in her letter, and this was not disputed, there was an absence hearing scheduled to take place some two to three days later on 19 August 2016. In all those circumstances therefore, given what the processes provide and the nature of the Claimant's grievance, Ms Davies was justified in concluding that the grievance by the Claimant was excluded.

68. The Respondent argued that the circumstances of the comparators were not similar to that of the Claimant and therefore they were not true comparators. First in none of those cases were the issues raised subject to a separate procedure. Although the Claimant found it difficult to accept this, it was a matter of evidence that there was no separate procedure which was being considered in relation to those grievances. The Tribunal had a number of documents relating to those grievances. The page reference for the grievance the Claimant brought against Mr Acheampong is (pp695-706). It took place on 12 March 2015. The notes of the meeting show that Mr Adewale confirmed that the grievance was not against Mr Acheampong as a person, but rather his management style and his treatment of the Claimant.

69. The complaint by Ms Grant against the Claimant was at pages 676-677. She outlined a catalogue of incidents which she complained about which were to do with what she believed to be inappropriate behaviour by the Claimant in the office environment. Ms Johnson's complaint which was submitted on 10 March 2015, also alleged unprofessional conduct within the office on the Claimant's part. The Claimant did not point to any other procedure under which these grievances should have been considered. These appeared to the Tribunal to be matters to be dealt with under the grievance procedure. It appeared to the Tribunal that that was the only credible explanation for the reason why those grievances proceeded. Also, there was no other current procedure going on at the time which they overlapped with.

70. Mr Cheves also made points in closing about the racial and gender profile of the comparators which somewhat undermined the Claimant's direct discrimination complaints. Ms Grant and Ms Johnson were black, female, of African-Caribbean background and Mr Maxwell Acheampong was black, of Ghanaian racial origin. Further, based on the document which the Claimant himself compiled and appended to his claim form (p74), Mr Acheampong was in the same age group as the Claimant, as was Ruth Johnson. Brenda Grant was in the age group of 41-50.

71. In the circumstances therefore, we rejected the complaints in issues 3 and 4 on the basis that the burden of proof did not transfer to the Respondent because the failure to investigate and the disparity in the treatment between the Claimant and the comparators was not unjustified. It was easily explained by the processes and the chronology as set out above.

Issues 5 and 11

72. These were both complaints about the Claimant being required to attend, what was in the end the final absence hearing on 24 August 2016 in circumstances in which the Claimant maintained he was sick and too unwell to attend. He complained that the first Respondent had disregarded the fit note of 15 August 2016 and his email of 17 August 2016 to Julia Claydon. There was no dispute that the Claimant's absences to that point justified the application of the procedure to him. They had been ongoing for the preceding year and amounted to 93 working days as at the date of the second absence hearing.

The Tribunal was satisfied that the absence procedure allowed the Respondent to have regard to a period beyond the previous twelve months up to a three year period. However, the Respondent in fact, did not rely on that extended period and they justified their actions on the basis that they were dealing with the Claimant in relation to his rolling twelve months absence.

73. Thus, the first absence review under the procedure was held with the Claimant on 9 September 2015 and chaired by his then manager, Mr Acheampong (p121). The current fit note dated 15 August 2016 was due to expire to permit the Claimant to return to work on 15 September 2016. In the event, the Claimant remained to work as anticipated. There was a further meeting held with the Claimant to monitor his absence on 4 April 2016. By this time he had been off sick for 18 continuous days from 29 February to 21 March 2016. That second meeting was held with Ms Harrington and she wrote to the Claimant on 4 April 2018 setting out what had been discussed and how matters were left (pp139-142). She informed him that any further sickness would proceed directly to a hearing, as he had previously attended an absence review meeting on 9 September 2015. The Tribunal found that this was consistent with the provisions of the procedure.

74. The Respondent had obtained an occupational health report in relation to the Claimant (pp137-138) dated 15 March 2016. The issues of the occupational health report are dealt with in relation to issue 8 below. However, there was nothing in the occupational health report which undermined the Respondent's handling of the hearing on 24 August 2016 and the requests for postponement etc.

75. The previous occupational health referral had taken place in September 2015 and a report was prepared on 17 September 2015 (pp122-123). The occupational health report indicated that he was fit for work.

76. By 21 March 2106, the Claimant had had five episodes of ill health in the preceding 12 months, each consisting of 15 or 16 days off at a time.

77. Despite the fact that the Claimant was found subsequently by an Employment Tribunal and was considered at the time, on the strength of the information available to the management, not to be a disabled person, the evidence was that Ms Harrington tried to make some adjustments to make the Claimant's life easier and to avoid further absences due to his shoulder pain. This included agreeing to fund a referral of the Claimant to Access to Work out of the department's budget.

78. Given the provisions of the attendance management procedure which showed that the Claimant had clearly reached the relevant triggers, the Tribunal had no hesitation in concluding that Ms Harrington was fully justified in referring the Claimant to a hearing in relation to his absence. Further, the previous monitoring of the Claimant's sickness absence by way of the two earlier meetings and the occupational health reports, had not identified any obvious solutions to curing the lengthy absences.

79. The Respondent also took the view that being signed off sick was not in itself a good reason not to attend the sickness absence meetings. This follows as a matter of pure logic from the nature of the sickness absence monitoring procedure. It necessarily is to be applied to people who are not fit to attend work. There was no suggestion in any evidence before the Tribunal other than by implication from the Claimant's application for postponement, that he was not fit to attend the hearing. There was certainly no

independent verification of this. Further, throughout this period, the Respondent had the example of the Claimant having attended a fitness monitoring meeting in September 2015 just short of a week before his current fit note was due to expire.

80. The Claimant requested a postponement of the absence hearing on 24 August by his email of 17 August 2016 to Sharon Harrington. This was contained in the letter which in the event, Ms Davies replied to. Ms Davies's letter was sent to the Claimant by email (pp496) and letter (pp191-192). The email confirms that it was sent on 17 August at 2:09pm. In her letter she separated her responses to the Claimant in respect of the two issues. Like all the other letters from the Respondent's staff to the Claimant, the Tribunal considered that this was a well written, courteously worded and clear letter. She asked Mr Adewale to note first of all that she was responding on behalf of Ms Harrington to whom the postponement request had been addressed. She reiterated the grounds for the postponement application, as cited above, about asking for the postponement until the end of the month. She also referred to the Claimant saying that he was disabled and that his current fit note expired on 29 August 2016 and that he had not approached his union to accompany him to the hearing and needed to check availability.

81. She noted that the Claimant had not provided any evidence of being too ill to engage with the Council procedures that he was contractually obliged to comply with, nor of his inability to undertake a journey. She recorded that Ms Harrington understood that the Claimant's commute was a long one however his contention was that it was the seating at work that was an issue for him not the travel. She continued that Ms Harrington was also aware that he was able to travel from Croydon to the London East Tribunal and sit at a hearing for 6 days immediately before and after commencing his current sickness absence and that he was able to engage fully with those proceedings.

82. She stated that the Respondent's position as advised by Ms Harrington, was that the Claimant had been aware of the date of the hearing since 4 August, erroneously referred to as being in 2014, and that this was confirmed on 9 August 2016 which had given the Claimant ample time to arrange representation. (Although the Respondent made no reference to this in their submissions, it was not in dispute that the Claimant represented himself in the Employment Tribunal proceedings).

83. She concluded the letter by advising that the hearing would go ahead as scheduled and that the Claimant was strongly advised to attend to present his version of events. However, if he did not attend, she told him that the hearing may take place in his absence and the hearing officer may make a decision on the day, which would be based solely on the management case if he was not in attendance to present his own. Taking into account that he had recently been able to engage in a 6 day Employment Tribunal, they could see no reason why the Claimant could not fulfil his obligations as an employee to engage with this formal process.

84. The Tribunal also took into account the nature of the Claimant's ill health. It still related to his shoulder. This was not a matter which was said to have affected his cognitive or intellectual functioning. In those circumstances, there were no proper grounds being put forward, the Tribunal considered, to substantiate a postponement request. Nor indeed was there any certainty that the period of sickness which was certified to the end of the month would not be renewed. The application to postpone was being made at a late stage and management time had been set aside to deal with it.

85. The Tribunal accepted Ms Davies's evidence that the way in which she dealt with Mr Adewale's case was in line with the way in which she dealt with numerous other similar applications from other members of staff in varying circumstances. As she stated, this was her job. The decision to reject the postponement application seemed to the Tribunal to be justified and explicable by reference to the circumstances of the absence review and the notice given to the Claimant and the reasons put forward by the Claimant for the postponement not being sufficient. In those circumstances therefore, the Tribunal considered that the Claimant had not put forward primary evidence about the allegation which shifted the burden of proof onto the Respondent. Even if he had done so, the Tribunal considered that the explanation from Ms Davies established that there was no connection whatsoever with his race, age or sex by way of harassment and/or with the protected acts having been done. The reference back to the Employment Tribunal hearing was relevant in the context of the Claimant's ability to attend a hearing within the employer. There was nothing untoward about the application of this procedure to the Claimant in the circumstances. *Issue 5* was therefore not well founded and was dismissed.

86. In relation to *Issue 11*, although the hearing commenced on 19 August 2016, and Mr Osinaike agreed with the decision not to grant the postponement, he took the view that he would give the Claimant one further opportunity to attend. A two page letter was drafted and sent to the Claimant (pp195-196) by email (p498) from Mr Osinaike on 19 August at 1:55pm with a copy sent to Ms Davies.

87. In the first paragraph of the letter Mr Osinaike briefly outlined the recent chronology and the Claimant's request for a postponement and that the request had been rejected. He informed the Claimant that he had read Ms Harrington's report for the absence hearing along with the recent correspondence between the Claimant and the Council. He stated that he believed there was indeed good reason to proceed with the hearing in the Claimant's absence as he had not submitted compelling evidence as to why he was presenting as unable to attend and engage. He stated that he agreed with the management's position with regards to the Claimant's recent attendance at and full engagement in a lengthy Employment Tribunal case, and did not see how attending a formal workplace meeting could be considered more strenuous or exacerbating to the Claimant's condition. He also expressed the view that the Respondent could not resolve the issues that the Claimant raised without the Claimant engaging in the processes that he had a contractual obligation to comply with. All that being said however, he stated that whilst he would be entirely comfortable from a procedural point of view, with the hearing proceeding in the absence of the Claimant, he was very conscious that a possible outcome of the hearing may be dismissal on the grounds of incapability and therefore, he believed it was right to give the Claimant one more chance to attend the proceedings. He therefore notified the Claimant that the hearing had been rescheduled for Wednesday 24 August 2016. This therefore, gave the Claimant five days notice of the rescheduled hearing.

88. Mr Osinaike notified the Claimant that he had also arranged a meeting at the Town Hall rather than his office as this would reduce the journey time for the Claimant.

89. He concluded by stating, among other things, that the meeting would proceed with or without the Claimant in attendance. He invited him however, if he wanted any reasonable adjustments made to allow him to engage, to let Mr Osinaike know by the close of business on Monday 22 August 2016 so that they could be considered. He

suggested adjustments of presenting a written submission, asking a trade union or work colleague to attend on the Claimant's behalf or, if medical evidence was provided to confirm the Claimant's inability to travel, that the Respondent could arrange transport for the Claimant. He made it clear however, that this was not the limit to adjustments which could be considered. He expressly stated: "*I am amenable to discussing with you any other adjustments you put forward*." He urged the Claimant to engage with the process and reiterated that this was a significant meeting and that it was in the Claimant's interest to put forward his case to help Mr Osinaike consider his position.

90. In relation to the facts alleged under *Issue 11*, the Tribunal considered that the Claimant had failed to establish the primary facts relied upon namely Mr Osinaike had not disregarded the Claimant's fit note of 15 August 2016 or ignored the email of 17 August 2016. Despite the fact that these documents had been addressed by Ms Harrington and Ms Davies, he granted a further postponement. In the end, the Claimant's only issue was about the duration of the postponement, although this was not the case he put. The Tribunal considered that Mr Osinaike took a more than reasonable and flexible approach to the Claimant but quite properly required independent confirmation of the need to postpone the hearing further or to make provision for matters such as transport for the Claimant to the hearing.

91. *Issue 11* was said to constitute victimisation and/or direct race, sex and/or age discrimination (not harassment). *Issue 5* was said to constitute race, age or sex harassment and/or victimisation. Once again, the Tribunal considered that the reason for the treatment the Claimant received was patently referable to the circumstances before the decision makers and not the historical letter to Ms Harrington, which there was no evidence that either of them was aware of, or the Employment Tribunal case. Also in relation to *Issue 11*, there was no obvious or subtle connection with race, sex and/or age. The direct discrimination complaints were therefore also not well founded and were dismissed.

92. The Tribunal considered that in any event it was not obvious that the failure to grant a postponement for the length of time requested by an employee could amount to harassment. This was even more so the case with *Issue 5* in which the Respondent was clearly complying with procedure.

93. It was obvious that Mr Osinaike had seen the fit note and the 17 August letter because he referred to them and to the nature of those documents in the letter that he wrote to the Claimant of 19 August 2016.

94. The Tribunal considered in respect of both these issues that the Claimant had not overcome the threshold of stage one, i.e. that there was anything on the primary facts that could lead a Tribunal to believe that there was unlawful discrimination as alleged. Even if the Claimant had overcome that obstacle, the Tribunal considered that there was ample evidence to explain the Respondent's actions by reference to the circumstances.

95. The complaints were therefore not well founded and were dismissed.

Issue 6

96. It was convenient to deal with *Issue 6* at this point. Although it was not stated expressly in the agreed list of issues at the preliminary hearing in November 2017, it had

been directed that this complaint should be restricted to the fit note and the Claimant's letter (pp241-2 and p494). This was the "inaccurate or manipulated information" to which the Claimant referred. As the Tribunal's findings above make clear, Mr Osinaike did indeed see those documents.

97. At various stages during the hearing, the Tribunal considered that the Claimant wandered into areas which had been ruled impermissible such as matters to do with the disability discrimination complaint. Thus for example, in the evidence he sought to introduce a reference to an email sent by Ms Harrington to Mr Cox of Access To Work dated 22 August 2016 (p428) in which Ms Harrington was clearly seeking clarification from Mr Cox as to whether there had been any further developments in relation to consideration of the assessment of the Claimant. The Tribunal considered that if anything, this was yet further evidence that the Respondent was taking all practical steps to obtain all relevant information about the Claimant and to progress the processes as usual and, that the dismissal of the Claimant was not a foregone conclusion.

98. The preliminary hearing note was at page 107 (36) at paragraph 10. The fit note was at page 242 of 15 August 2016 and the Claimant's letter of 17 August was at page 494.

99. It appeared to the Tribunal clear that Mr Osinaike had all the relevant information and that it was presented to him in the bundle for the hearing. The Claimant appeared unable during his evidence, to explain where the inaccuracy or manipulation came in.

100. In the circumstances therefore, the Claimant had once again failed to establish facts which could lead the Tribunal to infer that there had been unlawful direct race discrimination as alleged. In any event, the Claimant had failed to establish that he had been subjected to unfavourable treatment which could found a complaint of victimisation. In all those circumstances, the complaint at *Issue 6* was not well founded and was dismissed.

Issue 10

101. It was convenient to set out our findings and conclusions in relation to *Issue 10* next. This was essentially a criticism of Mr Osinaike's decision to dismiss the Claimant at the hearing of 24 August 2016. This was said to constitute victimisation and/or direct race, sex and/or age discrimination. The Tribunal was satisfied that it was his decision alone. There was no suggestion of anybody else who had taken the decision and he came and explained his reasons in evidence. Apart from the reference in the correspondence flagged up by the Claimant himself on 10 August 2016 to the recent Employment Tribunal case, there was no other detail about the nature of the Tribunal claim previously brought by the Claimant. Whilst the Tribunal has noted above that if one had stopped to think about it, one may have deduced that this was in any event a discrimination claim and thus a protected act, the Tribunal considered that the lack of knowledge of the surrounding circumstances made less likely any intention to disadvantage the Claimant as a result of the fact that he had brought a Tribunal claim. Mr Osinaike was not questioned about his attitude towards discrimination claims. This complaint presumes that he might have been minded to treat a fellow employee less favourably because they had alleged unlawful discrimination against the Council. The fact that he was of the same racial origin as the Claimant was relevant to this. Further, it implied that he would similarly have reacted to discriminate against the Claimant on grounds of sex and/or age. No questions were put to

him about his age group. The Tribunal considered that he gave a reasoned account of why he reached a decision to terminate the Claimant' employment on grounds which were unrelated to those alleged.

102. The Tribunal also took into account that Mr Osinaike had received an email sent by the Claimant to him and three others (Ms Davies, Ms Claydon and Ms Cleary) on 22 August 2016 addressed to "*Dear All*". As before, he set out his understanding that the root cause of the dispute was because Sharon Harrington disputed his impairment amounted to a disability under the 2010 Act. This has been referred to above. He made a reference to his attendance at his Employment Tribunal in this letter (p197) as relating to his claim against Ms Harrington and the Council. He stated that "*in addition to my disability and back pain, I have sore throat".* He stated that he hoped to be well enough to return to work on Tuesday 30 August 2016 (some 8 days later). It was unclear why he was so confident about this.

103. It is also possibly relevant to just describe the other element of dispute between the Claimant and Ms Harrington. The Tribunal has referred to the fact that she had agreed to an assessment of the Claimant's needs by Access To Work to be funded by the department, because the Claimant was not considered disabled by occupational health. In his letter to "All", the Claimant referred to the issue of Sharon Harrington asserting an automatic right to be present at his assessment by Access To Work. He remained in dispute with her about this issue. Once again, the Claimant did not refer the Tribunal to any document which suggested that this was not an appropriate course. The Tribunal bore in mind that the purpose of an Access To Work assessment is to see what if any adjustments can be made for the employee in their workplace. It appeared to the Tribunal to be eminently sensible that the group manager of the service should be present to have some input into that assessment.

104. Further, the Tribunal had the provision in the Respondent's absence monitoring policy (pp254-256) which concerned the holding of absence hearings. There was no respect in which the Respondent had acted in breach of this process. Specifically (at p256) under the heading 'Dismissal', it was stated as follows: "…*If it is considered that all agreed support mechanisms have been put in place and/or the employee cannot confirm a return to work date, the hearing officer may decide to dismiss; the employee will be paid in lieu of notice. There is no entitlement for employees to exhaust their sick pay before dismissal on the grounds of capability/incapacity".*

105. It was also apparent from the typed notes of the hearing (pp200-204) that this was not simply a rubber-stamping exercise. Mr Osinaike probed matters with Ms Harrington and he was supported in this enquiry by Ms O'Brien from HR. He explored the adjustments which had been discussed for the Claimant and implemented by the Respondent. He also considered both the occupational health and GP evidence.

106. In compliance with the timetable set out in the attendance at work procedure, by a letter dated 30 August 2016, Mr Osinaike wrote to the Claimant setting out his decision and the reasons for it (pp205-207). At this point, Ms Harrington held the position of Deputy Operational Director. HR support was provided to her by Ms Siobhan Davies and Ms Jacqui O'Brien provided HR support to Mr Osinaike as Chair. The notes were also taken by a note taker.

107. He recorded that he had treated the Claimant's letter of 22 August 2016 referred to

above, the "Dear All" letter, as written submissions in the absence of the Claimant or a representative. He then summarised the process that had been followed and the matters which had been considered. He noted that there was no good evidence before him that the Claimant was disabled within the meaning of the Equality Act 2010. However, it was clear that he believed the Claimant had a problem with shoulder pain and that some of the adjustments had been discussed and agreed with him and had been implemented. He found no evidence of any resistance by management to making reasonable adjustments. Importantly however, he found that it was evident that the Claimant had not engaged in the sickness absence procedure and he found that Mr Adewale had hindered Ms Harrington's efforts to support him in the work place. Having reviewed other matters which had been considered, he concluded that Ms Harrington had gone above and beyond what was required from her as a manager to support the Claimant during his ill health.

108. In relation to his most recent assertion that he needed a special chair as an adjustment for his return to work, as well as referring to the fact that this had not been taken through the process which Ms Harrington had made special arrangements to pay for through her department's budget, by the Claimant having set up an Access To Work meeting because of his objection to Ms Harrington being present, he also referred to the fact that as far as he was aware, the Claimant had attended the Tribunal in Poplar for 6 days, directly after and before the two periods of sickness in July 2016 and that his shoulder pain had not prevented him from both travelling from Croydon where the Claimant lived, to East London where the Tribunal was and engaging fully with the proceedings. This was despite the fact that there was no special chair for the Claimant to use during the 6 days of the Tribunal.

109. He concluded therefore, that there was nothing more that Ms Harrington or the Council could put into place to help the Claimant maintain attendance in the work place and that as his absence was having an adverse effect on service delivery, and having considered all the information available to him at the absence hearing, his decision was to terminate the contract of employment on the grounds of the Claimant's incapability to attend work. His last day of service was to be 23 August 2016 and the Claimant would be paid 4 weeks in lieu of notice plus any outstanding annual leave entitlement.

110. Although the dismissal letter referred to the effective date of termination as 23 August, in fact the calculations in relation to annual leave entitlement were based on a termination date of 24 August 2016.

111. The Claimant relied on 2 comparators, Ms Corrine Rudd and Mr Christopher Beasley. Ms Rudd was relied on as a comparator in support of his direct race and direct sex discrimination complaints and Mr Beasley as a comparator in respect of his direct race discrimination and age discrimination complaints in relation to issue 10.

112. Ms Rudd was also a member of staff who was subjected to the Respondent's absence procedure and who attended an absence hearing in which the decision was taken to dismiss her because of her absence, but it was deferred for a year. It was made absolutely clear to her that if her attendance did not improve, the decision to dismiss would be implemented. The distinguishing factor however in relation to Ms Rudd, was that she cooperated and engaged with the process. The decision maker in that case was Robin Payne, who at the time was Divisional Director, Environment and Enforcement Services. There was also a possible way forward going forward in relation to the

employee working part time. A further distinguishing factor was that within the employment, Ms Rudd's condition was acknowledged as a disability within the scope of the Equality Act. She had attended the absence hearing with a representative of her union, T&GW Unite.

113. It was also clear from various comments and findings in the hearing outcome letter to Ms Rudd (pp668-670) of 27 May 2014 that the Respondent and indeed the manager concerned, Ms Harrington, took the issue of attendance very seriously, just as was the case later with the Claimant.

114. It was also clear that in relation to the option of part time working, there was a genuine dialogue going on between the employee and her managers.

115. Having said that, the Tribunal did not consider that a decision to dismiss deferred for one year was a different outcome in principle from the decision that was taken in relation to the Claimant. Both sanctions imposed were of a serious order and dismissal was indeed ordered in Ms Rudd's case, it was just deferred because of the mitigating circumstances and the possibility of other options. (pp626-628; 650-654; 657-667; 668-670).

116. The Tribunal therefore concluded that even if one accepted that there was a difference in treatment in that the dismissal of Ms Rudd was deferred, the Tribunal did not consider that it was likely that this was anything to do with race or sex. In those circumstances, the Claimant had not established the 'something more' under the ***Igen*** test, which would shift the burden to the Respondent. Even if the burden shifted however, the Tribunal considered that it was quite clear that this different outcome was likely brought about as the Respondent indicated, because that employee had attended the absence hearings and had engaged with the Respondent to find an alternative. The Tribunal took into account the terms of the letters to the Claimant particularly from Mr Osinaike of 19 August 2016, in which he almost pleaded with and certainly urged the Claimant to attend the hearing to bring about a result other than dismissal.

117. The second comparator Mr Beasley, was the Tribunal agreed with the first Respondent, not a true comparator. His absences were sporadic and short term and they were mixed with short term sickness and unauthorised absence. Thus, for example when he was called to a disciplinary in relation to absence and timekeeping (p600), in a letter dated 15 October 2015, the Respondent set out that he had recently taken unauthorised time off on a total four occasions over five days between August and October 2015 citing car trouble and child care as the reasons. Ms Harrington was the manager dealing with this case. Although in relation to this letter Mr Beasley was told that a hearing would take place on 6 November 2015, there was no evidence before the Tribunal that this hearing went ahead. There was evidence however, of a return to work meeting with him (p602) conducted by the Claimant. The outcome of which was that a guidance meeting would take place on 11 November 2015.

118. The Tribunal considered that this was another reason why he was not a true comparator because the decision maker here was the Claimant himself.

119. The documentation relating to Mr Beasley's absence started from the first quarter of 2014 (pp586-589) in the notes of a formal absence review meeting on 27 March 2014. Mr Gillam who was chairing the meeting noted that Mr Beasley had recently become a

father and was aware that Mr Beasley was finding the lack of sleep and fatigue a factor. The Tribunal noted that Mr Beasley gave assurances about his future attendance and commitment to maintain acceptable levels. He also attended the meeting and addressed the problem in cooperation with his managers. There was no further action taken as a result of that meeting. That meeting had been called after four periods of sickness absence totalling 6 days in a twelve month period. This was considerably different from the position that the Claimant faced towards the end of his employment.

120. Mr Gillam who was Parking Supervisor at the time, decided that he would monitor Mr Beasley's absence for 12 months from the date of the review. Mr Beasley was warned that further absence may lead to further review meetings or formal absence hearings if Mr Beasley was unable to attend work through illness during that period (pp588-589).

121. There was then some further evidence of Ms Harrington chasing up Mr Acheampong as Mr Beasley's direct line manager in terms of what action he had taken in relation to the sickness absence in December 2014 (p590). This again suggests that Ms Harrington was taking all sickness absence seriously. She wrote that chaser letter in an email in March 2015. By a letter dated 29 June 2015 from Ms Harrington, Mr Beasley was written to about an absence review meeting to take place on 17 July 2015. She indicated that this followed a recent absence of one day for toothache on 25 June 2015 and referred back to absence of one day in December 2014 and two days in March 2015. Once again, the Tribunal noted that this absence was not as extensive as the absence that the Claimant had accrued. Despite this, Ms Harrington implemented the procedure.

122. The outcome of the meeting which also considered a further day off sick on 16 July 2015 appears to have been inconclusive and, when he was written to after the meeting he was told that Mr Adewale who had now become his line manager, would be his first point of contact if he was unable to make into work (pp593-594).

123. Thereafter, the monitoring was done by Mr Adewale. The notes of a one to one meeting held between them on 25 September 2015 confirms that Mr Adewale was monitoring the attendance and timekeeping of Mr Beasley (p596). The next absence was due to a car breakdown on 12 October 2015, not sickness. Once again, Mr Adewale was responsible for dealing with this (p598). Having taken two further days of unauthorised absence on 5 & 6 October 2015, which the Respondent treated as unpaid leave, Mr Adewale noted that at the return to work interview on 9 October 2015, he had explained to Mr Beasley that further unauthorised absence would result in formal action being taken. Thus, he noted at the interview on 13 October 2015, that formal action would indeed be taken in respect of the unauthorised absence on 12 October 2015.

124. Mr Adewale gave the signed copy of a letter inviting Mr Beasley to the meeting on 11 November 2015 (p603) which was not the date that was proposed by Ms Harrington in the letter of 15 October 2015 (p600). He told Ms Harrington this and she acknowledged receipt of this in an email of 19 October 2015 (p603). The Tribunal considered it most likely that there had been an agreement by the managers to deal with the matter in this way. This was confirmed by an email from Ms Harrington to Mr Adewale of 19 October 2015 at 10:47am. She referred to having taken advice from HR and that they had advised that they should start with a guidance meeting (p606). This led to the invitation to the guidance meeting on 11 November.

125. At the guidance meeting which Mr Beasley attended and was represented by his

trade union representative, he obviously engaged in a discussion about the causes of his continued short-term absences which were predominantly not sickness related but due to the commitments of his family and the unreliability of his vehicle. He also engaged in a conversation about a request he had recently made to reduce his hours of work to four days a week for a short period of time. Once again therefore, there was a positive engagement and the Respondent was given a plan that they could implement in order to try to improve the attendance of the employee.

126. Despite the fact that there were records of further unauthorised absence on 16 December 2015 and 29 March 2016, these were both dealt with by Mr Adewale treating the absence as unpaid leave and not taking any further sanction. Thus, the Tribunal considered it was not appropriate to treat the way in which Mr Beasley was dealt with as a comparator for the Claimant, given the Claimant was the decision maker for that period of time.

127. The last document available to the Tribunal about absence on Mr Beasley's part related to a return to work interview on 24 June 2016. Here also, Mr Adewale was the relevant line manager. Once again, the non-attendance which was not related to health and was sanctioned retrospectively by the Claimant as a day's leave.

128. The picture was however, that Mr Beasley was also subjected to the absence procedure and disciplinary process when it was warranted in relation to his attendance. There was no evidence to suggest that the decision to dismiss the Claimant was made on the basis of his race, or sex or age by reference to these comparators. The Tribunal therefore considered the complaint in *Issue 10* was not well founded and was dismissed.

Post termination complaints

129. The Claimant then made complaints about matters which had occurred after the termination of his employment.

Issue 8

130. The first of these was *Issue 8*. Whilst the Claimant had difficulty articulating the basis of his complaints in many respects, this was one of the least well articulated. He referred to requests made by him on 17 October 2016 (pp533 and 535). Both these requests were directed to occupational health and not to Ms Harrington or any other member of the Respondent's management. He asked for "..*all data about me which you hold*" to be supplied to him. He referred in the heading of each of the letters, to the right of access to personal data and to the Data Protection Act 1998. In the second letter on 18 October 2016, he made reference to the letter of Keighley Smith dated 10 March 2016 regarding his referral appointment on 15 March 2016. He asked as a matter of urgency for a "*copy of the actual referral which you received from my manager*".

131. Ms Harrington wrote to the Claimant on 21 October (p536) acknowledging the Claimant's email requesting information and said that this had been passed to the information governance team who would contact him directly regarding his request.

132. Before the letter to occupational health, the Claimant had written to Sharon Harrington and copied to Michelle Coleman on 13 October an email (p528) in which he asked for the actual referral which Ms Harrington sent to occupational health minus what

he described as all the bits and pieces which she had included in her email to him of 12 October 2016; and also asked for the email purportedly sent by him, part of which he had included and appeared under '*please provide an overview of the reasons for this referral'?;* and all data about himself held by occupational health and any individuals in the organisation connected to occupational health.

133. It appeared that the request for the file from occupational health was sent securely to the Claimant by Annette Cardy as part of an email invitation on 20 October 2016 (p216). The Claimant responded to her by saying he was unable to read the email or to open the attachment and asked for the email to be re-sent and for the attachment to be in a particular format. Ms Cardy responded in an email sent on 25 October 2016 (p215) to explain that the Respondent's position was that it was important for the Claimant's security that his files were sent securely and not as an attachment that could be accessed by others fraudulently. She told him how he could access the email by setting up an account which would then allow him to access the documents securely.

134. The Claimant responded fairly promptly and indicated that he did not believe there had been a security issue over attachments sent to him via the usual format. He requested that if Ms Cardy was not willing to send the file as he had requested, whether it could be sent to him by post. She responded the following day by indicating that the insecurity was because the Claimant was using a Yahoo account and that the Council had a duty to send any private documents via a secure email method, which was the one that she had used. She referred again to the fact that the previous email would have instructions to guide the Claimant to set up his own log in and unique password so that he could securely access the documents that she had sent to him. She concluded by saying that if he gave permission for her to send the documents to him insecurely, to the Yahoo email account, she could also do this. The Claimant's response later on 26 October 2016 (p214) was somewhat short and he complained that he felt that Ms Cardy was dealing with him in an overbearing manner. He repeated his request for the email to be sent to him by post. By an email sent to him the following day, Ms Cardy indicated that as requested she would send the documents to Mr Adewale now by recorded delivery.

135. There was no suggestion that he did not then receive the documents.

136. It was therefore not clear in all the circumstances what detriment the Claimant was subjected to in terms of the provision of his data, which was achieved after ironing out of the practicalities within two weeks. There was no evidence that this was an unusually long time or as to how this compared with other similar requests. The Tribunal could also see the reason for the delay, which was a question about the security. That was obviously intended to protect the Claimant's interests or that of an employee seeking information. The fact that he did not ask for this does not mean that the reason was not genuinely the reason of protecting the Claimant's information. What it did not indicate was that there was any relationship between this action and the earlier protected acts or grounds of race, colour, sex and/or age. Further, it was difficult to see that it was reasonable for the Claimant to interpret it as an act of harassment.

137. In the meantime, Ms Harrington had responded promptly to the requests in the email which had been sent by the Claimant to HR on 7 September 2016. She wrote to the Claimant in an email of 12 October (pp519-526). In the covering email she addressed the requests made by the Claimant about contact details of whoever at Access To Work had advised Ms Harrington or agreed that she should be a third party, with an automatic right

to be present at his assessment; as to the copies of the referral letters sent to occupational health in March 2016; and as to information on the re-deployment options raised by Julia Claydon. In the copy of the email she attached responses to each of the requests for information. In particular, she attached in the email the referral which was sent on 15 March 2016. As to the last request for information on the re-deployment options raised by Julia Claydon, she attached two letters which she said that Mr Adewale had previously received and that if this was not what he required, could he please explain in more detail what it was he was looking for.

138. It was not suggested that the Claimant did not have the relevant occupational health reports which were prepared. He received the referral for March 2016 on 12 October 2016. It was therefore unclear what it was he was lacking thereafter.

139. Nor was it obvious or to be implied from the requests made, that there was any connection with any of the grounds of discrimination relied on by the Claimant in relation to the documents he requested.

140. Mr Cheves appeared to suggest that it was only in the Employment Tribunal hearing that it became clear that the Claimant was asking for all information held by occupational health about him. The Tribunal does not consider that this is accurate in the light of the terminology used by the Claimant in his letters to occupational health at pages 533 and 535 of 17 & 18 October 2016. However, the Tribunal considered that there was no basis for contending that this amounted to harassment, given the correspondence the Tribunal has outlined already between the Claimant and Ms Cardy and also the background of the referral having been given to the Claimant. Further, there was no evidence that anyone connected with occupational health was aware of the protected act relied upon by the Clamant. Prior to this, the last involvement of occupational health had been in March 2016. Further, there was no circumstantial evidence of any discriminatory acts or omissions. There was no evidence as already stated, about how others were treated when they made similar requests. Finally, there was no evidence that this was detrimental to the Claimant. He had already presented his appeal. He was no longer employed by the Respondent and, once he obtained the relevant information, it is not clear what use he made of it.

141. Ms Harrington who was aware of the protected acts, had asked occupational health to forward the documents to the Claimant as set out above. (p536).

142. *Issue 8* was therefore not well founded and was dismissed.

Issue 9

143. Here again, although it was complained of as an act of harassment in relation to all three protected characteristics and direct discrimination on a similar basis and victimisation, there was no evidence whatsoever about what the delay was in other cases in terms of the provision of the copies of notes of the absence hearing from anyone apart from the Respondent's witnesses. The Respondent's witnesses were clear that delay of some 27 days as was experienced in the Claimant's case of the provision of typed notes was commonplace. Further, during the course of the hearing, the Claimant's position on this changed somewhat to stating that he was complaining not so much about the typed notes of the hearing, which he had not attended, but about the failure to provide handwritten notes of the hearing. He did not point to any detriments to him of not having

the handwritten notes. Further, the Respondent had complied with their duty under the procedure to notify the Claimant of the outcome in writing of the hearing within 5 working days. The Tribunal noted that the letter from Mr Osinaike was very detailed and it was not apparent what further information the Claimant lacked. Indeed, he presented his appeal on 9 September 2016 (pp208-212). The document ran to 5 pages.

144. Although Mr Adewale complained in his letter of appeal dated 9 September 2016 that he had not yet seen the notes and that there were factual inaccuracies and contradictions in Mr Osinaike's letter (para 8 p210), he did not subsequently submit any further points to the appeal (p222). He had written a letter to Mr Osinaike of 21 September 2016, before he received the notes. This was included in the bundle for the appeal.

145. There was no reference whatsoever in his contemporaneous documents that the Claimant wished the copies of the manuscript notes. Thus, the Tribunal considered that there was no evidence of a detriment. The period of time that it took the Respondent to provide the typed notes did not constitute harassment and could not reasonably have been seen as such especially as there was no evidence available to Mr Adewale about how long such requests took. It was also noted that there was no evidence of Mr Adewale having chased up the provision of the typed notes or indicated that he wanted the notes to be copies of the original manuscript. Further, there was no basis for even considering that the Claimant had established primary facts which could lead to the Tribunal concluding that the 27 days it took to provide the typed notes, came about by reason of the Claimant's race, sex and/or age.

146. In conclusion, the Tribunal did not consider that this complaint was well founded and it was therefore dismissed.

Issues 12 and 13

147. The next two matters complained about were *Issues 12 and 13* and they addressed the appeal. The Claimant complained that the Respondent had failed also to postpone the appeal on 12 December 2016 and that the appeal had not been upheld. The Claimant was invited to an appeal hearing by letter dated 25 October 2016 (p541A) and the letter of invitation enclosed the appeal hearing report (pp223-8).

148. In an email to Michelle Coleman of 14 November, the Claimant had ostensibly written to chase up the outcome of his appeal. He then made the point, which he had made previously as cited above: "..*I understand from ACAS that my managers do not accept that I am disabled and that they dispute my claim. <u>This being the case</u> (*emphasis added)*, I consider it a pointless exercise going through the motion of a sham appeal process with no realistic prospect of success*." He then continued that if on the other hand there had been a "*misunderstanding between ACAS and my managers, I would require adequate notice of any appeal hearing as I would require representation as I do not want to be further disadvantaged*". The Tribunal noted that the second possibility of his attending the appeal appeared to based on the premise that his managers accepted that he was indeed a disabled person. The Tribunal also thought that this correspondence encapsulated the theme running throughout the contemporaneous documentation of the Claimant primarily believing that he had been subjected to disability discrimination and being somewhat exasperated at the Respondent for not accepting that he was a disabled person.

149. As to the complaint about an unjustifiable failure to postpone the appeal hearing from 8 December 2016, the first point was that the Claimant made no request whatsoever for a postponement. Indeed, the letter or email to Michelle Coleman referred to on 14 November (p541) suggests that if anything, he was pressing the first Respondent to move on to deal with the appeal.

150. Another element of complaint in relation to these issues was that the Claimant said that the Respondent should have postponed the hearing of their own accord because they could not be certain that the Claimant had received the pack. It was not disputed that the pack was sent by the Respondent. The Tribunal considered that the correspondence between Michelle Coleman, HR Manager (Employee Relations) and the Claimant between 29 November and 8 December 2016 captured the relevant factual background. Ms Coleman wrote to the Claimant to inform him that the papers for the appeal had been sent to him by recorded delivery on 28 November 2016. She asked him to please email her to confirm receipt.

151. Further, the Claimant did not suggest he did not receive any of these emails. Mr Adewale did not then reply to Ms Coleman until 5 December 2016, some three days before the hearing was due to take place. He informed her that the papers had not been delivered, he had not received them, and he asked for proof of postage.

152. During the hearing, the Claimant on more than one occasion, explained to the Tribunal that it was not unusual for documents addressed to his home address, to either not be delivered or for there to be difficulty in delivering them because his actual letter box was not obviously situated on the street which the address related to. At no point during this correspondence with the Respondent, or in any of the documents that we saw, did he make that point to the employers. Nor did he suggest another method by which the papers could have been sent to him for example, by being scanned and sent as an attachment, when he received the notification from Ms Coleman, on 29 November 2016, that the papers had been sent by recorded delivery to him.

153. The Tribunal considered that it was odd that rather than provide information which would facilitate the sending or the receipt by him of that documentation, he queried the genuineness of the postage by asking for proof of postage. Ms Coleman responded by sending the confirmation and also advised Mr Adewale to contact the post office urgently to arrange collection. The information that she obtained about the delivery was that there had been an attempt to deliver the documentation before 2:15pm approximately on 13 November 2016 and that the post person had left a 'while you were out' card. It also noted that there were instructions on the card on how to collect the item or arrange a re-delivery.

154. Unsurprisingly, Mr Adewale then contacted Ms Coleman on 7 December 2016 just after 4:10pm to indicate that he had indeed contacted the Royal Mail and that they would redeliver the papers the following day. There was no reference whatsoever in this correspondence from the Claimant to a request for postponement or querying whether the hearing would still go ahead given that he was only due to receive the papers the next day. The Tribunal did not consider it was reasonable to expect an employer to imply such a request given the history of non-attendance by the Claimant, his ability to express his opinions and views quite clearly in correspondence, as set out in the documents referred to in this case and the fact that he had in the recent letters referred to by the Tribunal, indicated that he believed the whole process was a sham. He had also not attended

several hearings in relation to the absence process and restructuring. In any event, Ms Coleman wrote to Mr Adewale by email sent just after 9:45am on 8 December 2016 just to remind him that his appeal was going ahead at the Civic Centre at 10:30am. There was no response from the Claimant.

155. The Tribunal has already remarked in a different context, in relation to the complaint about not being sent the notes of the hearing; that the appeal packs of documents itemised in an index (p222) consisted of documents that the Claimant had in any event prior to the hearing before Mr Osinaike and then clearly the Respondent had added the Claimant's letter of appeal and the letter to Mr Osinaike of 21 September 2016. There was therefore nothing new in the appeal bundle and the Claimant did not put forward any basis for suggesting that he might have anticipated that there would be something new in this bundle.

156. In all the circumstances therefore, the Tribunal considered that there was no evidence that race or sex or grounds of age were implicated in any way in the decision not to postpone the hearing (I*ssue 13*) and therefore, the Tribunal did not consider that the Claimant had established facts from which the Tribunal could conclude that the Claimant had been treated less favourably on those grounds.

157. In relation to *Issue 12*, given that the Claimant did not attend and the appeal was upheld on essentially the same grounds as the original decision was made, and that the appeal panel could see no reason why the Claimant had failed to attend or to engage or to take up the options suggested by Mr Osinaike to facilitate the hearing, they endorsed the decision made by Mr Osinaike. They also acknowledged that the sickness absence amounted to 93 working days as at the date of the second absence hearing and that this had had a detrimental impact on the Claimant's colleagues and on service delivery. Given that the Tribunal also considered that the dismissal by Mr Osinaike was not in any way related to the Claimant's protected characteristics, as outlined by him and/or constituted an act of victimisation, the Tribunal rejected *iIssue 12* and considered that it was not well founded.

158. A further point in relation to the failure to postpone which the Tribunal accepted, was the evidence from Ms Coleman about the practical difficulties of arranging appeal hearings given the participants in those meetings and their conflicting timetables and schedules. The Tribunal did not consider therefore, that postponements were lightly given as Ms Coleman confirmed. Also, once again, the Tribunal accepted that this was the Council's general approach to postponement applications and not a different approach for the Claimant. The Claimant had no evidence about postponements being granted for anyone else.

159. Finally, there was no evidence in relation to the victimisation complaint (*Issue 12)* that any of the members of the personnel board who made the decision to uphold the decision of Mr Osinaike, was aware of the protected acts relied upon. Certainly, there was no evidence that their decision was related to the protected characteristics, such as to raise issues which would lead to the burden of proof shifting to the Respondent.

160. In all the circumstances, the complaints in *Issues 12* and *13* were not well founded and were dismissed.

161. The final matter for consideration was *Issue 14*. This was a complaint under the

Employment Rights Acts in relation to non-payment of money. The Claimant clarified that he was not alleging failure to pay notice pay.

162. This was the issue which the Tribunal found the Claimant had been the least clear about. Although he had provided a number of pages of calculations which had been ordered by an earlier Tribunal in order to get to the bottom of where the dispute lay, it appeared that he still was unable to identify what, if any, underpayment had been made. The Tribunal therefore encouraged the parties to see if they could make available to the Claimant, an appropriate member of staff from the human resources side, so that the documents could be run through to identify any underpayments. Everyone agreed that if the Claimant had not been paid appropriately, then he should be reimbursed, but that equally if he had been paid appropriately, it was right that he should not be paid any further. Further, the Tribunal was keen to identify if there was a point of principle that needed to be determined and then the parties could calculate the figures.

163. Unfortunately, the parties were not able to agree on the position despite a meeting having taken place between Mr Adewale and Ms O'Brien who gave evidence on the last day of evidence. She produced an exhibit which was a table (R10) in which she set out her view about the Claimant's annual leave entitlement since the commencement of his employment, through to the termination on 24 August 2016.

164. The Claimant also relied on various documents, the most significant of which was a screen shot of his annual leave position at a date which was not clear (p870a) but which tallied with the leave dates in [R10] provided by Ms O'Brien. It therefore appeared to the Tribunal that there was in effect agreement, although the Claimant did not concede this, in relation to the holiday taken in the final leave year.

165. The Respondent's position in simple terms, was that the Claimant had taken far more leave than he had accrued up to the date of termination and that therefore, he owed the Respondent about 101.5 hours for which he had been paid in error by the Council. Ms O'Brien frankly admitted that she did not think that the Council would have become aware of this if they had not revisited the issue of payments made to the Claimant at the termination of his employment in order to answer the allegation in this case.

166. The Claimant also relied on the payslips for July, August and October 2016 in which it was apparent to the Tribunal, because they were listed as such, that there had been a number of adjustments, particularly in the last two payslips. Further, the Claimant relied on a letter which had been sent to him from the Respondent's pay section which taken at face value, suggested that he had not taken more holiday than he was entitled to.

167. Finally, the Tribunal considered that the position in relation to holiday taken for the leave year 2014-2015 was also substantially agreed although there was a difference between the Claimant and Ms O'Brien of abut half an hour. This indicated that there were 21 hours to be carried over to the next leave year (p432). There were no documents about the leave year 2015-2016 save the calculation by Ms O'Brien. On her calculation, the Claimant carried over 38.5 hours from 2015-2016 into the final leave year. Ms O'Brien then added those hours to the hours that he accrued during the four months of his employment in that leave year from 1 April to 31 July 2016, which she calculated as giving 63 hours. She added this to the 38.5 hours carried over and that yielded 101.50 hours entitlement.

168. It was not clear to the Tribunal why she used 31 July 2016 as the calculation point for the leave accrued in the final leave year as opposed to 24 August 2016. It appeared to the Tribunal that this was, in all likelihood, simply a typographical error of which there were others on the page. She calculated as follows:

> "Annual Leave Entitlement
> 1 April 2016 - 24 August 2016
> →189 hours /12 months x 4 months (1.1.16-31.7.16) = 63 hours entitlement"

It appeared to the Tribunal therefore, that there may have been an error in her calculation in not crediting the Claimant with entitlement for the last month or 3.5 weeks of employment up to 24 August. Even if that were an error in calculation, it did not appear to the Tribunal that that would adequately account for the discrepancy between the amount actually paid to the Claimant in respect of annual leave and the amount to which he was entitled. The Tribunal was mindful that this was not an application by the Respondent to seek a repayment of the sums in respect of annual leave which was overpaid. The Tribunal was primarily concerned with checking whether the Claimant, on whom the burden of proof lay, had established that he was underpaid at all. He would also have needed to establish to what extent he was underpaid and in respect of what.

169. The Claimant, it was agreed, had taken leave from:

"Tuesday 12 April - Friday 15 April 2016 -	28 hours
Thursday 28 April – Friday 29 April 2016 –	14 hours
Monday 23 May to Thursday 26 May 2016 –	28 hours
Friday 27 May 2016 –	7 hours
Monday 6 June 2016 –	7 hours
Monday 4 July - Friday 8 July 2016 –	35 hours
Monday 11 July –Friday 15 July 2016 –	35 hours
Monday 18 July – Friday 22 July 2016 –	35 hours
	_____
	189 hours"

170. Against this, Ms O'Brien set the 101.5 hours which she calculated the Claimant had accrued and/or was entitled to by virtue of 38.5 hours being carried over from 2015-2016. This gave a shortfall of 87.5 hours in favour of the Respondent.

171. The Tribunal was thus not satisfied on the basis of the evidence put forward by the Claimant, that he had been underpaid annual leave.

172. The additional way in which the Claimant put the case, was that the time that he had taken off to attend the Tribunal hearing was treated as sick leave and that therefore he was entitled to the annual leave pay. The Tribunal was not confident that this was actually still being pursued at the hearing because the Claimant had not addressed this adequately in his witness statement.

173. The Claimant referred to this matter in his "Dear All" letter of 22 August 2016. He stated that he had been on pre-booked holiday from 4-22 July 2016 to attend his Employment Tribunal hearing and that since this period was "regarded as sick absence", he wished to request that he got the 15 days annual leave reinstated on his annual leave

records on Oracle so he could get the benefit to which he was entitled.

174. On the snapshot document the Claimant produced about his annual leave ("Oracle"), (p870a), the annual leave for the period 4-22 July 2016 was recorded under approval status as 'pending approval'. Ms O'Brien's evidence was that when she had conducted the research into what the Claimant had been paid and what annual leave he had taken, the time off from 4 July to 22 July 2016 had indeed been recorded as annual leave and not just pending approval. The Claimant was unable to tell us exactly what date the screenshot from oracle referred to and also, there was nothing on the face of the document to tell you what the date was. There was apparently some further part of the document which would normally be available but which the Claimant had apparently not brought to the Tribunal. He volunteered to bring it the following day but the Tribunal considered that it was not proportionate to delay consideration of this matter until receipt of that document and also, the Tribunal had by now understood that the dates of leave recorded in this document, were consistent with the dates that Ms O'Brien had relied on in her calculation and that the Claimant wanted taken into account.

175. The Respondent's payroll department had written to the Claimant (p440) by letter dated 2 August 2016 informing him that his entitlement to full sick pay would end on 4 August 2016. Thus, at the time that the Claimant took time off to attend the Employment Tribunal and prepare for his hearing between 4-22 July 2016, he was still entitled to full sick pay, apparently. There was no information beyond the statement in the letter from the payroll officer to the Claimant, as to what dates had been taken to be sick leave by her. There was no examination of this issue during the course of the hearing as to whether in fact the notification that the Claimant would be going on half pay as from 4 August 2016, was an erroneous calculation.

176. The letter the Claimant relied on as having received from the payroll officer, was sent on 27 September 2016 (p440a) after the termination of his employment, and purported to describe to the Claimant that certain errors had been made in calculating his pay, but that these had now been adjusted with the net effect that the Respondent owed the Claimant 35 hours annual leave which he was told he would be paid in October. The October 2016 payslip (p439) contained a payment for 35 hours leave described as 'leave not taken'. It appeared that this paperwork was not accurate.

177. The Tribunal was also satisfied that apart from in that payslip and where there was an adjustment retrospectively, the payslips did not normally indicate when it was normal pay, whether there were any days of sickness or annual leave in respect of which the Claimant would have been entitled to be paid full pay for. It was therefore perhaps understandable that it had been somewhat difficult for the Claimant to understand the position in respect of his pay correctly. However, in accurate statements in letters do not give rise to entitlement to pay.

178. The documents that the Claimant had provided in an attempt to clarify this claim, were at pages 448a – 448x. However, as set out above, despite the Tribunal urging the Claimant to clarify his position in relation to what the error was on the Respondent's part, this was never properly articulated. It was certainly not evidenced by contemporaneous documentation. Although the Claimant made various points about contesting the adjustments which had been made to his final payslips in August and October, during the hearing he seemed preoccupied with the July 2016 payslip and indeed the documents he produced by way of tables to support his unlawful deductions of wages claims, had been

amended several times and a further set of amendments was produced during the course of the hearing.

179. Certainly, during the hearing when Ms O'Brien gave evidence about the fact that the Claimant had not accrued as much leave as he had taken in the leave year, the Claimant did not seem to appreciate the effect of that statement.

180. The Tribunal considered that merely from casting an eye over the leave dates which were agreed for the final leave year, it was apparent that by August 2016, the Claimant had used more leave than he was entitled to up to that point. In the normal course, if the Claimant's employment had continued, this would not have presented a difficulty but it did because his employment was terminated towards the end of August. As stated above, this took into account the fact that the Claimant had carried over about 5.5 days leave (38.5 hours) from the previous leave year.

181. Thus in days, the Claimant had taken 27 days leave on the basis that the total working hours for one day were 7 hours (27 x 7 = 189 hours). Ms O'Brien calculated that he was entitled to 101.50 hours and this was equivalent to 14.5 days (9 days in the current leave year plus 5.5 days carried over from the previous leave year).

182. The most recent document in the bundle, although neither party referred the Tribunal to this document, was the Claimant's statement of outline terms following the re-grading of his post as debt recovery officer sent to him on 24 June 2015 (p120). That confirmed that his holiday entitlement was 27 days per annum. Thus, if the Claimant had taken 27 days by 24 August 2016, the Tribunal considered that the likelihood was that Ms O'Brien was correct in her calculations.

183. The Tribunal therefore considered that in all the circumstances, the Claimant had failed to establish that there had been an unlawful deduction from wages and/or a failure to pay holiday/and sick pay. That complaint was therefore also dismissed.

Evidence adduced

184. The parties had agreed on the contents of a bundle which ran to some 750 pages and was contained in two lever arch files. In addition, the Claimant wished to rely on a further file of papers of about 200 pages, also in a lever arch file. Although it was not strictly agreed, the contents had helpfully been numbered consecutively, so the Tribunal treated all three files as it [R1].

185. The Claimant's witness statement was marked [C1] and ran to some 45 pages.

186. [R2] was a cast list prepared by the Respondent. The Respondent prepared a chronology of events which they then amended at the Tribunal's request. They were marked [R3] and [R6] respectively. [R10] prepared by Ms O'Brien has already been referred to above.

187. The amended List of Issues, dated 20 June 2018, was marked [R6]. The witness statements of Sharon Harrington, Hakeem Osinaike, Siobhan Davies, Michelle Coleman, Julia Claydon and Jacqui O'Brien were marked [R5], [R7] – [R9] and [R11] – [R12] respectively.

188. Both parties addressed the Tribunal orally at the close of the evidence and did not present written submissions.

Employment Judge Hyde

10 December 2018