EMPLOYMENT TRIBUNALS

Claimants: Mr Zahed Hussain & Mr Sheldon Shillingford

Respondent: Peabody Trust & Its Subsidiaries

Heard at: London South Croydon**,** in public, in person.

On: 13-17 & 21-23 May 2024 (last day partial in chambers) and 1 August, 24-25 September 2024 (in chambers)

Before: Employment Judge Tsamados
Mr C Mardner
Mr K Murphy

Representation

Claimants: Both in person, Mr Lynch acting as McKenzie Friend for the second claimant
Respondent: Ms J Danvers, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is as follows:

The first claimant

The complaints of direct race discrimination, indirect race discrimination and victimisation are not well-founded and are dismissed.[1]

The second claimant

The complaints of direct race discrimination, indirect race discrimination, harassment and victimisation are not well-founded and are dismissed.

[1] Save for the complaints of direct race discrimination at paragraphs 2.2.12 & 2.2.13 of the first claimant's list of issues which were decided by a majority.

REASONS

Background

1. The two claimants are both ex-employees of the respondent. Their claims were ordered to be heard together by Employment Judge ("EJ") Siddall in a letter sent to the parties on 16 November 2023.

2. The first claimant, Mr Hussain, presented his claim to the Employment Tribunal on 5 June 2021 following a period of ACAS early conciliation between 21 April and 7 May 2021. In his claim he raised complaints of race discrimination. In its response dated 8 July 2021, the respondent denied his claim in its entirety.

3. The second claimant, Mr Shillingford, presented his claim to the Employment Tribunal on 17 June 2021 following a period of early conciliation between 20 April and 19 May 2021. In his claim he raised complaints of race discrimination. In its response dated 9 August 2021, the respondent denied his claim in its entirety.

4. On 9 December 2022, a case management discussion was conducted by EJ Prichard, at which time the claims had not been formally consolidated but both claimants attended in person (at paragraph 3 of the note). The respondent was represented by Counsel. EJ Pritchard made a number of case management orders, which included: the claimant to provide a table setting out further information (a "Scott Schedule") as to his complaints and the respondent given leave to present an amended response.

5. The claimants both provided Scott Schedules setting out the further information required. The respondent set out its replies to both within annotated versions of the Scott Schedules and by way of service of amended grounds of resistance to the claims.

6. At this stage, the claimants had identified complaints of both direct and indirect race discrimination, harassment related to race and victimisation. The first claimant subsequently withdrew his complaint of harassment.

7. On 21 March 2023, a further case management discussion was conducted by EJ Wright. The first claimant was represented by Counsel and the second claimant appeared in person. The respondent was represented by a Legal Executive. At that hearing, the EJ made a number of case management orders so as to prepare the claims for final hearing. In particular, the EJ set out the list of issues to be determined at the final hearing.

8. On 12 May 2023, the Employment Tribunal sent notice of the final hearing to the parties, listing it for 10 days commencing 13 May 2024.

Documents

9. We were provided with the following documents both in hardcopy and electronically: a bundle of documents consisting of 3016 pages (across 10 lever arch files in the hardcopy version); an index to the bundle consisting of 47 pages; a witness statement bundle consisting of 159 pages; a cast list; and a chronology. Where this Judgment makes reference to pages within the bundle, these will be prefixed by the letter "B".

10. On the first day of the hearing, the respondent submitted an opening note and a proposed timetable. Also on that day, the second claimant submitted the page numbers in the bundle referred to in his witness statement and his own versions of the chronology and cast list.

11. During the course of the hearing a document setting out which pages of the hardcopy bundle could be found in each of the lever arch files.

12. On 22 May 2024, after the close of evidence, we directed the parties if they wished to do so to provide written submissions to each other. Later that afternoon, the respondent provided us with written closing submissions running to 37 pages and a separate note on the law consisting of 18 pages. However, the first claimant indicated on the morning of 23 May 2024, that he required additional time to produce his and so we agreed not to start the hearing until 11.30 am. In the event, the first claimant had not completed his submissions by that time and so we suggested that we could start, hear the respondent's submissions and then he could leave and complete his submissions during the second claimant's submissions. This is what happened and the first claimant ultimately provided a document consisting of 21 pages and was essentially an annotated version of the respondent's submissions.

13. On 23 May 2024, Mr Lynch, provided us with the following electronic documents: Housing Associations and ALMOs February 2015 prepared for the Housing Diversity Network; the Equality Act 2010 section 149; Preventing Discrimination Public Sector Equality Duty from the ACAS website; and The Public Sector Equality Duty published 28 June 2022 from the Equality and Human Rights Commission's website.

The issues

14. These are set out at B145-149 in respect of the first claimant and B149-155 in respect of the second claimant. I explained that these are the complaints and issues that the Employment Tribunal will be determining and that we will not depart from them unless there are exceptional circumstances.

Conduct of the hearing

15. Prior to the start of evidence, the first claimant, Mr Hussain, explained that he thought he was going to be represented by a solicitor and that if the solicitor could not attend today, he expected that he would be able to do so on the following or subsequent days. However, the solicitor did not attend. As a result, he was clearly unprepared for the hearing, perhaps surprisingly so, given his expectation of a solicitor attending and then not for unclear reasons seemed a somewhat loose arrangement. Indeed, it did appear unrealistic to

expect that someone might turn up and take up the case midway but that was another matter. Nevertheless, we took into account his lack of preparation and provided as much assistance as appropriate and proportionate under the Employment Tribunal's overriding objective. In addition, at times, the first claimant was clearly unwell, having a bad cough. However, he indicated when asked that he was able to continue.

16. The second claimant, Mr Shillingford, attended with a McKenzie Friend, Mr Lynch, who clarified that he was appearing in an advisory capacity and indeed provided sporadic assistance to him in the presentation of his case. Towards the end of the respondent's evidence, Mr Lynch cross examined a number of its witnesses and, after close of evidence, presented part of the closing submissions for the claimant. The second claimant also with him Ms Campbell and Ms Jervis who were referred as being in "support".

17. The respondent was represented by Ms Danvers of Counsel with supporting instructing solicitors.

18. Due to ill-health, I was unable to attend the hearing on the first day and so we took the opportunity of beginning our reading in of the witness statements and documents and commenced the case on the second day. We heard evidence from the parties between 14-22 May 2024 and submissions on 23 May. In the afternoon of 23 May we started our deliberations in chambers and continued again on 1 August and 24 & 25 September 2024.

19. I would take the opportunity to apologise for the length of time it has taken to produce this Judgment. This is due to my part-time work pattern, volume of work and intervening ill-health.

Evidence

20. We were provided with two witness statements for each of the claimants: one which dealt with their own claim and the other which dealt with the other's claim. We were also provided with similar provided with two witness statements from Charmaine Barrington and Maxine Jervis and a statement from Shanika Nicholas on behalf of the second claimant.

21. We were told that Ms Barrington and Ms Nicholas were not going to attend the hearing. I explained that this would affect what weight, if any, we gave to the contents of their witness statements.

22. Whilst the respondent did not accept the evidence of Ms Barrington and Ms Jervis, as it did not propose to cross examine them, Ms Danvers indicated that it was content to take their statements as read, that is without the need for them to attend to give evidence (although not agreeing to the veracity of the contents). Nevertheless, the second claimant wanted Ms Jervis to formally give evidence. I explained why this was not necessary. However, he was insistent. So we agreed that she would formally give evidence to swear her statement and then answer any questions that we might have.

23. We therefore heard evidence by way of witness statements and in oral testimony from each of the claimants and on the second claimant's behalf from Ms Jervis.

24. On behalf of the respondent, we heard evidence by way of witness statements and in oral testimony from Richard Ellis, Sophie Muirhead (nee Redding), Robert Mathison, Lisa Crush, Emma Burton, John Spillett, Andrea Gordon, Irena Bennett, Jonathan Cawthra and Stephen Burns.

Findings

25. We decided all the findings referred to below on the balance of probability, having considered all of the evidence given by the witnesses during the hearing, together with documents referred to by them. Any failure to mention any specific part of the evidence should not be taken as an indication that we failed to consider it.

26. We have only made those findings of fact necessary to determine the issues. It has not been necessary to determine every fact in dispute where it is not relevant to the issues between the parties.

Common matters

27. Both claimants were employed by the respondent, which is a charitable registered provider of social housing, regulated by the Regulator for Social Housing and in receipt of public funds.

28. In May 2017, the respondent merged with another social housing provider called Family Mosaic.

29. Mr Greg Walters was the first claimant's line manager between December 2009 and 2018 apart form a period between 2011-213 when Mr Stan Grant was line manager.

30. Mr Richard Ellis was Group Surveyor until around 2017 when he became the Head of Asset Strategy. At that time he believes that the first claimant was in the Asset Delivery team which was not in his remit. He then became Assistant Director of Asset Management from April 2019, when he took over both the investment and asset management sections. In March 2021, he became Director of Sustainability. Mr Ellis has undertaken equality and diversity training and we referred to his training record to B2215.

31. Mr Robert Mathison was the Head of Asset Management from 2008 until September 2017. He no longer works for the respondent. Mr Mathison has undertaken several equality and diversity training courses particularly during his time with the respondent.

32. Ms Irena Bennett was initially the Interim Head of HR Business Partnering and was appointed to the position of Assistant Director of People and culture from 1 June 2022. She has undertaken equality and diversity training including courses on "Inclusive Peabody", the Peabody Code of Conduct,

Chartered Management Institute (CMI) Level 6 in Diversity & inclusion, Unconscious Bias, and Deafness Awareness.

33. Mrs Andrea Gordon was the Director of HR from July 2019 until April 2022, when she became Group Director of People and Culture. She has a sound knowledge of equality and diversity in the workplace given the nature of her role. She has undertaken lots of equality and diversity training. All of her colleagues are required to undertake mandatory online EDI training which she herself is completed. Prior to April 2022, the head of ED&I also reported to her.

34. Mr Stephen Burns has been employed in various versions of the same position since 2006, is current job title being Executive Director of Care, Inclusion and Communities. He has undertaken EDI training most recently on 23 May 2023. He spends a good amount of his time on EDI and approves all of the specialist EDI related policies for the respondent and is the executive lead for Peabody's Race Equality Network.

Mr Hussain

35. The first claimant, Mr Hussain, identifies his race as Asian British Bangladeshi. He was employed by the respondent from 16 July 2007 until 25 January 2021, when his employment terminated on the grounds of voluntary redundancy.

36. He was initially employed as a Senior Surveying Technician until 1 September 2010, when he was assimilated into the role of Stock Condition Surveyor, following a restructure in the Asset Management team. He describes this as a demotion.

37. Mr Hussain's role involved carrying out surveys of properties. When he first joined the respondent, these surveys were carried out on paper. He undertook six or seven property visits per day. Most of the visits were made using public transport and involved carrying a large amount of paper documents with him in a heavy rucksack and walking to and from the office to make the visits. The surveys were later changed from paper to using a handheld electronic device which meant maintaining the same posture repeatedly whilst undertaking the work.

38. Sometime in 2008 to 2009, he noticed symptoms of pain in his shoulders with the pain increasing over time. He raised this with Ms Jill Nash, his previous line manager from 2007-2010, and then with Mr Waters, and was advised to self-manage the pain and symptoms it was having. Mr Hussain was taking painkillers, exercising and having soft massages but this only helped for that time. Much of his witness statement is taken up with the detail of what he describes as repetitive strain injury ("RSI"), reporting this to the respondent and being assessed by the respondent's occupational health services.

39. On 9 May 2013, Mr Hussain was assessed at work by Ms Bunny Martin, the Director of Back to Back, specialists in the prevention of work related disorders. It was unclear what medical qualifications Ms Martin had. By email dated 19 May 2013 sent to Mr Walters and others, including Mr Hussain, she

attached her Physical and Ergonomic Report (at B218-220). This sets out a number of recommendations. This includes a recommendation of "some specialist rehabilitation treatment and passive stretches to slow release his body from the muscular and neural inflammation" (at B219).

40. Mr Hussain also underwent a consultation with the respondent's consultant occupational health ("OH") physician. In his letter dated 20 May 2013, the OH physician wrote to the respondent in more circumspect terms than Ms Martin, about this course of action (B222-223):

> *"… if the lady who assessed him recently is a qualified Physiotherapist I would not have any objection for her to treat him at least to try and reduce the muscle spasm that he is having. My reservations are around the fact that we do not have a specific diagnosis at the moment, hence the need to write to the GP. If some massage and stretching exercises are advised by this lady, I would not have a problem again if she was a qualified professional. Alternatively, I could propose that he is seen by our Physiotherapist, who again could help with some exercise/stretching plan and even massage, bearing in mind that certain exercises or "hands on" treatments would not be indicated depending on what problem there might be in the neck."*

41. On 17 June 2013, Mr Hussain was further assessed by Ms Martin. Her assessment report is at B226-251). Ms Martin examined Mr Hussain, set out his medical conditions and identified a number of ergonomic and other recommendations to alleviate those conditions. It is far to say that the respondent allowed Mr Hussain time off and adjusted his working duties and undertaking a workstation assessment following this assessment.

42. As to the recommendation of some specialist rehabilitation treatment and passive stretches, Mr Mathison gave oral evidence that Mr Hussain had access to private healthcare via BUPA. Mr Hussain confirmed in oral evidence that this was the case. Mr Mathison's further evidence was that it would not normally be something that was funded by the respondent. Medical interventions would be expected to be provided by the NHS or privately if an employee was part of the private healthcare scheme.

43. In 2014, following the restructure, Mr Hussain's role changed to one that was more desk-based, with external consultants undertaking surveys. There was no evidence that Mr Hussain repeated his request for this treatment. His position in oral evidence was that he expected the respondent to volunteer to pay for the treatment. By 2014, Mr Hussain was receiving private treatment.

44. Mr Hussain also describes in his evidence that he is unable to undertake a large number of surveyors' duties because of his health conditions.

45. Indeed, it is clearly evident from his evidence and from the nature of some of complaints that he has made to the Tribunal that he is very aggrieved about the matters relating to his health. He alleges that his work caused the condition and the respondent did nothing about it, in fact putting him into roles which exacerbated his condition and also by increasing his workload.

46. Much as we sympathised with Mr Hussain and indeed I empathise with him having suffered from RSI myself, I had to point out to him several times, that his complaints relate to race discrimination and this is not a disability discrimination complaint or a personal injury claim.

47. Part of Mr Hussain's case is that he was not offered any or sufficient support in progressing by way of obtaining specialist qualification and promotions. He alleges that during 2008 and 2013, Mr Mathison and Mr Ellis denied him support obtain qualifications. At the time, Mr Hussain held level 3 qualifications in construction and he wanted to progress to level 4. He alleges that the respondent had an unofficial policy whereby staff members who want to progress further with qualifications need to speak to their line manager to obtain approval to make an application. The line manager would then check with their line manager and give an indication of either yes or no. His line managers at this time was Ms Nash and Mr Walters, who then would speak to Mr Mathison and Mr Ellis who denied him the opportunity. He states that he requested approval from management to make an application for the Level 3 qualification once a year but for a variety of reasons he was told this was not possible.

48. In cross-examination, Mr Hussain accepted that he did not raise any allegations of discrimination during any of these conversations with his line managers about training.

49. Mr Walters remembered encouraging Mr Hussain to undertake an HND and subsequently a degree and helping him to secure sponsorship. However, he felt that Mr Hussain had a feeling that he would not be successful in changing his career because it was hard for him to get the experience he needed (we refer to the notes of an interview with Mr Walters on 15 April 2021 as part of the investigation into Mr Hussain's subsequent grievance at B1637-1638).

50. Ms Nash left the respondent's employment many years ago and the respondent had no contact details for her. We have her records of 121s with Mr Hussain which are referred to in Mr Mathison's evidence below.

51. Mr Ellis did not directly or indirectly manage Mr Hussain's progression. In evidence, he said that he did not deny any support to any members of his team to obtain qualifications and denied the allegations made against him. Mr Ellis stated that he only had authority to sign off any training requests if no one else had and that they would normally be signed off by the direct line manager or the head of section because he only tended to deal with his direct line reports, of which Mr Hussain was not one.

52. His further evidence was that he has always encouraged members of his team to obtain Royal Institution of Chartered Surveyors ("RICS") accreditation because it was well thought of in surveying and the only reasons for refusing an application would be if the course was not business related or because of budgetary restraints. He added that he had never witnessed Mr Mathison not supporting Mr Hussain or holding him back.

53. Mr Ellis also gave evidence that he did advise those wanting to undertake courses that they must fit it around their substantive jobs because the respondent was only able to give limited time off. In respect of David Smith, a Building Surveyor, who Mr Hussain alleges was granted time off to obtain RICS accreditation, Mr Ellis said that this is an almost entirely work-based qualification and you need to be working "on the job" in order to evidence the work undertaken.

54. Mr Mathison's evidence was that he certainly did not hold Mr Hussain back for training or career progression and has never held anyone back because of their race.

55. He pointed to the learning and development policies in place at B1885-1904, 1921-1940 and 1961-1979 which clearly put the onus on the individual employee with the assistance of management and HR in seeking development and progression. This was echoed by Mr Ellis in his evidence and he added that in his experience, employees would generally come forward to their line managers and ask to do a particular course and if it was business related then it was more likely that the respondent would pay for some or all of the course.

56. Mr Mathison's further evidence was that there was a lot of training available and the respondent was good at supporting colleagues who wanted to do more training to progress their careers. He added that the annual appraisal was an opportunity at which to identify any training needs or desires with the employee's direct line manager.

57. Mr Mathison's evidence is that he, Mr Ellis and Mr Walters encouraged Mr Hussain as much as they encouraged anyone else to attend training. He pointed to B172, 174, 179 and 181 which are specific pages of 121 meetings between Mr Hussain and his then line manager, Ms Nash, in which training was discussed, although he added that he could not recall whether Ms Nash subsequently spoke to him about this or not.

58. There is no written record of Mr Hussain asking to do level 4 training until around July 2015, when he was given the opportunity to apply for a BTEC.

59. Mr Mathison's evidence is that Mr Hussain did not make any applications prior to July 2015 because had he done so, Mr Mathison would have needed to approve them and so would have been aware of them. His further evidence is that it was very rare that applications for training would be turned down and so he would have remembered having refused a previous application from Mr Hussain.

60. Mr Mathison's further evidence is that he remembers having a conversation with Mr Hussain, although not precisely when, in which he told Mr Hussain that he should not feel as though he had to obtain professional qualifications to be able to progress and that he could carve out a career without doing so if he wanted. Mr Mathison also states that he told Mr Hussain that he would support him if he did want to go down a more academic route, such as undertaking a degree and/or obtaining professional qualification such as RICS accreditation. In addition, his evidence is that at the time he was a little concerned about whether Mr Hussain was ready for the academic route because he had previously told Ms Nash that he could not give full commitment to this because of his family situation and Mr Mathison knew what a difficult qualification it was and with a high failure rate.

61. Mr Mathison's evidence is also that he asked Stan Grant, the former temporary Asset Manager, to support Mr Hussain, although due to the

passage of time he could not recall when. However, he does recall that Mr Grant told him that he had advised Mr Hussain about some short courses although he cannot recall if he took them up.

62. On balance of probability we accept Mr Mathison's and Mr Ellis' evidence.

63. As indicated above, Mr Hussain applied for the respondent's External Sponsorship Scheme in July 2015. He made an application for sponsorship to undertake a BTEC HNC Construction course which was successful. The respondent agreed to pay 75% of the course fees and loaned him the remaining 25%. We were referred to B269-270 and 274.

64. In or around August 2015, Mr Hussain applied for sponsorship from the respondent to become a chartered member of the Chartered Institute of Building, an alternative to becoming RICS accredited. This was approved and on 14 August 2015 it was confirmed to him that the respondent would pay 100% of the membership fees (at B275 and 276).

65. In or around July 2016, Mr Hussain applied for further sponsorship to undertake a BTEC HND Construction course and again the respondent agreed to pay 75% of the fees (B281-284).

66. On 20 July 2017, Mr Hussain asked the respondent for permission to complete a BSc (Hons) in Building Surveying. Mr Mathison approved his application that same day (at B286-292). Mr Hussain commenced the course in November 2017 and completed it in or around August 2020.

67. In August 2017, the respondent undertook a restructure of its Asset Management and Strategy Team. Mr Hussain's role of Stock Condition Surveyor was placed at risk of redundancy and he was ultimately assimilated into the role of Stock Condition Surveyor in the new structure under the respondent's Managing Change Policy and Procedure. This was because there were in sufficient similarities between his role and the new Senior Stock Condition Surveyor roles.

68. The respondent's Redundancy And Restructuring Policy is at The policy is at B340-348. Paragraph 11.1, at B347 deals with job assimilation. This states as follows:

"Peabody may identify situations where the role previously performed is changed slightly to reflect the new way of working required. Where the change between the existing and new job is such that the new role remains substantially the same as the previous role the post holder will be offered the new post without the need to undergo a formal selection process. However if there are more suitable individuals at risk in this situation than there are new roles, a competitive selection process will take place."

69. Mr Ellis decided not to assimilate Mr Hussain into the role of Senior Stock Condition Surveyor because the role was not sufficiently similar to his existing role of Stock Condition Surveyor. His comments on the job description and the reasons for not assimilating the first claimant into that role are at B316, 318-321 and in an email at B322.

70. Mr Hussain could have applied for the role of Senior Stock Condition Surveyor but decided not to. Instead he successfully applied for the role of Building Surveyor and he started in that position on 1 January 2018.

71. As a result of the integration within the Service Delivery section of the respondent's Customer Services Department with effect from 1 May 2018, the claimant was then assimilated into the role of Project Surveyor.

72. In cross-examination, Mr Hussain questioned Mr Ellis as to whether he considered whether putting him back into the Stock Condition Supervisor role would exacerbate his RSI and thereby his ability to undertake the job. Mr Ellis responded that this was an issue of assimilation and policy was quite narrow in terms of what he could do. Whilst he appreciated that the first claimant had RSI he could not manufacture something out of that.

73. In addition, Mr Hussain put to Mr Ellis that he had previously held the role of Senior Stock Condition Surveyor and had been fulfilling those duties and so why was he not assimilated. Mr Ellis responded that the assimilation had to be between his current role and something very similar to it and that the need to undertake surveys was much greater than Mr Hussain had been undertaking at the time. Mr Hussain also made the point that Mr Ellis did not know him or what he was undertaking. Mr Ellis stated in response that whilst he did not know Mr Hussain, he had a copy of his job description and knew what he was doing, and in addition he spoke to him about it.

74. In early 2020, Mr Hussain applied for the role of Construction Programme Manager. He successfully got through to the second interview stage. However, shortly after this, the respondent decided not to proceed with the recruitment because due to the Covid-19 pandemic, budgets being cut and the organisation implementing a halt on recruitment across the business. The respondent accepts, as Mr Hussain alleges, that there was a delay in informing him of this. Mrs Muirhead (nee Redding), who at this point was the Head of Investment, told him of the position in around May 2020 and also sent him an email on 6 May 2020 explaining this (at B1771).

75. In around August 2020, Mr Hussain applied for the position of Senior Building Safety Manager. Emma Burton was the manager in charge of recruitment. She did not know Mr Hussain. The respondent had a scoring criteria for the interview process for each role. Having received all the applications, the initial applicants were shortlisted and eight people, including Mr Hussain, were put through to the first round of interviews.

76. On 30 September 2020, Mr Hussian was interviewed by Ms Burton and Josephine Bukulowya, Building Safety Project Manager. During the interview, Mr Hussain did not provide them with enough examples of evidence that was required to score him particularly highly. He was the lowest scoring candid overall and when the two of them combined their scores, he was second from the bottom. Ms Burton's evidence is that Ms Bukulowya is a very outspoken person and so she felt that Ms Burton had unfairly scored Mr Hussain because of his race otherwise she would certainly have challenged Ms Burton on this. Ms Burton points to the fact that from Ms Bukulowya's scores it was clear she was of a similar view to her (at B1773).

As a result, Mr Hussain was not put through to the second round of interviews. Ms Burton denies that he was unsuccessful because of his race and avers that he simply did not get through to the second round of interviews because other candidates scored higher than him. We were refer to the notes of interview at B931-947 and 1778-1832.

77. Ms Burton's evidence was put to Mr Hussain in cross-examination and he was asked if he now accepted that the reason he was unsuccessful was because he scored low at interview and that this was nothing to do with his race. His response was that he did not know this time and was simply told that he was unsuccessful because he did not hold a similar role previously. He went on to make the point that it is difficult to hold if one is not supported into such roles. He accepted her feedback on face value but having seen so many people appointed to roles not held previously without experience, in a company that does not help you obtain that experience, then he thought that there was something more to it. However, on reflection he accepted that his initial thoughts that this amounted to race discrimination were not that strong.

78. In or around October 2020, the respondent proposed to carry out further restructure of the Investment Team. This affected Mr Hussain's role of Project Surveyor and he was therefore placed at risk of redundancy. Mrs Muirhead, who at the time was the Head of Investment, took the lead in the consultation process and she reported to Mr Ellis.

79. On 4 November 2020, Mrs Muirhead held an individual consultation meeting with Mr Hussain. She explained the consultation process, outlined the proposed changes and timeline. Mr Hussain indicated that he would be interested in the Senior Project Officer role and she told him he should express his preference for roles by 4 December 2020. Mr Hussain asked for confirmation of his redundancy entitlement and it was agreed to send these details to him. Notes of the meeting are at B1067-1068.

80. On 2 December 2020, Mrs Muirhead sent Mr Hussain an email which among other things attached role profiles within the proposed new structure and in response on 3 December he queried why the respondent needed a particular role (at B1175-1176). Mr Hussain sent a further two emails with further queries (at B1177-1178). Mrs Muirhead's evidence is that she found these emails to be quite rude and did not feel it appropriate to respond to them.

81. Later that day, Mrs Muirhead and Ike Diru, the Legal Disrepair Case Manager, emailed Mr Hussain as to work related matters (at B1179-1186). Mrs Muirhead's evidence is that she found Mr Hussain's emails in response to be again ruled and quite aggressive. In particular, she refers to an email in which he stated (at B1222-1223):

"Ok Sophie I'll just delete everything and wont bother deal with all the shit that come our way coz no one else responds (sic)".

82. On 3 December 2020, Mr Ellis was copied into email correspondence between Mr Hussain and Mr Diru. Mr Ellis' evidence is that he found Mr Hussain's use of language to be quite aggressive and confrontational Mr Diru.

83. The run of emails appears to be from B1179-1186. Mr Hussain becomes involved on 3 December 2020 at B1180-1181. Mr Diru responds to Mr Hussain's email and, in reply, Mr Hussain takes exception to Mr Diru spelling his name wrongly and not following what he refers to as corporate professional standards by including his signature in his email. He then states:

"no one knows who you are or what you do"

"(responding to the substantive matter) nothing to do with me. Speak to senior investment team. I just get involved to try to help and get people talking have been doing this for the last 15 yrs but I don't know for how much longer".

84. Mr Diru responds apologising for spelling Mr Hussain's name wrong and points out that his signature and work section are at the bottom of his initial email. He then responds to the remainder of the email in strong but certainly not as strident terms as Mr Hussain.

85. Mr Hussain then responds further at B1179 as follows:

"You trying to be funny, it is standard practice to include a signature on every email. Brendan also sent a companywide email reminding everyone to include a corporate signature on their emails.
Please don't include me in these emails are sent to whole of investment once you have someone (Sheldon) that has responded. You should then only communicate with that person. There over 30+ people on the Investment group email."

86. On 3 December 2020, Mrs Muirhead sent an email to Mr Hussain which resulted in the response to her set out above. Mrs Muirhead said in evidence that she found his response out of character and spoke to Mr Ellis. She was also concerned as to the tone of his emails to others (at B1222-1223).

87. Ashing Fox, the then Chief Operating Officer, sent an email to Mr Hussain and those others copied into the correspondence on 3 December in what appears to be a conciliatory attempt to calm the situation down (at B1184).

88. Mr Ellis also emailed Mr Hussain later that day expressing his disappointment at the tone of his emails to Mr Diru and Mrs Muirhead, stating that it was not acceptable. His email continued (at B1197):

"I appreciate that this is a difficult time with the restructure, but we are all working together to deliver the service for our customers and our stakeholders. We all need to be polite and professional in our interactions and communications.

I will call you shortly"

89. Mr Hussain responded shortly afterwards stating that he was equally disappointed with Mr Ellis' tone and not to call him because he did not want to talk to him. The email is at B1207 in which Mr Hussain said as follows:

"HI Richard (didn't spell wrong)

Thanks for your email. I am equally disappointed with your email and tone. Please don't call rne, I don't want to talk to you as you promised you will call everyone after telling us about the restructure at the beginning of October but no call from you. Was that call only for the selected a few?

I am always polite and have been. dealing with everyone's problems complaints and left to rot in the same job because of you and only moved to project surveying last 2 years because you wasn't in charge of the recruitment."

90. The email appears to end here although there is a page number "1" at the bottom. However, we were not taken to the following page.

91. Mr Ellis' evidence is that he found this response to be rude and confrontational, not least because he had copied a number of others into his response. Mr Ellis further states that he tried to contact Mr Hussain via Teams and telephone but did not get through to him.

92. Ms Bennett, the Head of HR Business Partnering, also sent an email to Mr Hussain later that day asking to speak to him urgently because she was concerned about the content of his email to Mr Ellis (at B1207).

93. Mr Ellis made no further attempt to contact Mr Hussain given that his email made allegations about his management. The matter was thereafter dealt with by Mrs Muirhead and HR.

94. On 4 December 2020, Mr Hussain sent an email to Mrs Muirhead stating that he was not 100% on his choice (of the new positions in the restructuring) but he wanted to be considered for the position of Project Surveyor for minor works but would also like the opportunity to take redundancy, if after the 3-6 month trial period if he was not comfortable with the role. This email is at B1233 and continues:

"My mind is very unstable at the moment and I'm very stressed so please be gentle.

I have discussed this with Darren (Blyth) and I am suffering from anxiety, stress and depression. So my communication at times maybe out of character for me."

95. Mrs Muirhead was concerned about Mr Hussain's health, particularly given the tone of his recent email which seemed out of character. She contacted Ms Bennett for advice before responding to his email. The advice from Ms Bennett would appear to be in her email to Mrs Muirhead at B1236 in the form of suggested bullet points.

96. Mrs Muirhead emailed Mr Hussain back later that day (at B1237). Her email dealt with the following matters relating to the restructuring: there was no trial period for the Project Surveyor role because it is not a change of role or suitable alternative employment; he would be assimilated into the role as there are the same number of people as positions available; if he was interested in voluntary redundancy, he should confirm this by the end of the day. Her email went on to state the following: we have only learn of your stress and anxiety, RSI and other health issues today and suggest a referral to OH to ensure that you are fully supported in the workplace; we are extremely concerned about the allegations made about Mr Mathison and would like to meet to discuss them as soon as possible; with regard to your recent emails to Mr Mathison and others, which fall short of the standards of expected behaviour towards colleagues, whilst we appreciate this is out of character and you have cited a number of external factors impacting upon your behaviour and are not purposing to take formal action, on this basis we do not expect to see a repeat of this behaviour.

97. Mr Hussain responded to the email the same day (at B1239). He said that given the length of the email he would review it and respond on the Monday.

He asked why it was so important to decide tonight? He stated that this is unnecessary extra stress and seemed like bullying him into making a choice.

98. Mr Hussain commenced a period of sick lave from 4 December 2020 until 21 January 2021 due to stress and subsequently presented medical certificates citing conditions of "Thoracic outlet syndrome and acute stress" and latterly "acute stress reaction" (at B1246, 1264-1266 and 1319).

99. On Monday 7 December 2020, Mrs Muirhead responded expressing her concern for Mr Hussain and explained why it was important to have a decision as to whether he wanted to take the Project Surveyor role or take voluntary redundancy (at B1241).

100. On 8 December 2020, having not heard from him, Mrs Muirhead sent an email to Mr Hussain inviting him to a Teams meeting to have a quick chat about whether he wanted to be considered for the Project Surveyor role (at B1242). He did not attend the meeting. In evidence, Mrs Muirhead said that it was imperative to get a decision from Mr Hussain because it affected whether the rest of the team, who had not opted for voluntary redundancy, would need to interview for the new roles and she did not want the matter to continue in abeyance and uncertainty over the Christmas period.

101. Given that Mr Hussain did not state his intentions, Mrs Muirhead and HR formed the view that he did not want to take voluntary redundancy. Mrs Muirhead wrote to Mr Hussain on 9 December 2020 to confirm that as he had not opted for voluntary redundancy, he was still at risk of redundancy and would therefore need to go through an application process for a role in the new structure (at B1254-1255).

102. On 16 December 2020, Mrs Muirhead wrote to Mr Hussain to confirm that as more employees had indicated that they wished to take voluntary redundancy, he no longer needed to apply for the role of Project Surveyor and would be directly assimilated into it and was therefore no longer at risk of redundancy (at B1271).

103. On 18 December 2020, Mr Hussain emailed Mr Blyth (at B1277) and told him he wanted to take voluntary redundancy albeit he was concerned as to why he had been assimilated when he had made it clear in an email to HR and Mr Blyth on 4 December that he wished to take voluntary redundancy. His email continued:

> *"I have been doing the same job for 15 years and not progressed and do not feel I will In another 15 years so do not want to stay at Peabody. The senior management team are all a white from CEO level down to all the Heads of department. I'll be happy to leave even for a lower paid job then stay in a place where I've been systematically denied progression and development . The people that tried very hard to help me was you and Greg and I'm very grateful for that.*
>
> *Can you please discuss this with HR and let me know what's happening in my absence because ft appear HR are making decisions for me. These emails ate stressing me out. When I feel a bot better I may reply to some the emails from HR heads."*

104. In addition, it appears that Mr Hussain telephoned Mr Blyth, as indicated in Mr Blyth's email to Mrs Muirhead shortly after he received the above email (also at B1277):

"Please see Zahed email. He called me very upset and concerned that he has been assimilated. Please see his email of the 4th December where he has indicated he wanted to take Voluntary redundancy. I think the last paragraph did leave this open though. Can you urgently review the situation and confirm what is happening as he is not very well. He is aiming to return to work on the 4th January. He stated he didn't want to any calls from Peabody until the new year as this will add to his stress."

105. Mr Hussain's application for voluntary redundancy was accepted and it was agreed that he could remain in employment until 25 January 2021 to allow him to go to the office to finish some work and collect his belongings, despite the new structure coming into effect on 18 January 2021.

106. On 14 January 2021, Szilvia Jona, HR Business Partner, wrote to Mr Hussain to give him notice that his employment would end on 25 January 2021 on the grounds of voluntary redundancy (at B1338-1341). Mr Hussain was paid 12 weeks in lieu of working his period of notice and a redundancy payment of 28 weeks' pay amounting to £26,544.

107. On 25 January 2021, Mr Hussain brought a grievance against the respondent. This is at B1363-1371. In essence, this encompasses those matters that Mr Hussain has raised in his claim to the Employment Tribunal. At the outset, he states that his grievance is brought to highlight his experiences to demonstrate "the systematic, structural and institutional racism that exists in Peabody's management team". The grievance then sets out a series of headings relating to matters in which he believes he has been treated very unfairly and discriminated against within his various employment roles and in relation to training, support and promotion. He also includes the issue of his RSI.

108. Mr Shillingford had already brought a grievance which is dealt with later on within this Judgment and the facts relating to the appointment of the grievance officer are pertinent to both claimants and so are dealt with here.

109. Mr Shillingford's grievance was submitted on 10 November 2020 and in essence contained complaints both of an individual nature and relating to "structural, institutional and systematic racism" within the respondent organisation. The grievance is structured in much the same way as Mr Hussain's, although it was submitted before Mr Hussain's. Mr Shillingford's grievance is at B1481-1488.

110. Initially, the respondent appointed Sara Tutton, Director of Health and Safety as the investigating manager. She was appointed by Mrs Gordon, in consultation with Ms Bennett. They decided it would be best to appoint a manager outside of the Customer Services Directorate who was entirely impartial. There were a number of potential candidates including Ms Tutton. Mrs Gordon chose Ms Tutton on the basis that she believed she was very thorough in all work and would be able to logically address each of Mr Shillingford's concerns. Her evidence is that her choice of Ms Tutton was not motivated by Mr Shillingford's race or because he had complained of discrimination.

111. On being advised of the name of the grievance officer, Mr Shillingford raised objections to her appointment on the basis that he was concerned as to

whether she would be impartial (B1244-1245 and 1256-1258). He requested an external grievance investigator.

112. Mrs Gordon did not know of any external grievance investigators and so she suggested that Sarah Welsby, Regional HR Business Partner, liaise with the respondent's legal advisers to see if they knew of anyone. Jonathan Cawthra was one of the people that they named and ultimately Mrs Gordon decided he was the most suited because the legal advisers had said that he had previous experience in the housing sector. Mrs Gordon had never met Mr Cawthra and her evidence is that her decision to appoint him was not motivated by Mr Shillingford's race at all or because he had complained of discrimination.

113. Mr Cawthra went on and dealt with Mr Shillingford's grievance and this is dealt with later on in this Judgment.

114. On receipt of Mr Hussain's grievance, Ms Bennett emailed Mrs Gordon and suggested that Mr Cawthra hear his grievance as well (at B1409). This was on the basis of the crossover in subject matter between Mr Shillingford's and Mr Hussain's grievance. Mrs Gordon's evidence is that this decision was not made because Mr Hussain's race or because he had complained of discrimination.

115. Mr Cawthra is an independent HR consultant with over 34 years' experience working of in HR, most recently as Group Director of HR and Corporate Services for a large housing association. He has worked as an HR consultant regularly undertaking independent investigations in other grievance matters and has received and commissioned a significant amount of training in EDI, as well as conducting a large number of grievance investigations and hearings.

116. In answer to questions from the panel, Mr Cawthra said the following. He had experience of dealing with issues of race discrimination before, he was familiar with the types of discrimination including victimisation and harassment and applying the principles of the Equality Act 2010. He was not investigating allegations of institutionalised racism because that was not within his remit. He was dealing with specific complaints made by the individuals.

117. Mr Cawthra further stated. In December 2020, he was approached by Ms Welsby and asked to undertake and investigation into Mr Shillingford's grievance. In February 2021, he was also instructed to investigate Mr Hussain's grievance given that both grievances raised similar issues and unlikely to be some overlap in the investigations. At around the same time he was also instructed to hear a grievance raised by Rashida Kutubu, a Project Surveyor.

118. Mr Cawthra had no prior knowledge of either of the claimants and his evidence is that his instruction was wholly impartial and that he does not believe that their race of the complaints of discrimination played any part in his appointment. He states that he believes he was appointed because Mr Shillingford objected to Ms Tutton's appointment, the respondent sought out

an external investigator and he was appointed on that basis. He was appointed to Mr Hussain's grievance purely because of the overlap with Mr Shillingford's.

119. On 3 February 2021, Mr Cawthra contacted Ms Welsby as to clarification of his remit: to act as the grievance hearing manager and reach a decision on both claimants' grievances or to send a report to an internal grievance hearing manager? Ms Welsby confirmed that the current arrangement is that the investigator is also the decision maker (at B2191). This is dealt with in more detail as part of Mr Shillingford's claim.

120. On receipt of the information relating to Mr Hussain's grievance, Mr Cawthra reviewed all of the documents and then he met with Mr Hussain on 18 February 2021. Mr Hussain was subsequently sent notes of meeting and indicated that he would provide his comments on these by 26 February. There was some delay in him doing so and these were ultimately provided on 31 March 2021. We referred to B1447 and 1575-1588.

121. On 1 April 2021, Mr Cawthra contacted Mr Hussain to confirm that he would now determine what witnesses he needed to speak to. He then went on to interview the following witnesses (references are to his notes of the interviews): Mr Mathison on 8 April 2021 (at B1631-1632); Mrs Muirhead on 9 April 2021 (at B1632-1633); Ms Gordon on 12 April 2022 (at B1633);Ms Jona on 12 April 2021 (B1635-1637); Mr Ellis on 13 April 2021 (at B1634); Mr Blyth on 13 April 2021 (at B1634-1635); Mr Walters on 15 April 2021 (at B1637-1638); and Mr Grant on 22 April 2022 (at B1638-1639).

122. On 29 April 2021, he completed his report in respect of Mr Hussain's grievance. This is at the 1415-1425. The investigation and outcome is set out in some detail in the report and, as far as they relate to the list of issues in this claim, Mr Cawthra deals with those findings relevant to the complains brought within the lists of issues at paragraph 38 of his witness statement (save where covered at paragraph 25 of his witness statement in relation t the findings relevant to the list of issues in Mr Shillingford's claim). On that same date, Mr Cawthra sent a copy of the report and its various appendices to Mr Hussain. This advised Mr Hussain of his right of appeal (at B1605-1705).

123. Whilst Mr Cawthra upheld some elements of Mr Hussain's grievance (at paragraphs 3.2 and 16.9 of the report), he did not uphold the majority of the complaints. He did point to the quality of his investigation having been significantly hampered by the passage of time that had elapsed since some of the issues raised took place, some which dated back to at least 2012 and others to 2018. He made no judgement on the delay in bringing the grievance but simply noted that it meant that he had been unable to make any finding, even on the balance of probability, on some of the issues raised.

124. Mr Cawthra made it clear in his report that whilst the grievance had been structured by Mr Hussain to demonstrate systematic, structural and institutional racism existed within the respondent's management team and that he had been treated unfairly and discriminated against, he found no evidence of this.

125. It is clear from the report that there was some discussion of structural, institutional and systematic racism and that Mr Cawthra explored with Mr Hussain which of the respondents laws, rules, policies or practices he felt were symptomatic of the allegations he was making (at B1425). Whilst Mr Cawthra upheld certain elements of the grievance this was not the basis that they amounted to race discrimination.

126. We would point to the final paragraph if Mr Cawthra's grievance investigation report at B1425 in which he states:

> *"There is, though, a broader issue which (Mr Hussain) raises, which is: "The policies are not implemented with equality amongst all staff which amounted to me being discriminated." That's an allegation that extends beyond the remit of an individual grievance investigation and Into a broader diversity audit and review. My recommendation is that this is a step which merits serious consideration, and that Peabody should consider ways in which that might be achieved."*

127. Mr Hussain criticises Mr Cawthra for not interviewing the witnesses that he identified. Mr Cawthra's position is that he cannot recall being asked to interview anyone in particular and that he spoke to everyone he considered would be able to provide evidence in respect of Mr Hussain's specific allegations. He also said at the time and in evidence that he was not seeking to undertake a general diversity review and would not be assisted by general background information. Indeed, we have indicated the difficulties faced by an Employment Tribunal when asked to address allegations of institutionalised racism within this Judgment.

128. On 10 May 2021, Mr Hussain appealed against the grievance outcome (at B1718-1722).

129. Lisa Crush, the Group Director of Sales, was appointed as the appeal officer by Malini Indrasenan, People Business Partner. Ms Crush did not previously know Mr Hussain.

130. Ms Crush had held the position of Group Director of Sales since 2020 and worked for the respondent at that time in the region of 10 years. She had received EDI training and was one of two EDI representatives in the Development Directorate. At paragraph 2 of her witness statement she sets out details of her work as an EDI representative and states that she is heavily involved in the respondent's EDI strategy and had frequently spoken with Shaun Kennedy, Head of Diversity and Inclusion and that EDI issues are firmly on her agenda and that she is aware of their importance in the workplace.
131. In advance of the grievance hearing, Ms Crush looked at the grievance policy procedure (at B1310-1317) and in particular those pages relating to appeals. She was aware that an appeal was not a rehearing of the original grievance but the consideration of the specific areas which the employee was dissatisfied with from the original grievance outcome. She read all the documentation that was considered as part of the original grievance, including Mr Cawthra's grievance report and the various appendices, and Mr Hussain's original grievance letter. In addition she read comments provided by Mr Cawthra on Mr Hussain's appeal letter (B 1762-1769) and some further information collated by Ms Jona (at B 1770-1832.

132. The appeal hearing took place on 28 June 2021 before Ms Crush, with Malini Indrasenan as HR representative and Mr Hussain with a work colleague. The notes of that hearing are at B1833-1837.

133. During the hearing, there was some discussion arising from Mr Hussain complaint that Mr Cawthra had not interviewed some witnesses as part of his investigation. This is at B1834-1835. Malini Indrasenan explored this with Mr Hussain and identified that he was referring to Ms Barrington, Ms Kutubu, Ms Balagun and Mr Shillingford. He explained that Ms Kutubu could have confirmed that he had been doing his job for a long time and when he went for interviews he was not able to secure roles, although she had not specifically witnessed any of the events of which he complained. Ms Crush's response was that this would be based on Ms Kutubu's own opinion given that she was not actively involved in the recruitment processes. Mr Hussain also explained that Ms Balagun could have given evidence about his experience, to counter the allegations that he had no ambition. He further explained that Mr Shillingford could have referred to the treatment others were receiving based on his own experience. With regard to the witnesses generally, he stated that they had all experienced situations where they were treated unfairly and could have provided details about discrimination and recruitment discrepancies. Ms Indrasenan responded that this would be about their own experience and not his. Ms Crush then stated that she did not think they would add any value as again they would be giving their own personal opinion. The discussion then moved on.

134. On 13 July 2021, Ms Crush concluded her investigations. Her witness statement at paragraph 13 sets out in detail her findings in relation four main points of appeal. In essence, she could not find sufficient grounds to uphold Mr Hussain's appeal. She did not believe there had been any breach of the recruitment policy and also did not believe that Mr Hussain been subjected to discriminatory treatment in relation to the various recruitment decisions, restructures and/or learning and Development opportunities.

135. Mr Hussain was informed of the outcome of the grievance by letter dated 13 July 2021 which included a copy of the notes of the appeal hearing (at (at B2062-2066). Mr Hussain returned the notes of the appeal hearing annotated with his own comments (at B1838-1842).

136. On 5 July 2022, Mr Hussain sent an email to Ms Crush and Malini Indrasenan enquiring what had happened with regard to his appeal point in relation to his RSI and how the respondent intended to resolve this.

137. This is a reference to the final point in the notes of the appeal hearing (at B1837). On that page, in the context of what outcome Mr Hussain was seeking from his appeal, he referred to his RSI (a matter upheld by Mr Cawthra in his original decision) and asked Ms Crush if she could review this and let him know the outcome. Ms Crush replied that this would be separated from the rest of the appeal and she would pick this up separately with Malini Indrasenan.

138. Ms Crush found Mr Hussain's email most odd given that by this time he was no longer employed by the respondent and so there were no measures that could be taken to support him in respect of his injury. She thought that he must be seeking financial compensation and because this fell outside of her remit she forwarded it to HR to respond.

139. It would appear that Ms Crush did not reply to Mr Hussain's email and neither did anyone else. Indeed, on 22 July 2022, Mr Hussain further raised the matter with Ms Fox and Ian McDermott, the Chief Executive, who forwarded his correspondence to Ms Bennett (at B1849-1850).

140. On 11 August 2022, Ms Bennett responded to Mr Hussain in effect stating that the matter was closed and given that by this stage he had issued his claim in the Employment Tribunal, she asked him to direct any correspondence about his claim to the respondent's legal advisers (at B1848). Mr Hussain replied that same day explaining that he was not trying to reopen the appeal process but was chasing a response in relation to the RSI element of his grievance. He said further email relating to this on 19 August 2022. These emails are at B1847-1848).

141. On reviewing the grievance and grievance appeal outcomes, Ms Bennett noted that the RSI issue had been dealt with at section 16 of Mr Cawthra's report(at B1613-1615). On 22 August 2022, she wrote to Mr Hussain confirming this and stated that at the time he had met with Ms Crush for his appeal hearing, he was no longer employed by the respondent and therefore no further action was taken to look into adjustments for him (at B1846). Mr Hussain replied that same day expressing his discontent with her email and the respondent's conduct generally and indicated that this matter would be looked at as part of his Tribunal and possibly a court claim (at B 1845-1846).

142. Part of Mr Hussain's claim relates to Ms Bennett's correspondence with him on this matter and in particular that she stated that the respondent had no responsibility to him because he was no longer their employee. In her written evidence she denies that her actions amounted to direct race discrimination and in particular that the correspondence had anything to do with his race.

143. Mr Hussain's employment ended on 25 January 2021 on the grounds of voluntary redundancy. The termination of his employment does not form part of complaints within the list of issues in his Tribunal claim. However, in his written evidence he does state that he believes that he would not have taken voluntary redundancy if he had not been bullied during the restructuring and because of all the previous discrimination and unequal treatment for his professional development. He continues, that Peabody is a good organisation, however some of the senior management that represent them are racist which consequent represents the organisation as a racist institution. In as far as these matters are relevant to the complaints within the list of issues they are addressed in this Judgment.

<u>Mr Shillingford</u>

144. The second claimant, Mr Shillingford, identifies his race as Black and of Caribbean Heritage. He was employed by the respondent from 30 June 2014

until 31 January 2021 when his employment ended on grounds of voluntary redundancy.

145. Mr Shillingford started employment as an Assistant Surveyor in the Asset Management Team reporting to the Principal Surveyor, Mr Blyth. On 15 December 2015, he was promoted to Surveyor.

146. He took voluntary redundancy as part of the restructure (referred to above) which took place between October to December 2020. His employment ended on 31 January 2021. He does not rely on his redundancy as an element of any of the complaints that he has brought in his Tribunal claim. However, he does cite a number of matters at paragraphs 12 and 13 of his first witness statement as factors that led to his decision to request voluntary redundancy and a number of these form part of the list of issues and so are addressed in this Judgment.

147. In May 2018, the Asset Management Team was restructured and became the Investment (Delivery) Team which was moved to the Customer Services Directorate. Mr Shillingford was appointed to one of the two new Project Surveyor-Leasehold roles. The other appointee was Clive Phillips.

148. When Mr Shillingford joined the respondent in 2014 he aspired to complete his Assessment of Professional Competency ("APC") with the RICS, having started this process with his previous employer and having a vast amount of information recorded in his diary as required for the process. He alleges in his written evidence that he received little support from the respondent and there was no relevant structure in place to allow him and other surveyors in the Asset Management Team to complete the APC process.

149. There were only a small number of staff who were members of the RICS (Member of the Royal Institute of Chartered Surveyors = "MRICS") who could act as supervisors or councillors for APC candidates. Mr Ellis agreed to be Mr Shillingford's supervisor/counsellor at the time.

150. Mr Shillingford later changed from the graduate route to the professional experience route in order to speed up the process of becoming MRICS. He alleges in his written evidence, that the support was very minimal. Indeed, he further alleges that the only person who successfully completed the APC and became MRICS during his employment was a Mr David Lowery, who he describes as a Caucasian male, who was employed as a Quantity Surveyor but not in the Investment Team and who left the respondent's employment shortly afterwards.

151. Mr Shillingford also states in his written evidence that he was informed by work colleagues that to their knowledge, the only other person who became MRICS in Asset Management was Mrs Muirhead (then Miss Redding), who he describes as a Caucasian female. He believes that he was recruited into the Assistant Surveyor role due to her departure from the respondent's employment shortly after she became MRICS. Miss Redding later rejoined the Respondent's employment in 2019 as Head of Investment and after her marriage became known as Mrs Muirhead.

152. Mr Shillingford further states in his written evidence that he recalls the following. A colleague, Ms Kutubu, challenged Mr Ellis prior to Miss Redding's appointment, querying what experience she had. He states that Mr Ellis said that she had delivered work on multi-million pound projects to which Ms Kutubu responded that most surveyors have delivered multi-million pound projects and that Miss Redding was not appointed to deliver projects but to lead a team of 20-30 staff. Mr Ellis laughed this off uncomfortably, as he tends to do.

153. Mr Ellis' written evidence was that he gave the same level of support to Mr Shillingford as he gave to other members of the team of different races to obtain their RICS accreditation. He denied that he only allowed white members of staff to obtain RICS accreditation. We were referred to the following documents in support of this: B2073, 2080, 2092, 2094, 2097 and 2194. Mr Ellis' further evidence is that he put Miss Redding, Mr Lowry, David Smith and Payam Roodashtyan forward to APC, although only Miss Redding and Mr Lowry passed. He also refers to Mr Roodashtyan putting together an informal training programme for those seeking to obtain RICS credit discrimination, which she encouraged. This took place from October 2092 August 2020 and Mr Roodashtyan ran optional scheduled CPD sessions for all of Mr Ellis's team, including Mr Shillingford. We were referred to B605-619 in this regard. Mr Ellis' further written evidence is that Mr Shillingford never contacted him to say that he was not receiving sufficient support.

154. With regard to the position of Project Surveyor Leasehold, Mr Shillingford alleges that this forms part of the direct race discrimination complaints of (at paragraph 2.2.2 of his list of issues).

155. As part of the interview process for the role, applicants were required to submit a proposal identifying better ways of working to deliver planned investment works to blocks made up of only predominantly leasehold owned properties/flats. Mr Shillingford sent a written proposal at the time to the then Head of Investment and then after he had left, to Mr Bayliss on 7 February 2019. He did not hear back from Mr Bayliss and so arranged a meeting with him and Mr Blyth on 19 March 2019. Mr Bayliss requested a copy of the proposal which Mr Shillingford sent him that same day. He sought an update from Mr Bayliss on 15 April 2019 but did not receive any reply. He forwarded the email thread to Mr Ellis on 23 May 2019 (at B481).

156. There was a meeting in July 2019 to discuss the email. Mr Shillingford asserts that this was evidence of lack of support. Mr Ellis acknowledges that there was a delay in his response to the email but explains that this was simply because he had just taken over in the role of Head of Investment and did not have sufficient time.

157. Mr Ellis' written evidence is that his involvement with Mr Shillingford was the same for all colleagues regardless of their race. He took this to mean in gaining experience but stated that it was also down to them asking for experiences and work. He points to seeking regular feedback from his teams both in terms of their individual roles and as a team. He further states that off the back of staff surveys, in February 2020 he set up a series of regular meetings which staff could provide feedback and raise any issues (at B603-

604, 627-629 and 656). Both claimants were invited to these meetings and Mr Shillingford provided his feedback on 3 March 2020 which Mr Ellis says he was grateful for. Mr Shillingford in turn thanked Mr Ellis for giving him and the other staff the opportunity to feed into how the team would look and operate in future (at B625-626 and 630).

158. Mr Shillingford's further complaint, in oral evidence, was that despite the meeting in July 2019, nothing material was done after it.

159. On 24 September 2019, Mr Shillingford was copied into an email by Mr Roodashtyan in which he discovered that a meeting had been held the previous day about works to leasehold blocks which could affect the Project Surveyor Leasehold roles (at B520-521). He subsequently discovered that his proposal was being used to frame those discussions, as well as the task being assigned to him and he thus requested to be involved. When Mr Shillingford raised the issue of not being invited to the meeting, Mr Roodashtyan apologised and said this was because they needed to get some things sorted first and would invite him to the next one (at B520). Mr Ellis' position was that they needed to identify if there were sink funds available.

160. Mr Shillingford relied upon this as evidence that Mr Ellis did not allow him to develop. He further stated that his complaint was the Mr Roodashtyan (who is also not white) was leading on the issue and that Mr Ellis only included Mr Roodashtyan to disguise his racism.

161. Mr Shillingford states in his written evidence that Shaun Gilliam (who at this time we believe was Senior Construction Manager) was at some point appointed to lead on the development of a programme of work to leasehold blocks which was a remit of the Project Surveyor Leasehold roles. He states he does not know who made the decision or when. Thereafter, they had regular discussions and meetings about the programme. Mr Shillington's further evidence is that Mr Phillips (the other Project Surveyor) was not involved in any of the discussions or meetings. When he queried this, Mr Gilliam stated something like "Clive is retiring soon so he's not interested". Mr Shillingford relies on being assigned more work than Mr Phillips along with his lack of input into development of the programme as evidence of Mr Ellis not allowing him to develop in his role. In oral evidence he explained that having more work gave him less time to devote to his development.

162. It is fair to say, that Mr Shillingford has a history of speaking up for himself and for others in respect of matters that he believed to be unfair, prejudicial or discriminatory. Indeed, he refers in his witness statement to his membership of the respondent's Employee Council between February and October 2017.

163. In May/June 2019, the respondent commissioned the HIVE Staff Survey seeking staff feedback as to how they viewed Peabody performing in various areas. The results were provided by senior managers in July 2019.

164. This is referred to in the witness statements of Mr Shillingford and Ms Jervis but not in any real detail. We were not taken to the HIVE Staff Survey itself and the only mention of it in the bundle of documents appears to be in an

email to the Customer Services Directorate at B489-491. However, the evidence as to the survey and the emergence of what we will refer to as the Group was not challenged.

165. A group, variously referred to as the EDI Group, the EDI Taskforce and the Group was set up in August/September 2019 to look into the areas within the results of the HIVE Staff Survey with the lowest scores, which the Group saw as raising equality, diversity and inclusion concerns, so as to ascertain what could be done to improve those areas. The results were circulated in November 2019 and thereafter the Group held several meetings with Mr Ellis and staff from HR. Mr Shillingford joined the Group in November/December 2019.

166. On 16 June 2020, the Group requested certain data and information from the respondent's HR Team. This was provided by Ms Jona of HR on 16 July 2020 in an attachment entitled "Asset Management statistics for the group" (at B729). She explained in her email that the data in respect of promotions, disciplinaries and redundancies went back until June 2017. The data related to the Asset Management Team of 60 people.

167. The Group then requested further information on 30 July 2020 and this was provided on 10 and 20 August 2020 (at B819-820 and B830-836, respectively).

168. On 29 January 2021, Mr Shillingford sent Mrs Gordon and others in HR an analysis of the information provided to the EDI Group (at B1388). This included the information referred to as the "Data Review" (at B1401-1405).

169. The Data Review is relied upon by Mr Shillingford in his later grievance as indicative of what has been referred to as structural, institutional and/or systemic racism from which inferences can be drawn of discrimination.

170. The respondent has provided lengthy submissions on the value of the Data Review at paragraphs 8 to 13 and in particular at paragraph 13 of Ms Danver's written submissions. In essence, she submits that whilst statistical evidence showing a pattern of adverse treatment can be relevant to what inferences can be drawn, it must be treated with care and be of probative value in terms of the motivation of the alleged discriminators (citing the cases of Bailey and Karim referred to in Ms Danvers' Note On The Law), the Data Review shows neither a pattern of adverse treatment nor is it of probative value in terms of the motivation of the alleged discriminators.

171. We considered Mr Shillingford's position, the Data Review and the respondent's submissions. We agreed with the respondent's analysis, which given its significance, we have set out below:

    (1) Promotion (at B1401): This indicates that more BAME than non-BAME staff were promoted between June 2017 and July 2020 (6 BAME, 3 non-BAME and 2 not known);

    (2) Grade (at B1401): This indicates 20% of Grade 1 staff as of July 2020 were BAME but at the second highest Grade, 54% were BAME. We

accepted that this does not establish a pattern of the higher-Grade roles being dominated by White employees;

(3) Reward and spot bonuses (at B1402): 16 people appear to have been awarded spot bonuses in 2019/20, of whom 6 (38%) are of unknown ethnicity. We accept that this renders the data set effectively meaningless because it would be substantially affected by, for example, one of the unknowns being either a BAME or non-BAME person who received a particularly high or low spot bonus. Based on the data that is known, it appears that the average sum of spot bonuses received per person is higher for non-BAME than BAME staff, and that 3 non-BAME individuals received two spot bonuses (as compared to one not known person and no known BAME people). However, the average sum per bonus is slightly higher for BAME staff (£2,750 / 4 = £687.50) compared to non-BAME staff (£6,700 / 10 = £670). This paints a mixed picture even on the limited data available;

(4) Disciplinary (at B1403): This does indicate that for the 3-year period covered, there were more formal disciplinary / capability proceedings against BAME staff (3) as opposed to non-BAME staff (1). However, we accept that this is such a small sample size as to not provide statistically significant information;

(5) Redundancies (at B1404): This shows that 14 non-BAME staff were made redundant during the 3-year period - over four times the number of BAME staff made redundant during the same period. The EDI Group itself stated that there was not much that could be deduced from that information as there "isn't anything giving the reasons why the individuals left Peabody". But we accept that if the importance of context is recognised in respect of this set of data, it must also be recognised in respect of, for example, the disciplinary data.

172. In summary, we accept that the Data Review is based on simply too small a set of statistics and includes too many unknowns to be reliable in establishing a pattern. In any event, it shows a mixed picture in terms of the experience of BAME/non-BAME staff. It clearly gives cause for concern but that is not a matter that assists Mr Shillingford or for that matter Mr Hussain in their claims. The respondent has recognised these concerns and we have heard evidence of this and the action taken. Whilst we note this, it falls outside the matters that we are here to deal with.

173. Mr Shillington's claim includes complaints relating to references to some members of staff, including him, as "militant" and that they "needed to break this" and "nip (it) in the bud". This appears to relate to specific emails sent by Mrs Gordon. To understand these comments it is important to view the context in which they were made and a somewhat lengthy sequence of events, which follow.

174. On 1 July 2020 in a webinar when Ms Kutubu raised Black Lives Matter, Ms Fox said that the respondent was planning to set up a working group and asked for volunteers (see B2210-2211). When Ms Kutubu then explained the work that she and the Group had been doing with Mr Ellis, Ms Fox's response

was that she wanted to have Ms Kutubu on a wider audience and "potentially working with corporate" and for them to "pull together". Ms Fox focused on needing to drive this "from a group perspective rather than just a directorate". She invited Ms Kutubu to be on the working group to represent her colleagues (see B2211-2212). Mr Shillingford accepted in oral evidence that it appeared that Ms Fox had in mind a corporate-wide approach.

175. Following the meeting, Mr Ellis amended a draft email that the Group had sent him to send to the Team outlining the work they had been doing. Despite it being an email that Mr Ellis was sending, the Group wanted sight of it before a draft was sent to Mr Spillett (at B721).

176. On 3 July 2020, Mr Ellis sent the Group the revised draft he had already sent to Mr Spillett. That same day, Mr Shillingford responded, on behalf of the Group, that it was "very disappointing" and that they did "not agree with the contents of (his) email as it is drastically different to the draft (they) sent (him)" (at B718-719). This exchange was sent to Mrs Gordon on 14 July 2020 (at B717).

177. Mrs Gordon met with the Group on 10 July 2020, her evidence is that she formed the impression Mr Shillingford and Ms Kutubu had appointed themselves as leaders of the self-appointed group and that they wanted to do things in their own way. However, she told them that the Directorate would be taking a wholesale approach to EDI and implementing a plan.

178. In evidence, Mr Shillingford denied that Mrs Gordon had said that they were looking at implementing a wider plan on 10 July 2020 and said that "she was there to just listen and then go and look at stuff". However, in the Group's Chronology of Appointments document, which Mr Shillingford actually took Mrs Gordon to in evidence, their note of that meeting states that "Andrea (Mrs Gordon) said in her view this matter was best to be led by SLT (Senior Leadership Team) within the department" (at B1391).

179. On 13 July 2020, after queries about spot bonuses had been addressed in the webinar on 1 July 2020, and the Group had had a further meeting with Mrs Gordon on 10 July 2020 when she told them further information would be provided, the Group nonetheless wrote to Mr Spillett and others saying: "Is it the intention or not to officially reply to queries posed in staff emails?" Mrs Gordon was also aware of this email as she assisted Mr Spillett in drafting a response (at B716).

180. Later the same day, Ms Jona sent the Group the data they had requested, which would seem to belie the assertion that there was an official policy of not replying to queries posed in staff emails (at B729).

181. On 14 July 2020, Mr Spillett provided a formal response to the spot bonus questions as requested (at B739-740).

182. On 16 July 2020, Mrs Gordon sent an email to three colleagues which outlined that she had ben in lots of discussions with Ms Fox and that she wanted to pull together a directorate action plan. Her email provides specific concrete areas for improvement that she had a plan for. We accept that this

is consistent with her being engaged with the issues raised, but wanting to take a directorate-wide approach. The email is at B1165-1166.

183. That email also included the following sentence:

"There is a small group of people in the directorate who are becoming slightly militant and we need to break this so that it is the whole team's responsibility to embed inclusion and diversity".

184. Mr Shillingford to Mr Spillett's email on 23 July 2020 raising concerns about his response and also stated that his one specific aim and objective when it comes to any and everything relating to the Black Lives Matter movement was to achieve a level playing field for all Black people.

185. On 24 July 2020, Mr Ellis responded in Mr Spillett's absence (at B737). He outlined the steps the organisation were taking in relation to Black Lives Matter and the existence of the BAME network. He asked staff to come to him if they have "any ideas about how we can do that better" (at B738).

186. On 28 July 2020 Ms Kutubu sent an email on behalf of the Group (signed by her and Mr Shillingford as Co-Chairs) (at B749). This email outlined the work they were doing, stating:

"Albeit that the issues of inequality in all its forms must be reviewed across the organisation, the group strongly felt that it was critically urgent that the findings in relation to racism, especially affecting black staff, warranted immediate focus and redress. As a small and very concerned group, we have taken the segmented and bite size approach to be a constructive and positive catalyst for a better, truly inclusive and fair organisation with initial focus on this element of inequality."

187. The email ended in asking for people to contact the Co-Chairs if they wished to discuss their personal circumstances.

188. We accept that this then effectively created two messages: one from Mr Ellis directing staff to the BAME network and himself, and the other from the Group directing staff to themselves.

189. On 29 July 2020, Mr Spillett emailed Mrs Gordon raising his concerns about the discussion happening by email and suggested other ways of conducting a constructive discussion (at B748).

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190. On 29 July 2020, Mrs Gordon was sent the draft Customer Services D&I Action Plan that she had commissioned (at B1167-1171). Mr Shillingford accepted in evidence after being pressed, that it did not look like Mrs Gordon was trying to ignore the issues raised by the Group.

191. On 29 July 2020, Mrs Gordon sent an email to Mr Spillett responding to his earlier email in which she said as follows (at B747):

"I think we need to nip in the bud this group and especially Rashida and Sheldon calling themselves 'co-chairs' I spoke to Ash about this as well before I went on holiday and she agreed (I know she is away now) - so we do need to do some comms to the whole directorate, to spell out that this will be discussed and debated and actions planned as a whole directorate and then each team in the directorate will have a sub action plan - but we need to stop this small group of staff emailing out to the rest of the team in this way."

192. Mrs Gordon emailed Ms Fox on 31 July 2020 indicating she felt it was not helpful the Group were trying to "address the issues in the way that they have been" and indicating her view that it was important the whole Directorate was involved (at B1324-1325).

193. Ms Fox sent an email to the whole Directorate on 3 August 2020 highlighting the importance of a consistent approach and not working as silos on the issue. She also asked for people to volunteer to be D&I Champions and asked people to raise any concerns relating to D&I with line managers, head of services, diversity networks, HR or her (at B771).

194. Following a further meeting with the Group on 6 August 2020, Mrs Gordon responded to queries they had raised and said that further information would be sent by Ms Jona (at B 819-821). She confirmed that the Group were still welcome to meet as a group but asked them to feed concerns in as a group to the D&I Champion and to consider standing to be that Champion. We accept that this is entirely consistent with Mrs Gordon being receptive to the points being raised by the Group but wanting the discussion to be a directorate / business wide one.

195. Several months later listening sessions were advertised on the intranet to hear feedback on the experiences of Black colleagues (at B2189) and an EDI plan was put in place for 2021-2024 (B1752). This would indicate that the respondent was committed to an organisational wide approach and not seeking to stifle any discussion of such issues or Black members of staff raising their experiences.

196. In her evidence, Mrs Gordon stated that the reason she wrote in these terms was because from interactions she had with both the Group and another small group of individuals in the Directorate (some of whom were White) and their emails, that she was concerned that they were determined to move forward in their own way, rather than in a way that was aligned with the rest of the business. In other words not following a Directorate-wide approach as she was promoting.

197. Mr Shillingford's complaint of victimisation arises in part from the alleged protected act that between 21 August to 26 October 2020, he complained to Axis, a third party external contractor, that he did not appreciate being portrayed as an "angry Black man" (at paragraph 5.2.1 of his list of issues).

198. This in turn arises from a sequence of events set out at paragraphs 57 to 63, 88, 95 & 96 of his first witness statement.

199. In essence, the respondent received two formal complaints from Axis about Mr Shillingford. He accepted in oral evidence that these were not minor matters. They were investigated by Claire Cooper, Head of Home Ownership. We were referred to her Investigation Report dated 15 October 2020 at B1016-1018. Mr Shillingford was removed from the Axis contract whilst these complaints were investigated (see B2445). No disciplinary action was taken against him and he returned to work for Axis after the investigation had been concluded in October 2020.

200. We were referred to an email dated 16 September 2020 from ST at Axis to MJ also at Axis, in which she set out the telephone discussion she had with Mr Shillingford that day (at B895). The final paragraph references that Mr Shillingford complained specifically that "Axis are just trying to make me out as an angry Black man".

201. On 10 November 2020, Mr Shillingford raised a grievance with Mrs Gordon in which he complained of systematic, structural and institutional racism within the respondent's organisation and that HR was in collusion with senior management (at B1081-1091). As we have noted, Mr Hussain's grievance was in the similar general terms as this and structured in the same way.

202. On reviewing the grievance, Mrs Gordon noted that many of the points included in his grievance were matters that had been raised over the previous months by the ED & I Focus Group, as well as some new points not previously raised. She was disappointed that Mr Shillingford had included these matters given that she believed that they had been discussed successfully and productively at the ED & I Focus.

203. Mrs Gordon emailed Mr Shillingford to ask him what outcome he was looking for from his grievance given that the respondent was already working across the Customer Services Directorate (and indeed the whole organisation) to put a diversity plan into place (at B1080). Mr Shillingford responded on 11 November 2020 in which he said that in the last meeting he felt as though Mrs Gordon and senior management were tried to disband the group (B1093-1094). This is Gordon's evidence is that she found this odd given that she had explicitly advised in her email of 10 August 2020, that they were welcome to still meet as a group and encourage them to apply to be formally recognised EDI Champions.

204. Initially, Mrs Gordon appointed Sara Tutton, Director of Health and Safety as the investigating manager, in consultation with Ms Bennett. They decided it would be best to appoint a manager outside of the Customer Services Directorate who was entirely impartial. There were a number of potential candidates including Ms Tutton. Ms Gordon chose Ms Tutton on the basis that she believed she was very thorough in all her work and would be able to logically address each of Mr Shillingford's concerns. Her evidence is that her choice of Ms Tutton was not motivated by Mr Shillingford's race or because he had complained of discrimination.

205. On being advised of the name of the grievance officer, Mr Shillingford raised objections to her appointment on the basis that he was concerned as to her whether she would be impartial and her ability as "a middle-age Caucasian woman to understand the nuances around structural, institutional and systematic racism and/or microaggressions in my/this grievance" (B1244-1245 and 1256-1258). He requested an independent/external grievance investigator and if that is deemed not possible, two investigators, one BAME and one non-BAME.

206. Ms Gordon did not know of any external grievance investigators and so she suggested that Ms Welsby liaise with the respondent's legal advisers to see if they knew anyone. Jonathan Cawthra was one of the people that they

named and ultimately Ms Gordon decided he was most suited because her legal advisers had said that he had previous experience in the housing sector. Ms Gordon had never met Mr Cawthra and her evidence is that her decision to appoint him was not motivated by Mr Shillingford's race at all or because he had complained of discrimination.

207. Having been informed of Mr Cawthra's appointment, Mr Shillingford did not raise any objection at the time.

208. Mr Cawthra was sent the relevant documentation relating to Mr Shillingford's grievance by Ms Welsby, which he reviewed. On 10 January 2021, he contacted Mr Shillingford to arrange a meeting with him. This was ultimately agreed for 22 January 2021 (at B1333-1334 and 1336).

209. On 12 January 2021, Mr Shillingford sent Mr Cawthra some further information relating to his grievance (at B1336).

210. On 22 January 2021, Mr Cawthra met with Mr Shillingford and his representative, Andrew Bindi. At the start of the meeting, Mr Cawthra noted that in his email to Ms Welsby, Mr Shillingford had said that he had some concerns about Mr Cawthra conducting the grievance investigation. Mr Shillingford said that his concerns been resolved and that it was happy Mr Cawthra to conduct the investigation (at B1379 of the notes).

211. In the meeting, Mr Shillingford said he had concerns about the respondent's recruitment and promotion policies, that his progression and been hampered by what appeared to be a bias on the basis of his heritage and that he felt that if there was not this perceived bias he would be at Director or Head of level. He requested that Mr Cawthra speak with Ms Kutubu, and Ijay Onyechi, former Assistant Director Resident Services – East (now Director of New Homes and Customer Care), as part of his investigations.

212. In response, Mr Cawthra advised that his remit was to investigate Mr Shillingford's grievance and how the issues he had raised affected him personally. He further advised that he had not been instructed to carry out a broader diversity review. He added that if he felt the individuals he identified had relevant evidence, he would consider interviewing them (at B1380).

213. In his written evidence, Mr Cawthra states that at the end of the meeting Mr Bindi told him that he thought that the meeting had been well conducted.

214. The notes of the meeting are at B1378-1380. These were sent to Mr Shillingford after the meeting for review. He later returned a copy annotated with his own comments (at B1381-1385). In his email, Mr Shillingford said that the notes of the first meeting held on 22 January 2021 reflected what was said at the meeting "in principle" but he wanted to add context from his side, which he hoped would be useful (at B1381).

215. During January 2021, following the meeting, Mr Shillingford sent Mr Cawthra some further documents to review (at B1346-1361 and at B1388-1406) . Mr Cawthra asked Mr Shillingford if he intended to forward him any further documentation, as he wanted to review all his evidence at the outset, so that

he could structure his investigation appropriately. Mr Shillingford confirmed that he did not intend to send anything further (at B1411-1412).

216. On 3 February 2021, Mr Cawthra contacted Ms Welsby to clarify whether his remit was to investigate the grievance and present his report for an internal manager to make a decision about whether to uphold agreements, or whether the respondent also wanted him to make a decision as part of his report. He said he was happy either way and that he had been meaning to clarify this with her previously. Ms Welsby confirmed that the respondent wanted him to make a decision. Her email refers to "the current arrangement is that the investigator is also the decision maker" (at B2191).

217. On 11 February 2021, Mr Cawthra sent an email to Mr Shillingford updating him on his progress. In this email, he explained that he had not previously appreciated that his remit extended to making a determination of the grievance, that it was more usual for the person hearing the grievance and the investigator to be the same person and therefore the fact that he was now making the determination in the grievance was not out of the ordinary. He also confirmed to Mr Shillingford that this had not made any difference to his approach to the grievance other than he had not made this clear at the meeting on 22nd of January 2021 that it was the grievance meeting. He therefore offered Mr Shillingford the opportunity to attend a further meeting but confirmed that he did not have anything further that he needed to ask him. This email is at B1414.

218. In his written evidence, Mr Cawthra states that he is aware that Mr Shillingford has alleged that his brief changed. He explained that this was not the case. He had been initially asked to conduct the investigation and he believes that there was simply a misunderstanding between him and Ms Welsby about what "conducting an investigation" entailed. His further evidence is that this misunderstanding and subsequent clarification of his remit had nothing to do with Mr Shillingford's race or because he had submitted further documents. In addition, he states that, in any event, he cannot see how this would put Mr Shillingford at any kind of detriment. He asserts that it was actually more likely to be beneficial to him because it meant that the person making the decision was the person who collected all the evidence and so the decision could be reached sooner as it did not need to be passed to another person to make the decision.

219. Mr Shillingford indicated that he wanted a further meeting and this was arranged to take place on 8 March 2021 (at B1426-1433).

220. The further meeting took place on 8 March 2021 between Mr Cawthra, Mr Shillingford and Mr Bindi. Also in attendance was Raquel Roque, HR Adviser, taking notes.

221. The notes of the meeting were sent to Mr Shillingford on 15 March 2021 which he was invited by Mr Cawthra to review. On 21 March 2021, Mr Shillingford returned a copy containing his own comments at B1459-1467. In his covering email he stated that he felt that in his view several sections did not "reasonably reflect" the answers points/comments and discussion, so he had added more context where necessary (at B1457).

222. On 11 March 2021, Mr Cawthra emailed Mrs Gordon for her comments on her email dated 16 July 2020 and she responded that same day (at B1435 & 1438).

223. He interviewed the following witnesses: Shaun Gilam, Senior Construction Manager on 2 February & 22 March 20201 (notes of which are at B155-1556); Mrs Muirhead on 4 February 2021 (B1556-1559); Mr Ellis on 5 February 2021 (B1560); Ms Jona on 8 February 2021 (B1561); Mrs Gordon on 10 February 2021 (B1562-1563); Ms Onyechi on 17 February 2021 (B1563-1564); Ed Wallis, Senior Construction Manager, on 2 March 2021 (B1564-1565); and Mr Blyth, Senior Construction Manager, on 19 March 2021 (B1564-1565).

224. On 15 March 2021, Mr Shillingford sent an email to Mr Cawthra asking him whether he had spoken to the two witnesses he asked him to interview (Ms Kutubu and Ms Onyechi). On 18 March, Mr Cawthra confirmed that he had (at B1457 and 1458).

225. Mr Shillingford alleges that Mr Cawthra lied to him about interviewing his witnesses. Mr Cawthra's written evidence is that he spoke to both. We have already referred to his interview with Ms Onyechi on 17 February 2021 and the notes are at B1563-1564. Mr Cawthra' further evidence is that he assumes that allegation relates to Ms Kutubu. Mr Cawthra's evidence is that he spoke to her as part of his investigation into her own grievance and asked her questions about Mr Shillingford. However, she did not say anything that was of assistance and so he did not include any notes of her interview in Mr Shillingford's grievance investigation. He did not disclose to her that Mr Shillingford had brought a grievance and equally he did not disclosure that she had brought a grievance to Mr Shillingford.

226. On 26 March 2021, Mr Cawthra sent his grievance investigation report and appendices to Mr Shillingford (at 1469-1573). This is a very detailed document. In his witness statement at paragraph 25, he sets out his findings which relate to Mr Shillingford's list of issues in this claim. In a separate email of that same date, Mr Cawthra advised Mr Shillingford of his right of appeal (at B1574).

227. Mr Cawthra did not uphold Mr Shillingford's grievance. He found no evidence to support his allegation that race had played any part in the decisions that had been made. Whilst he did not doubt that Mr Shillingford's complaints reflected what he perceived to be the case, he did not find evidence to support his assertion that his experience was demonstrative of structural, institutional and/or systemic racism.

228. Mr Shillingford alleges that Mr Cawthra failed to include all of the documents provided in his grievance and or the grievance investigation. This related to the Data Review. Mr Cawthra's evidence was that he considered all of the evidence provided to him by Mr Shillingford and others. Anything specifically not referred to in his report was simply because he did not deem it relevant. His oral evidence was that he did consider the Data Review but did not include it as part of the appendices to his report because it was not within his remit to conduct a diversity review and he passed this matter onto someone else to deal with.

229. On 6 April 2021, Mr Shillingford appealed against this grievance outcome (at B1589-1590). This is divided into five headings:

    (1) the investigation was not conducted thoroughly and wholistically and failed to assess my allegations objectively and independently in the context of structural, institutional, and systemic racism;

    (2) there are several instances where the individuals interviewed do not recall discussions and decisions, however their accounts seem to have been given a higher “balance of probability” over mine;

    (3) the manner in which the internal Grievance Investigation Manager was appointed which I challenged and resulted in an external candidate being appointed, are both shrouded with bias and cronyism in an attempt to illustrate it was done fairly. However, the approach taken in my view amounts to a continued victimisation of myself (dating back to June 2020) and breach of the Equality Act 2010;

    (4) HR branding the Group as "slightly militant” and [they] need to break this on 16th July 2020 (approx. one week after our first meeting with Mrs Gordon) categorically highlights the way we were seen and further backs-up the agenda of victimisation that followed against me; and

    (5) The conclusion of the report states, "Something clearly went badly wrong [in the last six months], but quite what that was hasn't become at all clear" highlights the fact that despite all of the various correspondences. It appears little to no attempt was made to understand how my personal experience, when everything is viewed wholistically, is connected to the fact that post-merger majority of beneficial factors were to the advantage of Caucasian staff and to the detriment of Black staff career progression.

230. Mr Burns was asked by Mrs Gordon to hear the appeal although she then passed the matter over to Ms Welsby to liaise with him. We have set our Mr Burns’ credentials above.

231. Mr Burns considered all of the documentation which formed part of his original grievance, including Mr Cawthra’s report and appendices. He noticed that Mr Shillingford had complained that Mr Cawthra had not interviewed one of his witnesses. He then asked Ms Welsby to contact Mr Shillingford to find out which witness he was referring to and requested some further information be provided to him (at B1600-1604). Ms Welsby also asked Mr Cawthra about this point and sent Mr Burns some further information (at B1598-1599).

232. An appeal hearing was then arranged and this took place on 30 April 2021. This was conducted by Mr Burns, with Ms Welsby as notetaker and HR representative. Mr Shillingford attended with his union representative, Mr Bindi. We were referred to the notes of the meeting at B1710-1715.

233. During the hearing, Mr Burns explained that the appeal process was not intended to rehear his grievance but to provide him with the opportunity to explain why he was unhappy with the grievance process and outcome. Mr

Burns further explained that he would then look at all the evidence and make a decision.

234. One of Mr Shillingford's allegations is that Mr Burns set out the appeal in a manner to prevent him going over the points he raised. Mr Burns, in his written evidence, understands this to refer to his approach to the appeal being a deliberate attempt to prevent him going of the points he raised. Mr Burns denies this on the following basis: he was following the appeal process as defined in the respondent's grievance procedure (at B1313); and he gave Mr Shillingford ample opportunity to raise any points he was not happy with during the meeting and indeed Mr Shillingford did so and Mr Burns considered all these points in reaching his decision. Mr Burns' further evidence is that even if Mr Shillingford did feel that he was not able to raise all his points, his decision not to conduct the appeal as a full rehearing was not motivated by is race or because he had complained of victimisation.

235. During the appeal hearing, Mr Shillingford stated to Mr Burns that he did not believe that some of his information had been considered in the initial investigation and that Mr Cawthra had told him that the structural and systemic abuse that Mr Shillingford had raised was something that the respondent would need to consider separately to his grievance. Mr Shillingford told Mr Burns that he believed this made no make sense.

236. Mr Shillingford also raised that one of his witnesses, Ms Kutubu, had not been interviewed as part of the original grievance investigation. Mr Burns asked him whether Ms Kutubu witnessed any of the specific circumstances of discrimination against Mr Shillingford. Mr Shillingford responded that Ms Kutubu had also raised a grievance. Mr Burns' evidence is that he was therefore dubious as to what relevant evidence she may have had in relation to Mr Shillingford's individual grievance but decided that he would speak with her to ensure that he fully considered the appeal.

237. Mr Burns also asked Mr Shillingford what he was looking for by what he was looking for by way of a resolution to his grievance given that he was no longer employed by the respondent. His response was that he was looking for "substantial change and financial compensation". Mr Burns responded that with regard to "substantial change", the respondent was on a journey of change, not because it believed that there was systemic racism, but because it believed that it should reflect the communities that it worked with and that that diversity should be reflected across the organisation at all levels. Mr Burns further explained that the respondent was therefore taking action and setting targets which would definitely result in change. Mr Shillingford agreed and acknowledged that a lot of this change happened before his employment ended.

238. On 11 May 2021, Mr Shillingford was sent a copy of the notes of the appeal hearing and he submitted his amended notes on 17 May (at B1730-1739).

239. Mr Burns states in his written evidence that he interviewed Mr Kutubu but is unable to find his notes of the meeting and therefore cannot recall the exact date on which they spoke. His recollection is that she had no evidence that was directly relevant to or supported Mr Shillingford's specific grievances. He

further states that the context of her interview was that she and a few colleagues in the team had been part of a self-appointed ED&I focus group which had queried what they believed to be a lack of ethnic minority representation in positions of seniority within the respondent organisation.

240. On 18 May 2021, Mr Burns wrote to Mr Shillingford by letter informing him of the outcome of his appeal and the reasons for it. This letter is at B1742-1747. At paragraph 18 of his witness statement, Mr Burns sets out his findings in relation to Mr Shillingford's allegations made in his Tribunal claim.

241. At paragraph 21 of his witness statement, Mr Burns identifies that a range of steps have been taken by the respondent to attempt to increase ethnic minority representation at board, executive and senior management level within the organisation and to improve communication and transparency in recruitment, selection and promotions. This is by way of reference to the "substantive change" that Mr Shillingford referred to as part of the resolution of his grievance appeal.

Submissions

242. As we have indicated above, after the close of evidence, we were provided with Ms Danvers written submissions running to 37 pages and a separate note on the law consisting of 18 pages. In addition, Mr Hussain provided written submissions in the form of an annotated version of Ms Danvers' document, running to 21 pages. We heard oral submissions from the parties, including Mr Lynch.
243. We do not propose to set out those submissions in full but refer to them where it is appropriate to do so. However, we would assure the parties that the submissions have been fully considered.

Essential Law

244. Section 13 of the Equality Act 2010:

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

245. Section 19 of the Equality Act 2010:

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

246. Section 26 of the Equality Act 2010:

> *"(1) A person (A) harasses another (B) if—*
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
> *(b) the conduct has the purpose or effect of—*
> *(i) violating B's dignity, or*

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
(2) A also harasses B if—
(a) A engages in unwanted conduct of a sexual nature, and
(b) the conduct has the purpose or effect referred to in subsection (1)(b).
(3) A also harasses B if—
(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
(b) the conduct has the purpose or effect referred to in subsection (1)(b), and
(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect."

247. Section 27 of the Equality Act 2010:

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

Conclusions

Time limits

248. Paragraphs 1 of the List of Issues in respect of both claimants (at B146 and B149) asks us to consider whether we have jurisdiction to determine the claimants' complaints under the Equality Act 2010.

249. This requires us to consider a number of matters: were each of the complaints presented to the Tribunal within the requisite time limits; if any of them were not, do they form part of a continuing act; or would it be just and equitable for us to extend time so as to allow us jurisdiction to determine those complaints?

250. Section 123 governs time limits under The Equality Act 2010. It states as follows:

"[Subject to sections 140A and 140B,] proceedings on a complaint within section 120 may not be brought after the end of—
the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable…
For the purposes of this section—
conduct extending over a period is to be treated as done at the end of the period;
failure to do something is to be treated as occurring when the person in question decided on it.
In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
when P does an act inconsistent with doing it, or if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it".

251. In essence then, a claim has to be presented within a period of 3 months, plus any extension of that period by operation of the ACAS Early conciliation process, of the act complained.

252. However, any discriminatory conduct which "extends over a period" shall be treated as done at the end of that period under section 123(3) of the Equality Act 2010.

253. In addition, a Tribunal has the discretion to allow a claim outside the time limit if it is just and equitable to do so. This is a process of weighing up the reasons for and against extending time and setting out the rationale.

254. With regard to Mr Hussain. Given the date on which the claim was presented and the dates of early conciliation, any complaint made concerning something that happened before 22 January 2021 may not have been made in time.

255. With regard to Mr Shillingford. Given the date on which the claim was presented and the dates of early conciliation, any complaint made concerning something that happened before 21 January 2021 may not have been made in time.

256. Turning then to the position under section 123(3). In some situations, discrimination continues over a period of time, sometimes up to the date of leaving employment. If so, the time limit in which to present a claim form to the Employment Tribunal runs from the end of that period. The common, although technically inaccurate, name for this is "continuing discrimination".

257. In Hendricks v Commissioner of Police of the Metropolis [2003] IRLR 96, the Court of Appeal held that a worker need not be restricted to proving a discriminatory policy, rule, regime or practice, if s/he could show that a sequence of individual incidents were evidence of a "continuing discriminatory state of affairs".

Mr Hussain

258. References are to paragraphs of the list of issues at B145-149. The following acts of discrimination are out of time and do not form part of a continuing course of conduct: direct discrimination paragraphs 2.2.1 to 2.2.11; victimisation paragraphs 5.4.1 to 5.4.5. In as far as it is possible to identify dates on which the indirect discrimination took place, this appears to be out of time as well.

259. There are significant gaps between the various allegations. For example, there are allegations against Mr Ellis and Mr Matheson in the period 2008 to 2015, then an isolated event by Mr Ellis in August 2017, another by Mrs Muirhead in March 2020, one by Ms Burton in September/October 2020 and an email by Mr Ellis on 3 December 2020. All of these are out of time and have no connection to the decisions taken by different people in respect of the grievance and appeal.

260. Mr Hussain said in evidence he only thought his treatment was discriminatory around December 2020 when he was put at risk of redundancy. However, he does not allege that the redundancy itself was discriminatory (he actually took voluntary redundancy after being told he would be assimilated and not made redundant). That he did not consider matters prior to December 2020 to

amounted to unlawful discrimination, does, as the respondent asserts, support its contention that there is no basis for him to allege now that it was unlawful treatment.

261. In any event, as the respondent further asserts, it is unclear why Mr Hussain then waited some further four months before he notified ACAS. On this basis we do not believe it would be just and equitable to extend time.

262. That leaves his complaints of direct discrimination at paragraph 2.2.12 to 2.2.15 and victimisation paragraphs 5.4.6 and 5.4.7 in time.

263. However, in case we are wrong and for the sake of completeness, we have gone through each of the complaints in turn and considered whether they are well-founded or not.

Mr Shillingford

264. The allegations that the second claimant has brought within the primary time limit relate to the allegations against Mr Cawthra and Mr Burns with regard to his grievance and appeal. Mr Shillingford asserts that the other matters should be considered as continuing acts because all the perpetrators colluded with one another. However there is no evidence in support of this. Whilst HR liaised with some of the managers in terms of advice given on matters, this does not amount to collusion to discriminate or a continuing state of affairs.

265. We accept that Mr Shillingford did not see Mrs Gordon's comments until he received the reply to a Subject Access Request made under the data protection legislation in February 2021. However, were not convinced that it was just and equitable to extend time on this basis because from at least mid-2020 onwards, he had identified concerns about discrimination and there was no good reason why he could not have investigated his rights and time limits and pursued a claim at that time or in respect of the allegations against Mrs Gordon once he received the reply to the Subject Access Request. Instead he waited until 21 April 2021 to notify ACAS of a claim.

266. However, in the event that we are wrong and for the sake of completeness we have considered each of the complaints to determine whether they are well-founded or not.

Burden of Proof

267. Under section 136 of the Equality Act 2010, if there are facts from which an Employment Tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision.

268. We have taken account of the guidelines set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258 regarding the burden of proof. The Court of Appeal said the Tribunal must go through a two-stage process. At stage 1, the claimant must prove facts from which the

Tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent had discriminated against the claimant. In deciding whether the claimant has proved these facts, the Employment Tribunal can take account of the respondent's evidence. At stage 2, the respondent must prove s/he did not commit that discrimination. Although there are two stages, Employment Tribunals generally hear all the evidence in one go, including the respondent's explanation, before deciding whether the requirements of each stage are satisfied.

269. The full guidelines (as adapted for the Equality Act 2010) are as follows:

a. It is for the claimant to prove, on the balance of probabilities, facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful under the 2010. These are referred to below as 'such facts'.

b. If the claimant does not prove such facts s/he will fail.

c. It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few Respondents would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "s/he would not have fitted in".

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

e. It is important to note the word 'could' in section 136(1). At this stage, the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage, a Tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

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

g. These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw from an evasive or equivocal reply to a questionnaire or any other questions that fall within the Equality Act 2010.

h. Likewise, the Tribunal must decide whether any provision of any relevant code of practice is relevant and, if so, take it into account in determining, such facts. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

i. Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on

grounds of a protected characteristic or act, then the burden of proof moves to the respondent.

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

k. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of a protected characteristic or act, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive 97/80/EC.

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

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

270. We have also taken into account Madarassy v Nomura International plc [2007] IRLR 246, CA which found that the mere fact of a difference in protected characteristic and a difference in treatment will not be enough to shift the burden of proof. There needs to be "something more". There has to be enough evidence from which a reasonable tribunal could conclude, if unexplained, that discrimination has (not could) occurred.

271. In Qureshi v (1) Victoria University of Manchester (2) Brazie [2001] ICR 863, the Employment Appeal Tribunal stated that a Tribunal should find the primary facts about all the incidents and then look at the totality of those facts, including the respondent's explanations, in order to decide whether to infer the acts complained of were because of the protected characteristic. To adopt a fragmented approach "would inevitably have the effect of diminishing any eloquence that the cumulative effect of the primary facts might have" as to whether actions were because of the protected characteristic.

272. We have also taken into account the guidance from the, then, House of Lords, in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL. The House of Lords considered the classic Tribunal approach to discrimination cases, which is to first assess whether there has been less favourable treatment, and if so, consider if the treatment was on grounds of the relevant prohibited conduct and stated that it may be more convenient in some cases to treat both questions together, or to look at the reason why issue before the less favourable treatment issue.

273. We have considered the evidence that was put before us and have reached findings of fact as indicated having looked at the matters individually and then gone back and looked at the matters in their totality, drawing inferences from the primary facts if we felt it appropriate to do so.

Institutional / structural discrimination

274. Part of the claimants' case is that the respondent was institutionally or structurally racist and that this is supported by statistical information contained with in the Data Review documentation. In addition, the claimants' assert that the respondent's failure to investigate institutional or structural racism as part of their individual grievances was in itself evidence of and/or an act of race discrimination. We can understand why the claimants' might believe this.

275. However, as the respondent rightly reminds us, there is no concept of institutional racism under the Equality Act 2010, nor is there any doctrine of transferred malice (Chief Constable of Greater Manchester Police v Bailey) [2017] EWCA Civ 425).

276. In Stockton on Tees Borough Council v Aylott [2010] ICR 1278, Mummery LJ noted that an Employment Tribunal can err in law if they:

> *"…conclude that liability for direct discrimination has been established simply by relying on an unproven assertion of stereotyping persons with that particular [protected characteristic]. Direct discrimination claims must be decided in accordance with the evidence, not by making use, without requiring evidence, of a verbal formula such as "institutional discrimination" or "stereotyping" on the basis of assumed characteristics."*

277. In General Medical Council v Karim [2023] EAT 87, also gave guidance as to the place of statistics and the importance of focusing on the individual decisions.

278. Our task in this case is to consider whether approximately 12 individuals, that the claimants have identified as being alleged perpetrators of direct discrimination, harassment, and / or victimisation, acted because of (or for a reason related to) race, or because of a protected act.

279. Unless it is alleged that the act is inherently discriminatory (which only seems to be the case in respect of one allegation by Mr Shillingford which is discussed later on in this Judgment), this means that the Tribunal must explore the mental processes of the alleged perpetrators (conscious or unconscious) to determine the "reason why" they acted as they did (R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS & Ors [2010] IRLR 136 SC.

280. Of course, a Tribunal can draw inferences of discrimination. However, these must be supported by primary findings of fact and cannot be drawn speculatively and the primary facts on which they are based must be clearly identified (Chapman v Simon [1994] IRLR 124, CA). Further, the primary facts relied on must have probative value as regards the motivation the alleged discriminator is alleged to have (as per Bailey). What follows from this is that evidence of disparity within an organisation over which the alleged perpetrators have no control, does not necessarily assist the Tribunal in respect of those individuals.

281. Statistical evidence showing a pattern of adverse treatment can be relevant to what inferences can be drawn, but it must be treated with care and be of probative value in terms of the motivation of the alleged discriminator(s) (as per Bailey and Karim).

282. The claimants rely on the Data Review documentation in this regard. The group of which Mr Shillingford was a part of requested certain data from the respondent, which was provided by Ms Jona of HR on 16 July 2020 (at B729). Ms Jona explained that the data related to the Asset Management Team (of 60 people) and that the data in respect of promotions, disciplinaries and redundancies went back until June 2017.

283. The group then requested further information on 30 July 2020 (at B750-754), which was provided on 10 August 2020 (at B819-820 and 20 August 2020 (at B830 & 831-836).

284. On 29 January 2021, Mr Shillingford sent Ms Gordon and other members of HR an analysis of the information provided to the Group (at B1388), including the Data Review documentation (at B1401-1405).

285. The respondent asserts that this Data Review documentation neither shows a pattern of adverse treatment, nor is it of probative value in terms of the motivation of the alleged discriminators.

286. Having considered the statistical data within the Data Review documentation and made findings as above, whilst we can see that it would show some cause for concern for the respondent and to the claimants and the Group, it does not support a pattern of adverse treatment because it covers a limited period of time and involves a limited sample of employees. However, moreover, it does not provide evidence in support of the motivation of the alleged discriminators.

Public Sector Equality Duty

287. Very belatedly in the course of hearing the respondent's evidence, Mr Lynch, on behalf of Mr Shillingford, raised the matter of the claimants' reliance on the Public Sector Equality Duty ("PSED") arising under section 149 of the Equality Act 2010. This matter was not part of the claimants' evidence and was introduced in cross examination of the respondent's witnesses. In answer to questions, Ms Gorden stated that she was unaware of the PSED and the respondent's position was that it did not apply to them.

288. In support of his contentions, during submissions, Mr Lynch subsequently provided various documents relating to the PSED. These are identified above. His submission was that the respondent was bound by this duty and its failure to comply with it was further evidence of institutionalised racism in support of the claimant's claims. He relied on R (Weaver) v London Quadrant Housing Trust [2009] EWCA Civ 587, which states that section 149 applies to housing associations.

289. During the hearing I expressed my concern that it was unclear from this case whether or not that extended the duty to anything more than housing

associations' obligations to the public i.e. whether it included the exercise of its employment function and specifically its relevance to the claimant's case.

290. Mr Lynch was of the opinion that it did but without adding much more. In essence, he submitted that it was of relevance because if the respondent had adhered to the PSED then the claimants would not be here today because the respondent would have had policies and procedures in place which would have avoided the institutionalised/structural racism endemic in the respondent's organisation.

291. The respondent submitted that this matter was raised very late in the day and with limited evidence in support. Ms Danvers asserted that the respondent was not a public body under Schedule 19 of the Equality Act 2010 and in any event the duty under section 149 does not extend to its obligations towards its employees. Further, the respondent submitted that the Tribunal has no jurisdiction to deal with this matter.

292. In our deliberations, we considered the position more carefully than had been presented to us during submissions.

293. The first public sector duty was introduced by the Race Relations (Amendment) Act 2000. This resulted from the MacPherson Report following the Stephen Lawrence enquiry. The purpose of such a duty was to address institutional racism.

294. Under section 71 of the Race Relations Act 1976, a positive duty was placed upon a public authority in carrying out its functions to have regard to the need to limit unlawful race discrimination and to promote equality of opportunity and good relations between people of different racial groups. This included employment functions.

295. From 6 April 2007, a similar gender equality duty came into effect under the Sex Discrimination Act 1975 and this covered pay as well as other areas of employment.

296. The Disability Equality Duty came into effect on 5 December 2006.

297. The PSED then came into force on 5 April 2011 under the Equality Act 2010, replacing the previous race, gender and disability duties.

298. Under section 149 of the Equality Act 2010, there is a Public Sector Equality Duty which applies to public authorities which are identified with Schedule 19 of the Act. This extends to include government departments, local government, the police, the NHS and various educational bodies. It also extends to cover non-/public authorities which nevertheless exercise a public function.

299. Section 149 states:

> *"(1) A public authority must, in the exercise of its functions, have due regard to the need to–*
> *(a) eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act;*

(b) advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it;
(c) foster good relations between persons who share a relevant protected characteristic and persons who do not share it."

300. In addition, public authorities in England must prepare and publish one more specific and measurable equality objectives which they think they should achieve in order to meet the general duty under section 149. Authorities must also publish annual information to demonstrate their compliance with the section 149 general duty. The Equality & Human Rights Commission ("EHRC") has also publish technical guidance on the PSED as it applies in England (Technical guidance on the public sector equality duty: England, 2014 updated February 2021).

301. Individuals cannot bring private law claims against public authorities for failing to comply with the PSED. In individual discrimination cases, an employer's failure to follow the PSED may be particularly relevant to complaints of indirect discrimination or adjustments for a disabled worker.

302. Turning to consider the case before us. Whilst in evidence the respondent seemed unaware of the duty, in as far as it can only to the assertion relating to the significance of institutionalised racism, we have already dealt with this matter above. For the reasons already stated it is hard to see how in itself it has any bearing on the individual claims brought by the two claimants.

<u>The complaints</u>

303. Turning now to the complaints brought by each of the claimants. References are to paragraphs within the list of issues at B144 to 149 in respect of Mr Hussain and B149 to 155 in respect of Mr Shillingford. We would point out that rather confusingly both sets of issues bear the same paragraph numbers.

THE FIRST CLAIMANT - MR HUSSAIN

Direct discrimination

304. Under section 13 of the Equality Act 2010 ("EQA"), it is unlawful to treat a worker less favourably because of a protected characteristic, in this case disability, by reference to an actual or hypothetical comparator in the same or similar circumstances.

305. At paragraph 2.1, Mr Hussain identifies his race as Asian British Bangladeshi.

306. At paragraph 2.2, Mr Hussain sets out acts/omissions that he relies upon and in paragraph 2.3 the comparators relied upon. Paragraphs 2.4, 2.5 and 2.6 ask us to determine if appropriate whether the treatment found was because of race, amounted to a detriment and whether the respondent was able to show a non-discriminatory reason for the treatment. Rather than deal with each issue separately, we have dealt with them, as appropriate, when dealing with each of the allegations within the sub-paragraphs of paragraph 2.2.

307. At paragraph 2.2.1, Mr Hussain alleges that between 2008 and 2013, Mr Ellis denied him support for him to obtain qualifications.

308. As we have found, Mr Ellis did not directly or indirectly manage Mr Hussain during this period and there is no evidence to indicate that he was inputting in any way on decisions made about his training, qualifications or progress.

309. The evidence that there is indicates that his line managers do not recall Mr Mathison or indeed Mr Ellis denying any training requests but rather that Mr Hussain was initially reluctant to undertake qualifications. There is no written record of the Mr Hussain asking undertake Level 4 training until 2015 when his application was approved. There is one note of him speaking to Mr Mathison about doing his RICS accreditation in which Mr Mathison states that it would be hard for the Mr Hussain to achieve in his current role.

310. On this basis we reach the conclusion that there is insufficient evidence to support this allegation of less favourable and no evidence that such treatment if it were found was because of race.

311. At paragraph 2.2.2, Mr Hussain alleges that between 2008 and 2013, Ms Nash and the Assistant Director of Asset Management supported Mrs Muirhead to obtain a post graduate degree in building surveying.

312. We accept the respondent's submission that this is not less favourable treatment of or a detriment to Mr Hussain and so it cannot succeed. However, the wider point is that there is no evidence that she was supported due to her race. Moreover, as we have already found, there is insufficient evidence that Mr Hussain made requests for training that were denied and evidence that indicated that he was reluctant to undertake qualifications.

313. At paragraph 2.2.3, Mr Hussain alleges that between 2008 and 2015, Mr Ellis did not shortlist him for various positions of a lower pay grade that he applied for.

314. In evidence, Mr Hussain confirmed that this just related to an application for an Assistant Surveyor role in 2014. We accept the respondent's submissions that it is put at a disadvantage because it no longer has documents relating to this appointment. Mr Ellis had no recollection of it. Mr Hussain said in oral evidence that the position was in another team and he did not know if Mr Ellis was involved in the decision and he was not sure what experience or qualifications that Elizabeth Atkins, the successful applicant, had.

315. On balance of probabilities then, this allegation must fail because the Mr Hussain has not shown that Mr Ellis was even involved in the process or that the failure to appoint him was because of race.

316. At paragraph 2.2.4, Mr Hussain alleges that between 2008 and 2015, Mr Ellis and Mr Mathison did not support him with any training courses for progression and held him back.

317. This is essentially an extension of the allegation set out above and we repeat our findings and conclusions here.

318. At paragraph 2.2.5, Mr Hussain alleges that between 2013 and 2021, senior management Robert Matheson failed to provide him with rehabilitation recommended by occupational health in respect of his RSI.

319. From our findings, we conclude that this allegation is not made out. Whilst Ms Martin made a recommendation for treatment, it was not clear whether she was qualified to do so and the recommendation was in effect qualified by the consultant occupational health physician. It is not clear what further steps were taken. There is no evidence that the claimant made a request that such treatment be funded by the respondent despite his expectation it would. Indeed, we view it as most unusually that such treatment would be funded by an employer, particularly one covered by a private healthcare benefit already provided by the employer. As I explained to Mr Hussain several times, this is a complaint of race discrimination and not disability discrimination. In any event there is nothing to indicate that the circumstances of this had anything to do with race.
320. At paragraph 2.2.6, Mr Hussain alleges that in 2015, Greg Walters, under instruction from Robert Mathison, told him that any time spent on his graduate programme studies would need to be made up and white colleagues Sophie Muirhead and David Smith were not required to make up time.

321. This relates to the Mr Hussain's BTEC HND Level 4 course which he started in 2015. His allegation here is at odds with what he said in his grievance interview (at B1629), where he states that Mr Mathison offered him three options and in witness statement where he says that he was told by Mr Walters he would have to make the time up.

322. Mr Walters evidence was that did not recall Mr Hussain being told he would have to take holiday, make up hours or have his pay reduced (at B1638).

323. Ms Barrington, Mr Hussain's witness, was employed by the respondent from 2010 until April 2021, in a number of roles, latterly as an Assistant Surveyor. She did not attend to given evidence. Whilst the respondent indicated it accepted her statement in evidence, it did not accept the veracity of her testimony which it could not test by way of cross examination. Ms Barrington's written evidence was that she had been offered the same options. Her further written evidence is that she was approached 1-2 years into her course by a white male colleague within her directorate who was also on a training course who told here that neither he not other White colleagues within the directorate were required to make up hours. She further states that she was aware of at least two other colleagues of Black African or Asian background who were give similar options to her. She also states that at the next team meeting she raised her concerns about this matter and thereafter it was agreed she would no longer be required to make up her hours for her day release.

324. As we have stated, Ms Barrington did not attend to give evidence and so it is not possible to test her testimony which in key respects is vague. We therefore attach no weight to it.

325. Mr Mathison and Mr Walters' recollection is that the only requirement was to fulfil the requirements of his role (at B1638 and within their written evidence. This is consistent with the policy in place at the time (at B1970).

326. Mrs Muirhead said in evidence she was also required to still do the same number of surveys when she had day release.

327. On balance of probability we find that the Mr Hussain was simply told that he had to keep up with his work as per the normal requirement, not to make up hours, as he alleges. He accepted in evidence that everyone was required to keep up with their roles including the comparators that he relies up.

328. At paragraph 2.2.7, Mr Hussain alleges that in August 2017, Mr Ellis told him that he would need to apply for the position of Senior Stock Condition Surveyor and could not be assimilated into this role.

329. As we have found, the respondent decided not to assimilate Mr Hussain into this role because it was not sufficiently similar to his existing role of Stock Condition Surveyor. Further, as we found he could have applied for the senior Stock Condition Surveyor role but decided not to do so and instead he successfully applied for the role of Building Supervisor.

330. The Mr Hussain was unaware if any of his named comparators had been assimilated into higher responsibility roles.

331. We were concerned as to the issue relating to the Mr Hussain is RSI and being put back into the job which he said had caused it. Whilst this was raised in cross examination it was not clear whether Mr Hussain raised it at the time. However, this might at best point to a defect in process and perhaps be more pertinent to a disability discrimination complaint but without something more it is not indicative of race discrimination.

332. We conclude that whilst what the claimant alleges in paragraph 2.2.7 happened, there is nothing to indicate that it did so because of race.

333. At paragraph 2.2.8, Mr Hussain alleges that in March 2020, the respondent put a position that he had applied for on hold and failed to advise him of this.

334. This relates to the recruitment for the role of Construction Project Manager. This was put on hold in March 2020 and there was a delay in informing the Mr Hussain of this. However, when Mr Hussain was taken through Mrs Muirhead's reasons for this, he accepted that it was probably not to do with his race. Whilst respondent submits that the Mr Hussain did not put this allegation to Mrs Muirhead, we are willing to give him the benefit of the doubt given that he was acting in person.

335. Mr Hussain accepts that this was probably not to do with his race and we could find nothing to support the contention that it was because of race.

336. At paragraph 2.2.9, Mr Hussain alleges that in September and October 2020 he was not successful in reaching stage 2 of the recruitment process for the role of Senior Building Safety Manager.

337. From our above findings, whilst the Mr Hussain was unsuccessful in reaching stage two of the recruitment process, the evidence indicates that this was simply because he did not perform well at interview having been interviewed and scored by two independent people. Indeed, in cross-examination when he was asked if in the light of this explanation he was still pursuing the allegation, he replied that on considering what Ms Burton said, his initial thoughts that he had been discriminated against or not were not that strong.

338. At paragraph 2.2.10, Mr Hussain alleges that in December 2020, management Richard Ellis used bullying and aggressive behaviour towards him.

339. This relates to Mr Ellis' actions as a result of the Mr Hussain's emails to Mr Diru. It is clear from our findings that Mr Ellis, and indeed Mrs Muirhead and Ms Burton, found the tone and the contents of his emails, not just to Mr Diru but also to Mr Ellis himself and to Mrs Muirhead, to be inappropriate and unacceptable. On reading those emails they are clearly impolite and intemperate. Mr Ellis' response to Mr Hussain was mild, indicating that he was disappointed and he whilst he noted that it was a difficult time, given the restructuring, everyone needed to be polite and professional (at B1197).

340. There is nothing bullying or aggressive about the conduct of Mr Ellis in this regard and nothing to indicate that his response had anything to do with race. Indeed, several members of the respondent's management were concerned that Mr Hussain's behaviour was out of character and were concerned about him. Mr Hussain indeed stated that his behaviour had been affected by stress and anxiety. He was sent supportive emails in return.

341. There is nothing to indicate that Mr Ellis threatened Mr Hussain with disciplinary action. Whilst Mr Hussain said in oral testimony that Mr Blyth told him that he had been instructed to take disciplinary action, he has presented no evidence in support and in fact the email correspondence at time indicates that this is unlikely. In any event, Mr Hussain did not allege that Mr Blyth told him that the instruction to discipline him came from Mr Ellis.

342. In support of the allegation of bullying and aggressive behaviour, Mr Hussain asserts in his written submissions that Mr Ellis copied his email to HS (we believe he means HR) and Mr Spillett "to make it formal", as he put it, and that Mrs Muirhead had been instructed to collate all emails during this time by both Mr Ellis and Mr Spillett. However, he did not raise it in his evidence or with the respondent's witnesses and there is no supporting evidence. We therefor do not accept these submissions.

343. At paragraph 2.2.11, Mr Hussain alleges that in December 2020 to January 2021, Mr Ellis threatened him with disciplinary action.

344. We repeat our conclusions under paragraph 2.2.10. There is no evidence that Mr Ellis threatened Mr Hussain with disciplinary action.

345. At paragraph 2.2.12, the Mr Hussain alleges that in February 2021, the respondent appointed Jonathan Cawthra to hear his grievance.

346. It is of course true that the Respondent did so.

347. As we have found, Ms Bennett suggested Mr Cawthra because Mr Hussain's grievance was very similar to that of the second Claimant. In addition, when asked in oral testimony whether his appointment was because of his race or because he had done a protected act (as part of his victimisation complaint) he replied, "probably not".

348. In any event it was difficult to see how appointing Mr Cawthra amounted to a detriment, particularly when Mr Cawthra was an external consultant. Mr Hussain in his written submissions asserts that it was detrimental to his grievance investigation which was biased because Mr Cawthra was suggested by the respondent's solicitors who would be mainly interested in the defence of its clients. We could not find anything untoward in their recommendation and there is nothing to indicate that it resulted in the investigation being biased. To the extent that the outcome might not have been what the Mr Hussain wanted it was of course detrimental. However, we did not believe it was reasonable to view this as a detriment. Moreover, there was nothing to suggest that the appointment was due to race.

349. We would comment that given the nature of the claimant's grievance, then perhaps the respondent should have appointed someone with experience dealing structural racism. But that is not part of the claims and there is nothing to suggest that the failure to do so amounted to discrimination.

350. At paragraph 2.2.13, Mr Hussain alleges that in February 2021, Jonathan Cawthra did not uphold his grievance.

351. Clearly Mr Cawthra did not (save for some minor point and his complaint as to his RSI). But Mr Hussain's real concern is that he was biased in a number of respects and that was why he did not uphold the grievance.

352. Mr Hussain alleges that Mr Cawthra was biased because of the way he interviewed witnesses. However, he provided no further evidence in support of this allegation.

353. He further alleges that Mr Cawthra was biased because he did not speak to his witnesses.

354. Mr Cawthra interviewed those witnesses named at B1415. Mr Hussain states at B1765 (within his grievance appeal letter) that Mr Cawthra failed to interview Ms Barrington, Ms Kutubu, Kudirat Balogun (also referred to as Bim) and Mr Shillingford. Mr Cawthra said in evidence that he could not recall being directed to interview those persons.

355. We considered that notes of his interview with the Mr Hussain at B1575 which contain the Mr Hussain's notes in blue type. We also considered Mr Cawthra's witness statement at paragraph 34. This was to determine if the Mr Hussain had named any specific people to interview beyond those mentioned in his grievance and identified by Mr Cawthra (at B1625-1631). This would be where one would reasonably expect the Mr Hussain to raise it.

356. At B1629, Mr Hussain mentions Ms Barrington. This was in the context of her being able to confirm her own experience of being offered three options in respect of making up work time whilst studying. At B1630, Mr Hussain mentions Ms Kutubu (who had her own grievance) and Ms Balogun as being witness to his ill-treatment. Similarly in the context of the complaint about his RSI at B1631 (along with Greg, Ruth Chait and Simon). So the Mr Hussain names everyone except the second Claimant.

357. This does make Mr Cawthra's answer that he did not recall being asked to interview the named persons err more on the side that he was but does not remember. Indeed, in oral testimony, Mr Cawthra made the point that their meeting was in February 2021 and given the passage of time he simply did not remember.

358. At least two of these areas of inquiry could potentially have had a bearing on the outcome. Ms Barrington potentially yes. Ms Kutubu and Mr Balogun we simply do not know what they would have said. As to the RSI complaint, that was upheld in any event.

359. We asked ourselves a number of questions. Did the failure to interview these people result in a failure to uphold those elements of the grievance? It is impossible to say with any certainty but potentially yes. Is the failure to do so because of race? There is nothing from the primary facts beyond the failure to interview them when they were identified which suggests this. Mr Cawthra's general position is that he interviewed all those who he considered could assist. And in respect of the named persons, he cannot recall if he was asked to interview them. Is it appropriate to draw an inference of discrimination from this? Is the failure to interview simply an omission or error, or possibly, incompetence? Or is it something more? Given Mr Cawthra's experience and his approach to the investigation, it does appear a stark omission.

360. Mr Hussain asserts in his written submissions that it is because Mr Cawthra was only interested in finding information to support the respondent.

361. The respondent submits that Mr Cawthra simply could not recall being asked to speak to anyone in particular and spoke to everyone who he considered would be able to provide evidence in support of the Mr Hussain's specific allegations. The respondent further submits that he was not seeking to undertake a general diversity review and would not be assisted by way of background information, by which it means the allegations of institutional racism. It further asserts that the specific allegations were carefully considered and determined as can be seen by the outcome letter. The respondent submits that in the circumstances, there is nothing about the way in which Mr Cawthra conducted the process or his findings that calls for an explanation or gives rise to any inference of an unlawful motivation. It further points to Mr Cawthra upholding elements of the grievance which suggests that he did not approach it in a biased manner. Additionally, the respondent points to Mr Hussain's answer to whether Mr Cawthra was motived by race in cross examination when he said that he was not sure and went onto say

that Mr Cawthra did not believe him he believed everyone else who were all white (whereas in fact Mr Grant was BAME).

362. We were of the view that this did call for an explanation and exploration of any inferences to be drawn and we noted that whilst Mr Cawthra upheld part of the grievance, which the respondent asserts indicates he was not biased, these are small elements of it.

363. We decided to park this until after we had considered the allegations made by the second Claimant against Mr Cawthra. We returned to this afterwards and having done so, we decided that this did not take the matter any further.

364. The majority of the Tribunal panel (Employment Judge Tsamados and Mr Murphy) concluded that whilst Mr Cawthra did not interview the witnesses identified by Mr Hussain it went too far to infer racial motivation from this.

365. Mr Mardiner was of the view that given Mr Cawthra's lack of experience of institutionalised racism, that he hived that matter off and did not deal with it, and that he failed to interview the witnesses named by Mr Hussain, it was appropriate to infer unlawful race discrimination.

366. At paragraph 2.2.14, Mr Hussain alleges that in June 2021, Lisa crash did not uphold the claimant's grievance on appeal.

367. In cross-examination, when it was put to Mr Hussain that he had offered no evidence to suggest that Mrs Crush's decision was because of race, he said he was "not sure" if the conclusion was based on his race and that it seemed to be based on investigation findings with which he did not agree. In cross-examination of Mrs Crush, he did not challenge the part of her witness statement in which she said that her decision was not due to his race. On this basis, the same majority of the Tribunal panel formed the conclusion that the allegation could not succeed. Mr Mardiner disagreed.

368. A further point that we considered was whether she actually corrected any of the failings of Mr Cawthra? Mrs Crush had limited experience. This was her first appeal and she had not received any grievance or EDI training. Although she is said to be an EDI Champion, we were not sure what this meant. In answer to questions from the panel, she stated that this meant bringing EDI into meetings and considering them and when pressed she said she was still learning. It appeared to us that perhaps she had a naïve understanding of what EDI was and how it should be applied. She did not interview anyone but was simply reviewing Mr Cawthra's decision as required by the grievance procedure. In her written evidence she stated that HR advised that the witnesses named by Mr Hussain were unlikely to add anything. In fact, HR go further than that (at B1835). In her written evidence, Mrs Crush stated that she would have reached the same conclusions. We did wonder why the respondent chose her given that she had no experience of the issues. Perhaps there was on one else? Or it was a deliberate choice. Either way it dos not correct Mr Cawthra's failings.

369. The majority were of the view that a race discrimination complaint is not made out simply by procedural failings. There is no evidence to indicate that Mrs

Crush's failure to uphold Mr Hussain's appeal was because of race and nothing from which to infer unlawful discrimination.

370. Mr Madiner disagreed. He believes that the complaints in respect of both the grievance and appeal succeed. His position is as follows. From the procedural failings we can infer that this was on the basis of race. Mr Cawthra failed to interview Mr Hussain's named witnesses when he had the opportunity to do so. During the appeal Mrs Crush was advised not to interview the witnesses because they had nothing to add this when in fact they would have because they had not been interviewed in the first place.

371. At paragraph 2.2.15, Mr Hussain alleges that Ms Bennett told him that the respondent had no responsibility for him as he was no longer an employee of the respondent.

372. It is not quite the case that Ms Bennett said that the respondent had no responsibility towards Mr Hussain. What she does state is that given the appeal process had ended and he was no longer employed at the time of the grievance outcome, no further action was taken to see if any adjustments needed to be made in respect of his RSI.

373. In any event, there is no evidence to support the allegation that her decision was made on the grounds of race. Given our findings there is nothing to challenge the fact that her email was sent for the reasons that we have found above, as set out in the email itself and within her evidence. Moreover, when it was put to Mr Hussain that there was nothing in the email to suggest it was because of race and that it had nothing to do with race, he responded that he was not sure.

374. During Mr Hussain's evidence, I did comment that I was concerned as to whether this particular part of his claim was misplaced. It was clearly of burning importance to him, as I said but I further explained that we were confined to looking at matters to do with race discrimination and victimisation (the latter of which we go onto deal with).

375. In conclusion, we unanimously conclude that the allegations of direct race discrimination are not well founded, save for the allegations at paragraphs 2.2.13 and 2.2.14 which by majority we find are not well founded. Therefore all of the direct discrimination complaints are dismissed.

Indirect Race Discrimination

376. Indirect discrimination is defined in section 19 EQA. In essence indirect discrimination occurs where there is apparently equal treatment of all workers, but the effect of certain requirements and practices imposed by the employer puts workers with a certain protected characteristic at a particular disadvantage. If the Claimant is able to show that indirect discrimination has occurred, then a defence is available. If the employer can prove that requirements and practices imposed are justifiable then the treatment complained of will not be unlawful.

377. At paragraph 3.1, Mr Hussain sets out three PCPs.

378. The first of these, in relation to the failure to promote him, is the respondent requiring him to hold specific academic qualifications and have specific experience. This is not phrased neutrally and so must fail. In any event, even if it were phrased generally, no evidence was presented that it was applied generally or that such a PCP disadvantaged people who were Asian in particular.

379. The second PCP, in relation to the failure to support Mr Hussain to advance himself is, requiring him to be in a more junior role to be supported for academic training. Again, this is not phrased neutrally and therefore must fail. Additionally, the evidence does not support this position and indeed the evidence indicates that the respondent did not require Mr Hussain or anyone else to be in a junior role to be supported for academic training. In particular, we note that Mr Hussain was supported for academic training from 2015 onwards whilst in his then role(s).

380. We therefore find that the complaints of indirect race discrimination are not well founded and are dismissed.

Victimisation

381. It is unlawful to victimise a worker because she has done a "protected act". In other words, a worker must not be punished because she has complained about discrimination in one or other of the ways identified under section 27 EQA.

382. At paragraph 5, Mr Hussain relies on to protected acts.

383. The first of these at paragraph 5.1.1 is bringing his grievance on 24 January 2021. The respondent accept that this is a protected act.

384. The second of these is at paragraph 5.2.1, by making verbal complaints on unspecified days. These were identified in evidence. The respondent does not accept that these allegations amount to protected acts.

385. The matters identified are as follows:

    (1) Asking his line manager for he could undertaken level 4 qualifications. In oral evidence, Mr Hussain said that this arises from paragraph 15 of his first witness statement, that between 2008-2013 he was denied support by Mr Mathison and Mr Ellis in progressing to level 4 having made applications via his then line managers. We have already mad findings and conclusions in relation this matter in the context of the complaints of direct race discrimination. In cross examination Mr Hussain accepted that he did not raise any allegations of discrimination in any of these conversations. On that basis this cannot amount to a protected act;

    (2) Telling Ms Nash and Mr Walters about his symptoms of pain in his shoulders. In evidence, Mr Hussain said that this arises from paragraphs 27 and 29 of his first witness statement, in which he describes the symptoms of his RSI and speaking to Ms Nash and then Mr Walters about

them and Mr Walter's advice. There are no dates or details given of these conversations and the passage of time impacts upon the respondent's ability to address this evidence. However, in any event there is nothing to suggest that these conversations amount to a protected act, either by reason of race or disability for that matter or of any allegation of discrimination or reference to matters falling under the EQA;

(3) Asking to be assimilated into the role of Senior Stock Condition Survey. This arises from paragraph 8 of Mr Hussain's first witness statement, in which he states that he told Mr Ellis that being assimilated into the role in August 2017 would help his ongoing health issues (by which he is referring to his arm pains). Mr Ellis did not recall Mr Hussain saying this. In his email asking for assimilation into the Senior Stock Condition Surveyor role (at B296), Mr Hussain does not mention that this is because it will assist with his health issues. In cross examination, Mr Hussain said that he saw no reason to mention this matter in every email he sent;

(4) On balance of probability we found it more likely than not that this was not raised with Mr Ellis. Given the significance of the matter to Mr Hussain in this case it is surprising that he did not refer to it in at least the email that we were pointed to or any other email relating to the matter at that time;

(5) In any event, were we to accept what Mr Hussain says, it is a very bland complaint at most but does not amount to a protected act. Indeed, we did think it was indicative of the way that Mr Hussain came across to us in evidence and someone who was largely compliant;

(6) Being told about the risk of redundancy. This arises from paragraph 59 of Mr Hussain's first witness statement, in which he refers to being told of this in October 2020. Being informed of the risk of redundancy cannot amount to a protected act.

386. This then leaves the protected act of bringing the grievance.

387. Turning then to the alleged detriments flowing from that protected act.

388. At paragraph 5.4.1, Mr Hussain alleges that in 2014, Mr Mathison did not implement the rehabilitation programme recommended by occupational health.

389. We have already dealt with this in respect of the complaint at paragraph 2.2.5 of race discrimination and have rejected it. We rely on those findings and have considered the matter in the context of victimisation but can find no evidence to indicate that this is a detriment that was influenced by the protected act.

390. In his written submissions, Mr Hussain alleges that Mr Mathison failed to discussion his rehabilitation programme with his line manager and yet it was for others and his belief that this was down to race. He cites Ms Martin's email to Mr Walters in support of this (at B219-220). We have already indicated our findings and conclusions on this issue. However, we would

stress that there is no evidence to support Mr Hussain's assertion and there is no evidence that either the respondent or Mr Hussain followed it up.

391. We would comment that we do feel that the respondent could perhaps have done more to support the claimant with regard to his RSI at that time. However, their failure to do so does not equate to race discrimination or victimisation.

392. At paragraph 5.4.2, Mr Hussain alleges that the respondent manufactured a false redundancy situation in 2014 in an attempt to get rid of him. Whilst Mr Hussain asserted this, there is no evidence to support it and it is clearly fanciful. However, given that he did not raise his grievance until January 2021, clearly this allegation of detriment cannot be as a result of the protected act.

393. At paragraph 5.4.3, Mr Hussain alleges that Mr Ellis told him that he would need to apply for the position of Senior Stock Condition Supervisor and would not be assimilated into the role.

394. We have already referred to our findings on this matter and rejected it as an allegation of direct race discrimination under paragraph 2.2.7. However, this alleged detriment also pre-dates the protected act and so cannot succeed.

395. At paragraphs 5.4.4 and 5.4.5, Mr Hussain alleges firstly that in December 2020, Mr Ellis used bullying and aggressive behaviour towards him and secondly in December 2020 to January 2021, Mr Ellis threatened him with disciplinary action. We have already referred to our findings on this matter and rejected these as allegations of direct race discrimination under paragraphs 2.2.10 and 2.2.11. We did not find any evidence or bullying and aggressive behaviour or any threat of discrimination action and so the alleged detriments are not made out.

396. At paragraph 5.4.6, Mr Hussain alleges that in February 2021, the respondent appointed Mr Cawthra to hear his grievance. It is of course correct that this happened. However, we have already referred to our findings on this matter and the majority rejected this as an allegation of direct race discrimination under paragraph 2.2.12. This was after considering the allegations made by Mr Shillingford relating to Mr Cawthra.

397. Having considered the matter again in the context of victimisation, there is nothing to indicate that his appointment was influenced by the protected act. Further, it cannot in itself be a detriment to appoint a person to hear a grievance once brought, assuming there is no element of bad faith in the choice of that person. There is no indication of bad faith in the choice of Mr Cawthra.

398. At paragraph 5.4.7, Mr Hussain alleges that in February 2021, Mr Cawthra did not uphold his grievance. Essentially this is correct albeit that Mr Cawthra did uphold some small elements of the grievance. However, we have already referred to our findings on this matter and the majority rejected as an allegation of direct race discrimination under paragraph 2.2.13. This was

again after considering the allegations made by Mr Shillington relating to Mr Cawthra.

399. Having considered the matter again in the context of victimisation we conclude that the grievance outcome was not influenced by the protected act. It cannot reasonably be said to be a detriment itself to fail to uphold a grievance once brought.

THE SECOND CLAIMANT - MR SHILLINGFORD

Direct discrimination

400. At paragraph 2.1 of his list of issues, Mr Shillingford identifies his race as Black and of Caribbean Heritage.

401. At paragraph 2.2, Mr Shillingford sets out acts/omissions that he relies upon and in paragraph 2.3 the comparators relied upon. Paragraphs 2.4, 2.5 and 2.6 ask us to determine if appropriate whether the treatment found was because of race, amounted to a detriment and whether the respondent was able to show a non-discriminatory reason for the treatment. Rather than deal with each issue separately, we have dealt with them, as appropriate, when dealing with each of the allegations within the sub-paragraphs of paragraph 2.2.

402. At paragraph 2.2.1, Mr Shillingford alleges that between 30 June 2014 to 31 January 2021, Mr Ellis denied him support to obtain RICS accreditation.

403. The evidence supports the view on balance that Mr Ellis did provide support to Mr Shillingford. Whilst Mr Shillingford might believe that the respondent did not have a structured enough approach to support him and others to complete the necessary process, this is not indicative of race discrimination. It would affect everyone. Mr Ellis agreed in evidence that whilst it was not ideal and he would have liked to put in place a structured programme, he did not have time alongside his substantive role. The evidence provided indicates that a number of employees of different races obtained support. Whilst only a limited number of employees obtained qualification, there is nothing to suggest that this was down to the respondent. Mr Shillingford asserted in evidence that he was not exposed to enough duties to its system in achieving RCIS accreditation. However, there was no evidence to support this.

404. At paragraph 2.2.2, Mr Shillingford alleges that between 7 February 2018 and 31 January 2021, Mr Ellis and David Bayliss (the Head of Investment between 2018-2019) did not allow him to develop in his role.

405. In oral evidence, Mr Shillingford accepted that Mr Bayliss' actions were nothing to do with his race. The allegation therefore focuses on Mr Ellis. This essentially covers the same findings that we have made in respect of paragraph 2.2.1. In addition, Mr Shillingford points to the delay in Mr Ellis responding to his email of 23 May 2019 (at B481) in respect of the Project Surveyor Leasehold role. Mr Ellis accepts that they did not meet until July

2019 to discuss the email but this was because he was busy, having just taken over in his new role.

406. In oral evidence, whilst Mr Shillingford asserted that nothing material was done after the meeting in July 2019. However, he did not identify what should have been done or how this amounted to Mr Ellis not allowing him to develop.

407. Mr Shillingford relies on the failure to invite him to the meeting on 23 September 2019 with regard to his allegation. However, this does not amount to Mr Ellis not allowing him to develop in his role. His further complaint as to Mr Roodashtyan being lead on the issue adds nothing by way of evidence to this allegation. His further assertion that Mr Roodashtyan was only included by Mr Ellis to disguise his racism is no more than that, an assertion.

408. Mr Shillingford also relies on his allegation that Mr Phillips was allocated less work than him. We were satisfied that allocation of work decisions were made by Mr Shillingford and Mr Phillips' direct line managers and not by Mr Ellis (with reference B1564). Mr Phillips had gone down to three days a week (which Mr Shillingford said that he did not know at the time) and was coming up to retirement. Mr Shillingford then asserted that had Mr Phillips been a Black guy, as he put it, and shown the same lack of interest in his work, his manager would have pulled him up on it. He further asserted that even if you are working 3 days a week you are still expected to do your work and if he had said he was not interested, he would have been pulled up on it. However, there was nothing to support this assertion of race discrimination.

409. In conclusion we find that this allegation is without foundation and there is nothing to support the complaint of direct race discrimination.

410. At paragraph 2.2.3, Mr Shillingford alleges that between 29 January and 19 May 2021, Mr Cawthra and Mr Burns failed to include documents provided in his grievance and/or grievance investigations.

411. This allegation relates to the Data Review. From our findings we accept that Mr Cawthra looked at the documents but did not include them as part of the appendices because it was not within his remit to conduct a diversity review and he passed this matter onto someone else to deal with. In any event, there is nothing to suggest that his actions were because of race.

412. With regard to Mr Burns, Mr Shillingford accepted in oral evidence that the Data Review documentation was included.

413. At paragraph 2.2.4, Mr Shillingford alleges that between 29 January and 19 May 2021, Mr Cawthra's brief changed following the claimant's submission of documents.

414. We have already deal with this in the context of Mr Hussain. We are satisfied that Mr Cawthra' brief did not change. The sequence of events indicates that he simply clarified his understanding of what he was asked to do as grievance investigating officer. Further there is nothing to indicate that this was linked to Mr Shillingford's submission of documents, how this allegation could amount to a detriment or any indication that it was because of race.

415. At paragraph 2.2.5, Mr Shillingford alleges that between 10 November 2020 and 26 March 2021, the respondent appointed Mr Cawthra to hear his grievance.

416. We have touched upon this in the context of Mr Hussain's grievance. Mrs Gordon appointed Mr Cawthra. Mr Shillingford had questioned the impartiality of Ms Tutton, her original chose and requested someone independent or external or if that was not possible, two grievance investigation managers, one BAME and one non-BAME (at B1257). Mrs Gordon did not know of any external investigators and asked the respondent's solicitors for a recommendation and chose Mr Cawthra because of his experience in the housing sector. Mr Shillingford confirmed twice that he was happy to proceed with Mr Cawthra (at B1295 and 1382).

417. Whilst it is true that the respondent did what is alleged at paragraph 2.2.5, there is no evidence to indicate that it was because of race or for that matter that it amounts to a detriment. Whilst Mr Shillingford appears to be suggesting that Mr Cawthra was chosen because he could be controlled by the respondent via its solicitors, there is no basis for this assertion.

418. At paragraph 2.2.6, Mr Shillingford asserts that between 10 November 2020 and 26 March 2021, Mrs Gordon initially appointed Sara Tutton to hear the Claimant's grievance.

419. We have already dealt with this matter in the context of Mr Hussain's grievance. Whilst it is true that Mrs Gordon initially appointed Ms Tutton to hear his grievance, this is clearly for the reasons we have sent out above and as stated in the email that she sent at the time at B1106. Further, when Mr Shillingford objected to her appointment, she advised him the following day that someone else would be appointed. There is nothing to indicate that Ms Tutton's initial appointment was done because of race. Further, Mr Shillingford accepted in oral evidence that Ms Tutton's initial appointment caused him no detriment.

420. At paragraph 2.2.7, Mr Shillingford alleges that between 10 November 2020 and 26 March 2021, Jonathan Cawthra lied to him about interviewing his witnesses.

421. Mr Shillingford alleges that Mr Cawthra lied to him because he said that he had spoken to Rashida when in fact he had not done so. Mr Cawthra's written evidence is that he had spoken to both witnesses that he identified and did not lie to him. We were referred to the email exchange between Mr Shillingford and Mr Cawthra at B1457-1458 in this regard. In oral evidence Mr Cawthra explained that he spoke to her as part of his investigation into her own grievance and asked her questions about Mr Shillingford. However, she did not say anything that was of assistance and so he did not include any notes of her interview in Mr Shillingford's grievance investigation. Whilst we can understand why Mr Shillingford believed this to be suspicious and we might share his suspicion as to the absence of even a reference to her interview, we do not find on balance of probability that this disturbs Mr Cawthra's explanation without something more.

422. At paragraph 2.2.8, Mr Shillingford alleges that between 10 November 2020 and 26 March 2021, the notes taken during the grievance meetings did not reflect the conversations.

423. There were two meetings, one 22 January 2021 at which Mr Cawthra took notes and the other on 8 March 2021, at which the notetaker was Ms Roque. However, it is assumed that this allegation is levied against Mr Cawthra in respect of both meetings..

424. At the time, Mr Shillingford said that the notes of the first meeting held on 22 January 2021 did reflect what was said at the meeting "in principle" but he wanted to add context which he hoped was useful (at B1381). With regard to the second meeting, held on 8 March 2021, Mr Shillingford said that he felt the notes did not "reasonably reflect" the answers he gave to questions and he amended them (at B1457).

425. There was no evidence to support the contention that this was done deliberately and Mr Shillingford did not point to any specific instances in his evidence. There was no evidence to support the contention that the notes not reflecting the conversations was because of race.

426. We accepted the respondent's submission that the most likely explanation for notes not being a verbatim record is the difficulty in taking a perfect note during a meeting. Further, Mr Cawthra pointed out that when the notes were read together with Mr Shillingford's additions, as was his intention, they reflected the conversations as a "joint enterprise".

427. In any event, Mr Shillingford accepted in evidence that the corrected notes and the corrected versions were considered by Mr Cawthra and so there was no detriment to him.

428. At paragraph 2.2.9, Mr Shillingford alleges that between 22 January and 26 March 2021, Jonathan Cawthra failed to consider evidence that the respondent's disciplinary policy was not followed.

429. This relates to the complaints made by Axis. When Mr Shillingford was taken to the relevant part of the grievance outcome at paragraph 15 on B1475, he agreed in oral evidence that Mr Cawthra did consider his allegation that the disciplinary policy was not followed. Further, when it was put to him that Mr Cawthra's conclusion on that point was for the reasons given and not to do with his race or complaints, his response was simply "I think it was". He provided no evidence in support of his assertion.

430. Mr Shillingford relied on Mr Kirby as a comparator but purely on the basis that Axis did not complain about Mr Kirby. However he does not suggest that Mr Kirby brought a grievance and Mr Cawthra.

431. At paragraph 2.2.10, Mr Shillingford alleges that between 22 January and 26 March 2021, Mr Cawthra showed empathy to Mrs Gordon.

432. Mr Shillingford did not provide any evidence as to what he believed in particular indicated that Mr Cawthra showed Mrs Gordon empathy. Mr Cawthra's evidence was that he tried to show everyone empathy. Further even on Mr Shillingford's own case he believes the empathy was shown because Mrs Gordon held a similar role to a role previously held by Mr Cawthra at another social housing provider. When it was put to him therefore that it had nothing to do with race or complaints that he had made, his response was that they were both Caucasian with similar experience and similar role. There is therefore no evidence to support empathy particularly being shown to Mrs Gordon or indeed that it had anything to do with race or for that matter the complaints that is Mr Shillingford has brought.

433. Moreover, showing empathy to Mrs Gordon does not amount to less favourable treatment or detriment to Mr Shillingford.

434. At paragraph 2.2.11, Mr Shillingford alleges that between 8 June 2020 and 19 May 2021, MRs Gordon referred to some members of staff as "militant" and said that they "needed to break this" and "nip [it] in the bud".

435. This is a reference to the words used by Mrs Gordon in two emails sent in January 2021 with regard to the Group and which includes Mr Shillingford.

436. We have set out our findings as to the sequence of events which led to and the context in which Mrs Gordon used those words

437. The respondent submits that it was the manner in which discussions were evolving that caused her to make those comments. Therefore, the race of Mr Shillingford and the concerns that had been raised were the context for those comments, rather than the reason for them (as in Gould).

438. The respondent further submits that the motivation for Mrs Gordon's motivation for sending those emails complained of was not because of the race of those in the Group.

439. Mr Shillingford alleged that the word "militant" is a stereotype "attributed to Black people when they are being difficult, they are labelled as militant."

440. The respondent submitted that the Tribunal would have to consider whether there is a stereotype that Black people are 'militant', and whether the reason Mrs Gordon used that word was because of that stereotypical assumption (as in Gould; B, C v A).

441. The respondent asserts that Mr Shillingford has not produced any evidence apart from his assertion that 'militant' is a stereotype of Black people. Effectively he is asking the Tribunal to take judicial notice of the fact that it is. The respondent did not accept that 'militant' is a trope related to Black people or a well-known stereotype. It avers that the Tribunal will have to consider based on their joint knowledge whether it is a stereotype that is 'so notorious or so well established' that they can take judicial notice of it (as in Dobson).

442. We specifically considered the use of the word "militant". Mr Murphy and I, based on our experience did not find these words to amount to racial tropes

or stereotypes, having been called "militant" ourselves in different contexts. Mr Mardiner was of the opinion that they did. The majority were not of the view that such words were so notorious or so well established that we could take judicial notice of them amounting to racial stereotypes (as per Dobson).

443. However, we unanimously concluded that there was no evidence to suggest that Mrs Gordon used these words as or because of such alleged racial stereotypes. On balance of probability we find that Mrs Gordon used them for the reasons that she gave in her evidence.

444. Mr Shillingford asserted that Mrs Gordon would not have used the word "militant" to describe a small group of white employees raising, for example, issues related to climate change who seemed to want to move things in their own direction. However, there was no evidence of this and we did not believe it appropriate to make this inference given our findings.

445. At paragraph 2.2.12, Mr Shillingford alleges that between 8 June 2020 and 19 May 2021, Mr Spillett was involved in correspondence relating to spot bonuses and the rewards scheme.

446. In oral evidence, Mr Shillingford said that he had no objection to Mr Spillett getting involved in correspondence relating to spot bonuses and accepted that his involvement was not due to his race or a protected act. Further, Mr Shillingford did not put to Mr Spillett that his involvement in the correspondence with detrimental, related to race or because of any protected act. We therefore accept the respondent's submission that on this basis the allegation cannot succeed.

447. Mr Shillingford did raise that he felt the allocation of his own spot bonus was discriminatory. However it was not included in the list of issues and has not therefore been addressed by the respondent's witnesses. Mr Shillingford did not apply to amended list of issues and it was not apparent that this matter, relating to his own spot bonus level, had been raised within the particulars of claim or the Scott Schedule.

448. At paragraph 2.2.13, Mr Shillingford alleges that between 4 April to 19 May 2021, Mr Burns failed to consider the Data Review and chronology documents as part of the grievance appeal.

449. In oral evidence, Mr Shillingford accepted that it was clear from the appeal outcome letter (at B1746) that Mr Burns did consider those documents accordingly he was not pursuing this allegation.

450. At paragraph 2.2.14, Mr Shillingford alleged that between 4 April to 19 May 2021, Mr Burns set out the appeal in a manner to prevent him from going over points raised.

451. Mr Shillingford did not put any evidence in support of this point. When he was asked why he thought that Mr Burns was motivated by his race or protected acts, he said it was because the allegations he made in his grievance were about structural racism and collusion and therefore everyone was colluding to bury the allegations. There was nothing to support this assertion.

452. In conclusion, we find that the allegations of direct race discrimination are not well founded and are dismissed.

Indirect Race Discrimination

453. At paragraph 3 of his list of issues, Mr Shillingford alleges indirect race discrimination by the respondent.

454. He relies on six PCPs which are set out at paragraph 3.1.

455. The PCPs at paragraph 3.1.1 (only allowing white staff members to gain RICS accreditation) and at 3.1.2 (only addressing concerns raised by white members of staff) are not neutral and so they cannot succeed as PCPs.

456. The PCP at paragraph 3.1.3 is "burying" information to prevent staff from seeing it". However, Mr Shillingford is not presented any evidence in support of the respondent applying such a PCP or of the particular disadvantage caused to people or share his race as compared to people who are not of the same race as him (as required by paragraph 3.2).

457. The PCPs at paragraphs 3.1.4 to 3.1.5 similarly fail on the basis that there is no evidence in support of the respondent applying such PCPs or of the particular disadvantage.

458. The PCP at paragraph 3.1.6 is having a toxic work environment in the Customer Services Directorate. In oral evidence, Mr Shillingford qualified this stating that it targeted Black staff. Put as such, it is not a neutral PCP and so cannot succeed. It was perhaps an allegation of direct race discrimination, but there was insufficient evidence on which to determine this to be the case or on which to phrase the allegation that way. Whilst Mr Mardner thought that it could arise from the Data Review, the majority were not of this opinion and in any event Mr Gardner accepted that it could not amount to indirect race discrimination.

459. So in conclusion, we find that the complaints of indirect race discrimination are not well founded and are dismissed.

Harassment related to race

460. Harassment is defined under section 26 EQA. A person "A" harasses another "B", if "A" engages in unwanted conduct related to a protected characteristic, or of a sexual nature, which has the purpose or effect of violating the dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. In deciding whether the unwanted conduct has such purpose or effect, the Tribunal must consider the perception of B, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

461. We took into account that where conduct complained of does not have that purpose, i.e. where it is unintentional in that sense, it is not necessarily unlawful just because the worker feels his dignity is violated etc. We also took

into account, as required, the other circumstances of the case and whether it is reasonable for the conduct to have that effect as well as the perception of the worker bringing the complaint. The starting point is whether the worker did in fact feel that his dignity was violated or that there was an adverse environment as defined in the section and that it is only unlawful if it was reasonable for the worker to have that feeling or perception. But not forgetting that nevertheless the very fact that the worker genuinely had that feeling should be kept firmly in mind (Richmond Pharmacology v Dhaliwal [2009] ICR 724).

462. We were also guided by ECHR Employment Statutory Code of Practice at paragraph 7.18:

"In deciding whether conduct had that effect, each of the following must be taken into account:

a) The perception of the worker; that is, did they regard it as violating their dignity or creating an intimidating (etc) environment for them. This part of the test is a subjective question and depends on how the worker regards the treatment.
b) The other circumstances of the case; circumstances that may be relevant and therefore need to be taken into account can include the personal circumstances of the worker experiencing the conduct; for example, the worker's health, including mental health; mental capacity; cultural norms; or previous experience of harassment; and also the environment in which the conduct takes place.

c) Whether it is reasonable for the conduct to have that effect; this is an objective test. A tribunal is unlikely to find unwanted conduct has the effect, for example, of offending a worker if the tribunal considers the worker to be hypersensitive and that another person subjected to the same conduct would not have been offended."

463. Mr Shillingford alleges that the respondent harassed him and that the harassment was related to race. The allegations relied upon are set out at paragraph 4.1 of his list of issues.

464. These are, save for paragraph 4.4.13, a repetition of the incidents relied upon as allegations of direct race discrimination.

465. At paragraph 4.1.1, Mr Shillingford repeats the allegations set out at paragraph 2.2.3. We reconsidered our findings and conclusions in the context of harassment.

466. Whilst it is correct to say that Mr Cawthra did not include documents provided within his grievance investigation, we established the reason was because he did not consider them part of his remit and referred them on. There is no evidence to suggest that his actions were related to Mr Shillingford's race. There is not evidence that this was done with the purpose of harassing Mr Shillingford. With regard to it having the effect of harassing him, whilst Mr Shillingford may have believed this and considering that the wider circumstances, we do not find it reasonable for the conduct in question to have this effect.

467. With regard to Mr Burns, Mr Shillingford accepted that he did include the documentation.

468. At paragraphs 4.1.2 to 4.1.8, Mr Shillingford repeats his allegation at paragraphs 2.2.4, 2.2.5, 2.2.6, 2.2.7, 2.2.8, 2.2.9, 2.2.10 and 2.2.11,

respectively. We reconsidered our findings and conclusions in each of these matters in the context of harassment.

469. Having done so, we conclude that each of these allegations fail because we are satisfied that they are not related to race. In relation to paragraph 4.1.5 in particular, we found that Mr Cawthra had not lied to Mr Shillingford as alleged.

470. At paragraphs 4.1.10 to 4.1.12, Mr Shillingford repeats the allegations set out at paragraphs 2.2.12, 2.2.13 and 2.2.14, respectively. We reconsidered our findings and conclusions in each of these matters in the context of harassment.

471. With regard to paragraph 4.1.10, given that Mr Shillingford accepted that he had no objection to Mr Spillett's involvement in the correspondence and that his involvement was not connected to his race, it must follow that this allegations fails both in terms of it not being related to race and not meeting the definition of harassment within section 26 EQA.

472. With regard to paragraph 4.1.11, Mr Shillingford accepted that it was clear that Mr Burns did consider the documents in question and so he was not pursuing this allegation.

473. With regard to paragraph 4.1.12, we found that there was no evidence to indicate that indicate that this happened or that it was related to race.

474. At paragraph 4.1.13, Mr Shillingford cites the respondent's representative sending him a costs warning letter as the act of harassment.

475. The respondent's solicitors sent Mr Shillingford a costs warning letter on 1 September 2022 (at B3014-3016). The reasons for sending such a letter are self-evident from the letter itself. In evidence, Ms Bennett explained that her instruction to the solicitors to send a costs warning letter were not influenced by race or by a protected act. The letter was sent because the respondent genuinely believed that the Mr Shillingford's claim had weak prospects of success and it has done the same in many other claims. Mr Shillingford accepted that he had no basis to dispute this in oral evidence.

476. It must be the case following Mr Shillingford admission, that this allegation does not fulfil the test of harassment under section 26. In any event, there is no evidence that the sending of the letter related to race beyond of course it being sent in response to what was considered a weak or unmeritorious claim of race discrimination.

477. Whilst Mr Shillington appears to have previously asserted that this conduct had either the purpose or effect of harassing him, there is no evidence it was done with that purpose. As to effect, when considering his belief and the wider circumstances, we find it is not reasonable to conclude that such conduct would have that effect.

478. We therefore find the complaints of harassment are not well founded and are dismissed.

Victimisation

479. Mr Shillingford's complaints of victimisation are set out at paragraph 5 of his list of issues.

480. The protected acts are set out at paragraph 5.1 and 5.2. The respondent accepts that those set out at 5.1, namely bringing his grievance on 10 November 2020 and issuing his claim on 17 June 2021, are protected acts.

481. Turning then to those protected acts alleged at paragraph 5.2.

482. At paragraph 5.2.1, Mr Shillingford relies on his complaint to an Axis member of staff between 21 August to 26 October 2020 in which he alleges that he said he did not appreciate being portrayed as an "angry Black man". Mrs Muirhead was informed of this the same day.

483. The respondent accepts that Mr Shillingford made such a complaint in those words to Sarah Taylor of Axis on 16 September 2020 (as referenced in her email of that date at B895) and that it amounted to a protected act.

484. We have set out our findings above in this regard. Axis made two formal complaints about Mr Shillingford which he accepted in oral evidence were not minor matters. Those complaints were investigated by the respondent and not upheld.

485. It is not clear what particular detriment Mr Shillingford attributes to this protected act. However, there is no evidence to support the view that making this complaint to Axis, a third party contractor, influenced any of the treatment he received by the respondent thereafter.

486. With regard to the alleged protected act at paragraph 5.2.2, that he raised issues on unspecified dates regarding the spot bonus and other inconsistencies in the Data Review. This relates to Mr Shillingford's emails of 22 June 2020 and from 24 June to 13 July 2020.

487. In the email of 22 June 2020, which Mr Shillingford sent to Mr Blyth and others, he asked for a breakdown of the data and said in relation to spot bonuses that he thought it was important to be able to determine the value and "whether the person was BAME or non-BAME" (at B676). This does not amount to an allegation of discrimination or do anything else under the Equality Act 2010. We therefore find that it does not amount to a protected act.

488. The emails of 24 June to 13 July 2020 are at B758-761. None of these emails sent as part of a chain starting on 24 June 2020 at B762, 25 June at B758-759 and 13 July at B758 contain any allegations of discrimination or do anything else under the Equality Act 2010. We therefore find that they do not amount to a protected act or protected acts.

489. The detriments that Mr Shillingford relies upon are set out at paragraph 5.4 of his list of issues. We have to find whether they happened and if they did

whether they amounted to a detriment and if so whether that was because Mr Shillingford did a protected act (which comes down to those acts at paragraph 5.1).

490. The detriments relied upon are a repetition of those relied upon for the purposes of the complaint of direct race discrimination at paragraph 2.2. We reconsidered our findings and conclusions in the context of the test of victimisation.

491. Paragraphs 5.4.1 to 5.4.12 are the same as paragraphs 2.2.3 to 2.2.14 respectively. The allegation at paragraph 5.4.11 is the same at that at paragraph 2.2.13, which Mr Shillingford said he was not pursuing.

492. Paragraph 5.4.1, there was nothing to indicate that Mr Cawthra's actions were influence by the protected acts. Mr Shillingford accepted in evidence that Mr Burns did include the documentation.

493. Paragraph 5.4.2, we did not find that Mr Cawthra's brief changed.

494. Paragraph 5.4.3, there was no evidence to indicate that the appointment of Mr Cawthra to hear Mr Shillington's grievance was influenced by the protected acts.

495. Paragraph 5.4.4, there was no evidence to indicate that the initial appointment of Ms Tutton was influenced by the protected acts and moreover he accepted in evidence that this did not cause him any detriment.

496. Paragraph 5.4.5, we found that Mr Cawthra' did not lie to Mr Shillingford about interviewing his witnesses.

497. Paragraph 5.4.6, there was no evidence to suggest that it was influenced by the protected acts.

498. Paragraph 5.4.7, there was no evidence to suggest that it was influenced by the protected acts.

499. Paragraph 5.4.8, there was no evidence to suggest that this amounted to a detriment and if it did whether it was influenced by the protected acts.

500. Paragraph 5.4.9, there was no evidence to suggest that it was influenced by the protected acts.

501. Paragraph 5.4.10, there was no evidence to suggest that it was influenced by the protected acts. Indeed, Mr Shillingford conceded as much in oral evidence.

502. Paragraph 5.4.11, in oral evidence Mr Shillingford accepted that Mr Burns did consider the documents and accordingly he was not pursuing this allegation.

503. Paragraph 5.4.12, there was no evidence to suggest that it was influenced by the protected acts.

504. Paragraph 5.4.13 is a repetition of the act of harassment pleaded at paragraph 4.1.13. Namely, on 1 September 2022, the respondent's solicitors sent Mr Shillingford a costs warning letter.

505. When considering whether this was because of the protected acts we have taken into account our findings as to why the respondent instructed its solicitors to send such a letter and why it was sent, as evident from its contents, and Mr Shillingford's acceptance of the reasons.

506. We could see why Mr Shillingford might believe that the sending such a letter was a detriment in broadest sense of the word but without applying the gloss of whether it is reasonable to view it as such. But our concern then was if such action to steps in litigation in defence of a discrimination claim could reasonably be taken to be detriments and if so, was the logical conclusion that if so then they flowed from a protected act, namely bringing a discrimination claim? This would call into question what happens in many Tribunal claims, namely the respondent sends the claim a cost warning letter for what might be quite legitimate reasons, just to name one step in litigation.

507. Indeed, this was a difficult question which arose under the old definition of victimisation in the legislation in place prior to the EQA: as to whether it was unlawful victimisation if an employer was merely taking steps to protect its position in discrimination litigation. The decided cases resolved this tricky issue by stating that, although such steps may be action by reason of the protected act, they did not necessarily amount to a detriment.

508. The question is whether a reasonable litigant would regard the employer's conduct as detrimental. An employer's reasonable conduct defending its position in litigation cannot reasonably be regarded as a detriment (Pothecary Witham Weld and another v Bullimore and another and Equality and Human Rights Commission (intervener) UKEAT/0158/09; [2010] IRLR 572, EAT summarising the effect of Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830, HL and St Helens MBC v Derbyshire [2007] UKHL 16; [2007] IRLR 540 under the old definition).

509. The House of Lords in Khan held, in proceedings concerning discrimination by way of victimisation under section 2(1)(a) of the Race Relations Act 1976 (the legislation applying before the Equality Act 2010 was enacted), that the respondent police sergeant had not been treated less favourably "by reason that" he had brought proceedings against the discriminator and allowed the appeal by the Chief Constable. The House of Lords (as the Supreme Court was then known) held that employers, acting honestly and reasonably, ought to be able to take steps to preserve their position in pending discrimination proceedings without laying themselves open to a charge of victimisation. Whilst the wording within section 27 EQA is that the detriment must be "because of" the protected act, by analogy, the old case law must hold good.

510. In conclusion then, we were of the view that it was not reasonable for a litigant in person to view an instruction to send and the sending of a costs warning letter to amount to a detriment.

511. In any event we concluded that the respondent acted honestly and reasonably in taking the action that it did and that this amounted to a step taken to preserve its position in pending discrimination proceedings. Indeed, the evidence the respondent had taken such action in many other cases. It was a step it would have taken not because Mr Shillingford had brought a race discrimination claim.

512. In conclusion, we find that the complaints of victimisation are not well founded and are dismissed.

Employment Judge Tsamados
Date: 8 December 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

11 December 2024

FOR EMPLOYMENT TRIBUNALS

P Wing