RM

EMPLOYMENT TRIBUNALS

Claimant:	**Mr M. Ahmet**
Respondent:	**London Borough of Tower Hamlets**
Heard at:	**East London Hearing Centre**
On:	**22-25 and 29-31 October, 1 November 2019 and 6-7 November 2019 (in chambers)**
Before:	**Employment Judge Massarella**
Members:	**Mr G. Tomey** **Mr D. Ross**

Representation

Claimant:	Ms N. Mallick (Counsel)
Respondent:	Mr A. Ross (Counsel)

RESERVED JUDGMENT

The judgment of the Tribunal is that:-

1. **the Claimant's claim of unauthorised deduction from wages is dismissed on withdrawal;**

2. **the Claimant's claims of direct race and religious discrimination, harassment related to race and religion and victimisation are not well-founded and are dismissed.**

REASONS

1. By a claim form presented on 2 November 2018, after an ACAS early conciliation period between 3 September and 3 October 2018, the Claimant complained of direct race and religious discrimination, harassment related to

race and religion, victimisation and unauthorised deduction from wages. The Respondent denied all forms of discrimination and raised limitation issues in relation to the earlier allegations.

The Hearing

2. The case was originally listed for twelve days, to include deliberation and judgment. It was reduced to ten because the Tribunal was not available to sit on two of the days. On the first day the parties agreed that evidence and submissions could be concluded within eight days, allowing the Tribunal to take the last two days for deliberation. The Tribunal completed its deliberations within the two days and reached its conclusions. Unfortunately, owing to pressure on judicial and administrative resources, there was then some delay in completing the judgment and sending it out to the parties, for which the Tribunal apologises.

3. The Tribunal took the rest of the first day to read into the case; the parties provided a joint, essential reading list. We had an agreed bundle of documents, running to over 1000 pages. The Tribunal reminded Counsel that they must refer us in cross-examination to any other documents in the bundle which they wished us to read. A timetable for evidence was agreed on the second day.

4. We heard evidence from the Claimant, Mr Mahmut Ahmet. For the Respondent we heard evidence from: Mr Anthony Galinis (Enforcement Officer); Mr Matthew Twohig (Green Team Coordinator); Mr Robin Payne (former Interim Divisional Director for Public Realm), who was Mr Wayre's line manager before March 2018 and Ms Proudfoot's line manager thereafter; Ms Karen Proudfoot (Interim Head of Communities and Enforcement, later Interim Head of Markets and Street Trading until June 2019, when she left); Mr Tom McCourt (Strategic Director until 11 April 2019, when he left).

5. We also had statements from Ms Denise Radley (Corporate Director, Health, Adults and Community) and Ms Debbie Jones (Corporate Director for Children and Culture). However, once the issues had been clarified it became apparent that their evidence was of little relevance since their involvement post-dated the alleged acts of discrimination; neither attended to give evidence.

6. Mr Wayre was the Claimant's line manager for at least part of the material period but he no longer works for the Respondent. By the first day of the hearing the Respondent did not have a witness statement from him ready for exchange, although we were told that there was a draft awaiting his approval. On the third day the Respondent told us that Mr Wayre had been in contact and confirmed that he would attend. Ms Mallick applied for his evidence to be excluded on the basis that it had not been served in compliance with the Tribunal's orders. We rejected that application: Mr Wayre was an important witness, against whom multiple allegations of discrimination were made; it would cause real prejudice to the Respondent if it were not to be able to call him. To achieve fairness between the parties, we set a cut-off point for the Tribunal and Ms Mallick to receive the final statement. If that deadline was not met, we would revisit her application to exclude Mr Wayre's evidence. We also indicated that, if anything arose out of this evidence which required the

Claimant to be recalled or other documents to be produced, we would consider any application sympathetically.

7. In the event, a statement for Mr Wayre was provided by the agreed date and he attended to give evidence without further objection from Ms Mallick.

Clarification of the issues at the start of the hearing

8. Ms Mallick clarified that the protected characteristics relied on by the Claimant were that he is a Muslim (religion) and that he is of Turkish national origin (race). The Tribunal's file indicated that the claim was accepted in part as a claim of unauthorised deduction from wages. Ms Mallick confirmed that no such claim was pursued; it was dismissed on withdrawal. She confirmed that all allegations associated with the Claimant's grievance against his colleague, Ms Minerva Brown, were no longer pursued.

9. Ms Mallick also sought to rely on two additional matters which were not in her original finalised list. The first was an allegation that the Respondent delayed in the investigation of the Claimant's CHAD grievance of August 2018. She clarified that the allegation was specifically made against HR. The Tribunal agreed with the Respondent's submission that the Respondent would be prejudiced in dealing with that allegation because it has not called any witnesses from HR, having had no notice that the case would be advanced on that basis. We refused permission to include the allegation. The second matter related to the Respondent's alleged failure to take steps to facilitate the Claimant's return to his substantive post. The Tribunal allowed Ms Mallick to add this claim. However, it was agreed that the allegation would only be considered in relation to the period up to the point at which the ET1 was presented.

10. A final list of issues, agreed between the parties and approved by the Tribunal, was drawn up and circulated before we began to hear evidence.

Withdrawal of allegations at the end of the hearing

11. The last witness to give evidence was Mr Wayre, on the seventh day of the hearing. After the conclusion of his evidence Ms Mallick, on instruction from the Claimant, withdrew all allegations of discrimination against him and applied to amend the claim to bring some of those allegations against other individuals. The position which she sought to advance was as follows.

    11.1. Allegation 6(i) was withdrawn altogether.

    11.2. Allegation 6(iv) was withdrawn against Mr Wayre, but still pursued against Mr Twohig and Mr Payne.

    11.3. Allegation 6(vii) was withdrawn against Mr Wayre, but Ms Mallick sought to amend the claim to make the same allegation against HR on the basis that Mr Wayre's evidence was that HR suggested the course of action in question.

    11.4. Allegation 6(viii) was withdrawn against Mr Wayre, but still pursued against Ms Proudfoot.

11.5. Allegation 6(xi) was withdrawn against Mr Wayre but Ms Mallick sought to amend the claim to allege that the act was done by 'Mr Wayre on the instruction of Mr Payne'.

12. We heard submissions from both Counsel. Ms Mallick submitted that the application fell to be considered under the familiar *Selkent* principles. She also referred us to the case of *Scott v Commissioner of Inland Revenue* [2004] IRLR 713. She submitted that the late application was justified by the late disclosure of information by the Respondent, including the late service of Mr Wayre's witness statement. She argued that it was in the interests of justice to allow the amendment and that the prejudice to the Claimant of not being able to make the allegation against the right individual outweighed any prejudice to the Respondent.

13. Mr Ross submitted that the substance of what Mr Wayre said in his oral evidence was already contained in documents in the agreed bundle. The list of issues had been agreed at the outset of the hearing in full knowledge of that evidence. No application to amend had been made when Mr Wayre's witness statement had been served. The application was raised for the first time when all the evidence been heard and all the Respondent's witnesses had been released. If the application were allowed it would have obvious consequences in terms of when the hearing could be finished.

Decision

14. In deciding whether to exercise its discretion to allow an amendment, the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. Relevant circumstances include:

14.1. the nature of the amendment, i.e. whether it is a minor matter, such as the correction of errors or a relabelling of facts already pleaded, or a substantial alteration, introducing a new cause of action or making new factual allegations which change the basis of the existing claim;

14.2. the applicability of statutory time limits. It is essential for the Tribunal to consider whether the complaint is out of time and, if so, whether the time limit should be extended under applicable statutory provisions;

14.3. the timing and manner of the application; why the application was not made earlier, particularly where the new facts alleged must have been within the knowledge of the Claimant when the claim was originally presented (*Selkent Bus Co Ltd v Moore* [1996] IRLR 661).

15. The Tribunal regarded this as a substantial amendment: it sought to raise new allegations of discrimination, which are always a very serious matter, against individuals. The application was made long out of time. We did not consider it was just and equitable to extend time for the reasons set out in the following paragraphs.

16. As for the timing and manner of the application, it was made at the last possible moment and after all the evidence had been heard. The late disclosure of Mr Wayre's witness statement did not assist Ms Mallick. If there was anything in it which caused the Claimant to think that an amendment was needed, the application should have been made on the morning of 29 October 2019 when the statement was produced. In any event we accepted Mr Ross's submission that the substance of what Mr Wayre said in oral evidence was already apparent from the documents contained in the agreed bundle.

17. We considered that the injustice to the Respondent of allowing the amendment outweighed the injustice to the Claimant of not allowing it: the individuals should be entitled to know the precise allegations against them and to amend their statements; some witnesses would certainly have to be recalled and an adjournment might be required; the Respondent would be put to additional cost and further Tribunal time would have to be allocated. We unanimously concluded that it was not in the interests of justice to allow the amendment.

Further application to withdraw the concession

18. On the morning of the last day of the hearing, which had been set aside for the Tribunal to read written closing submissions and then to hear oral submissions, Ms Mallick made an application to change her position again. By email sent to the Tribunal and to the Respondent at 7 a.m. that morning she sought to reinstate allegations (iv), (vii), (viii) and (xi) against Mr Wayre on the basis that 'an act of discrimination or harassment can still occur irrespective of the motive of the individual perpetrating it'.

19. The Tribunal sought clarification of this proposed further change of position. Ms Mallick explained that in respect of each of these allegations the Claimant no longer alleged that Mr Wayre was himself influenced by considerations of race or religion and she would not be inviting the Tribunal to make findings of discrimination against him. Nonetheless, she submitted that the allegations made against Mr Wayre 'can stand', as she put it. The case she wished to advance was that Mr Wayre was the unwitting vehicle of discriminatory decisions taken by others, who were motivated by considerations of race and religion.

20. We considered this was an attempt by Ms Mallick to make allegations, by the back door, against individuals who had not previously been named - an application which we rejected the previous day. There are no good grounds for revisiting that decision. Ms Mallick had every opportunity at the beginning of the hearing to identify the individuals against whom each allegation of discrimination was made. The trial proceeded on that basis. For the reasons given in rejecting the original application we considered it would be unjust to allow the Claimant to change his case in such a fundamental way after the completion of evidence.

21. Furthermore, we accepted Mr Ross's submission that Ms Mallick was seeking to advance the Claimant's case on the basis of what is referred to in *Reynolds v CLFIS (UK) Ltd* [2015] ICR 1010 as 'the composite approach', whereby an allegation is made against one person (Mr Wayre), who it is accepted was not influenced in any way by the relevant protected characteristics, but who it is

alleged is tainted by the discriminatory motivation of others (here, Mr Payne and/or HR). The Court of Appeal was clear in the *Reynolds* case that that approach is legally impermissible.

22. The application was refused.

23. The issues for determination, after the clarification referred to above, are attached as an appendix to this judgment. Each of the remaining live issues (in its final form) is also shown as an underlined subheading in the conclusions section below.

Findings of fact

24. Our findings of fact were unanimous.

25. The Claimant commenced employment with the local authority in 2003. On 14 September 2009 he joined the Respondent's Enforcement Service. Tower Hamlets Enforcement Officers are referred to as 'THEOS'. At the relevant time the Claimant's team was based at premises at the Toby Club in Whitechapel. The Claimant was known to some of his colleagues, and referred to in some of the documents we saw, as 'Del'.

26. On 15 June 2015 he was appointed Enforcement Service Team Leader. Mr Anthony Galinis applied for this role but was unsuccessful. Mr Galinis was unhappy with the recruitment process because he considered that the questions asked at interview did not properly reflect the seniority of the job.

27. For a period of time the Claimant was managing a second team as well as his own, the manager of the second team having been seconded to a full-time union role. For some eighteen months from mid-2017 Mr Galinis covered the second Team Leader role before reverting to his substantive post at the end of November 2018.

<u>The Claimant's dispute with Ms Brown</u>

28. On 20 October 2017 there was an incident between the Claimant and Ms Minerva Brown at the Toby Club. They raised grievances against each other, both alleging that the other behaved in an aggressive and threatening way. Ms Brown further alleged that the Claimant made a racially aggravated comment to her ('speak to me in English').

29. Mr Matthew Twohig was charged with investigating and duly produced a report. In the course of that investigation the Claimant alleged that Ms Brown's allegations against him were 'malicious and fictitious'.

<u>The Claimant's grievance about Ms O'Flaherty</u>

30. In December 2017 the Claimant raised a grievance against Ms Sharmila O'Flaherty, again alleging in part that comments she had made about him were 'fictitious and malicious'. Although Mr Wayre appointed someone to conduct an investigation, it appeared to have stalled and was never completed. The only explanation offered for this by Mr Wayre was that he was dealing with more than ten grievances at this time and simply neglected it. Although no longer pursued as an allegation of discrimination, the Tribunal

finds that this forms part of a pattern in which the Respondent failed to address concerns raised by the Claimant in a timely fashion or, in this case, at all.

The incident of 24 January 2018

31. On the morning of 24 January 2018, the Claimant and Mr Galinis attended a team training day, along with other THEOs. The Claimant drove Mr Galinis from the Toby Club in Whitechapel to Shadwell Training Centre.

32. According to Mr Galinis, while travelling along Salmon Lane E14 to the Shadwell Centre at around 09:10 to 09:20 in the morning, they were stopped by traffic congestion in a road with two lanes and vehicles parked on both sides. He said that children were crossing the road with adults and that there was a school crossing patrol woman just ahead of them. He explained that there was a Luton-type van which was stationary, facing them and at the head of a queue of oncoming traffic. He described what he says happened next in his witness statement:

> 'still in conversation the Claimant suddenly said: 'what's he doing?'. He then lowered his driver's window, put his head out and look backwards shouting loudly, 'what you fucking doing? There's a fucking car down there, can't you see?' or words to that effect. The 'fuck' was clearly said at least twice maybe more. It was apparent that the vehicle behind us or another was attempting to pass us whilst waiting in line, probably not looking ahead to the blockage. The Claimant's behaviour seemed to be aimed at that driver; I heard nothing from the said vehicle. After the brief episode the Claimant pulled his head back in, saying 'sorry kids'. He made himself upright and waited. There were clearly a number of primary school aged children close by and the loudness of the vocals from the Claimant would have been heard. I was somewhat stunned by the sudden outburst which threw me a bit off the conversation and thoughts of the day's events.'

33. Mr Galinis made a note in his pocketbook, which he transcribed in his witness statement. It reads: 'Inc[ident] Salmon Lane approx. 9.10-9.20 a.m. traffic related'. The Tribunal accepts that this referred to the incident described above and was made on the day.

34. Mr Galinis made a written statement on or around 16 February 2018, which is consistent with the account given in his witness statement.

35. By contrast, although the Claimant maintained a denial that the incident occurred at all, he accepted that he had little recollection of the journey in question. Nonetheless, he challenged Mr Galinis's account, both in the course of the internal investigation and before the Tribunal, on the basis that it was inconsistent and implausible.

36. Certain matters are not disputed: it is agreed that the Claimant and Mr Galinis travelled together in an unmarked Council car; the Claimant was driving and Mr Galinis was sitting in the front passenger seat; other officers travelled separately in two marked Council CCTV vehicles.

37. The Claimant and Mr Galinis disagreed about who else travelled in the car with them (and, therefore, who might have witnessed the alleged incident). At the time the Claimant disputed that Mr Clark was in the back seat of the car; he suggested that two other colleagues were in the back of the car, Mr Imran Khan and Mr Asim Uddin. However, in evidence before the Tribunal he accepted that he could not recall who else was in the car: 'it might have been Mr Clark or it might have been the others I mentioned'. Mr Twohig, who investigated the incident, spoke to a number of people: Mr Clark confirmed he was in the car with the Claimant; Mr O'Flaherty recalled that Mr Clark travelled with the Claimant; Ms O'Flaherty thought that Mr Clark was travelling with the Claimant and Mr Galinis; Mr Uddin told Mr Twohig that he was in a CCTV van with Mr Khan; Mr Khan could not recall who was in his vehicle; Ms Parkinson recalled that Mr Clark did not travel with her; Mr Rahman recalled that the Claimant did not travel with him. On the balance of probabilities, we find that the third, and only other, passenger in the car was Mr Clark; that is consistent with the recollection of most of the officers, including Mr Clark himself.

38. There was disagreement about the route taken. The Claimant said that he did not believe he would have driven along Salmon Lane. It is right that this was a detour, albeit a relatively minor one (2.2 miles, rather than 1.7 miles). Mr Galinis's description of Salmon Lane was careful and accurate; the Claimant does not claim to have any positive memory of which route he took. We accept that he took that detour, probably because of traffic during the rush hour.

39. There was disagreement about whether the incident could have occurred at the time identified by Mr Galinis. We find that it could: they set off around 09:00 and could have reached Salmon Lane by 09:10 or shortly thereafter. The Claimant made his own enquiries and discovered that the crossing patrol officer's shift ended at 09:00. This proves nothing: she may have finished her shift slightly later that day, or simply have been present while off duty. The fact that, when asked later by Mr Twohig during his investigation, she said that she had no memory of the event does not show that it did not happen.

40. Mr Clark did not make an allegation against the Claimant about this incident; he merely responded to questions properly asked in the course of a formal investigation by Mr Twohig (in March 2018), and later by Ms Proudfoot and Mr Wiggett. He confirmed the substance of Mr Galinis's account, although he took a more lenient view as to the seriousness of the incident.

41. The Tribunal accepts Mr Galinis's account of the incident as accurate: he made a brief contemporaneous note in his pocket book on the day; he spoke to Mr Wayre about the incident the following day (see below at para 44); he produced a detailed written account shortly thereafter (see below at para 47); his account was supported by Mr Clark and was more consistent than the Claimant's with the evidence provided by other witnesses at the time by reference to the other passengers in the car; he even proposed to Mr Wayre that the latter should request CCTV of the Toby Club so as to establish the time of departure. Moreover, Mr Galinis's evidence before us was consistent with his contemporaneous account: it was detailed and credible. Insofar as Ms Mallick was able to identify minor differences in his various accounts, we find that this was a natural consequence of the passing of time and did not affect our view of Mr Galinis's credibility.

42. By contrast, we found the Claimant's evidence about this incident unreliable: necessarily so, since he did not recall the journey; however, insofar as he did recall aspects of it, for example that Mr Clark was not in the vehicle and could not therefore corroborate Mr Galinis's account, we find that he was incorrect.

The initiation of the investigation into the incident

43. Mr Galinis reflected on the incident and considered that it was right to report it: he regarded the behaviour as unacceptable. We find that the incident was plainly capable of amounting to a serious incident: the Claimant had verbally abused a member of the public while in uniform and his actions had put Mr Galinis and Mr Clark in a difficult position. We accept that Mr Galinis might have dealt with the matter informally with the Claimant. However, he elected to report it formally and it was not unreasonable for him to do so.

44. The day after the incident Mr Galinis phoned his line manager, Mr Roy Wayre, who asked him to provide a written report. In late January/early February 2018 Mr Wayre asked Mr Twohig to investigate the incident. We find that Mr Wayre initiated the disciplinary investigation after a discussion with Mr Payne. Mr Payne took the view that an allegation of road rage in a public place by an officer wearing uniform was potentially serious misconduct. He explained, and we accept, that the Respondent takes matters of this sort particularly seriously because of its delegated crime and disorder powers. Serious disciplinary matters involving THEOs might have to be referred to the police and may result in the loss of accreditation.

45. Mr Twohig's involvement was confined to carrying out the investigation on Mr Wayre's instruction; he was not responsible for the decision to investigate.

46. Mr Twohig met Mr Galinis on 8 February 2018 but, when he discovered that Mr Galinis had not yet put his allegation in writing, he brought the meeting to a close and asked him to do so. On the same day Mr Twohig emailed Mr Wayre to update him about his meeting with Mr Galinis. He also mentioned that he had had a discussion with HR who had advised him that Mr Wayre and Mr Payne should consider the issue of suspension because of the nature of the allegation. Mr Wayre formally appointed Mr Twohig on or around 14 February 2018. Mr Twohig could not begin the investigation immediately as he was on annual leave between 14 and 21 February 2018.

47. Mr Galinis prepared a written report of the incident and submitted it to Mr Wayre on 16 February 2018. Mr Wayre phoned the Claimant on the same day and informed him that a serious complaint about him had been received and that he needed to give him a letter. The Claimant's evidence was that during this phone call Mr Wayre said: 'they want you out'. The Claimant did not make this allegation in the initial interview with Mr Twohig; he raised it for the first time some weeks later. In evidence before us he was equivocal as to what was said, ultimately saying that it was 'something along those lines'. Ms Mallick did not put to Mr Wayre that the remark was made; we find that it was not.

48. When Mr Wayre met the Claimant he gave him a letter, notifying him of the investigation and setting out the charges, which were as follows.

> 'Bringing the Council into disrepute in that it is alleged that you verbally abused a member of the public in the course of your duties, whereby on Wednesday 24 January 2018 you shouted out whilst driving in a Council vehicle in full uniform.
>
> Breach of section 2.1 the Code of Conduct, which states that the public is entailed [*sic*] to demand the highest standards of conduct from all local government employees.
>
> Breach of section 3.1 of the Code of Conduct which states that the Council expect all employees to deal with one another, the public, clients and elected Members in a courteous and simple manner.'

49. There is also a version of this letter signed by Mr Payne, but never sent by him. We find that the likely explanation for that was that he considered that the letter should come from the commissioning officer (Mr Wayre) and that he should hold himself back, in case he was required to chair a disciplinary hearing.

The removal of the Claimant from his substantive post

50. The Respondent's disciplinary policy states in relation to suspension:

> 'The employee can be suspended for a short period by the authorised manager, who will not normally be below a third-tier officer, for instance where there is an allegation of gross misconduct or where the employee's presence at the workplace may interfere with the impartiality of the investigation. Suspension will be on full pay…'

51. When Mr Wayre met the Claimant on 16 February 2018 he informed him that he was to be moved to a different team. The Claimant was adamant that it was Mr Wayre who took this decision. We find that it was Mr Payne: that was the evidence both of Mr Wayre and Mr Payne. Mr Payne felt that it was important that the Claimant should not come into contact with Mr Galinis and Mr Clark, but he was keen to avoid suspending the Claimant, considering that it was better that he remain at work. We had conflicting evidence as to where the Claimant would be based. Mr Payne said that he intended that he should work with Mr Wayre on a special project in Mulberry house; the Claimant said that he was told he would be working in the Toby Club, i.e. in the same building as Mr Galinis but on a different floor. If that was the message communicated to the Claimant, Mr Payne accepts that it was regrettable. When Mr Payne took these decisions, he had never met the Claimant.

52. The Claimant never took up the alternative duties: on 19 February 2018 he was signed off sick.

53. Mr Galinis took over leadership of the Claimant's team in his absence. Although the Claimant resented this, we find there were sound reasons for it at the time: Mr Galinis was best placed, both operationally and in terms of experience, to manage a team which was acknowledged by all as challenging. Later a white, female employee was appointed on an interim basis to the role. That appointment was not pursued in cross-examination.

Mr Twohig's investigation

54. Mr Twohig interviewed the Claimant twice. At the first meeting the Claimant said that 'I do not recall this incident happening'. He went on to say that, if it had taken place, would have been appropriate for Mr Galinis to challenge him and to ask him to stop the vehicle.

55. Mr Twohig interviewed Barry Clark on 7 March 2018, who confirmed that the incident had happened. It is right that Mr Twohig asked a number of leading questions, such as: 'can you confirm you were a passenger in vehicle LV64 KYU' and 'it has been reported that Mahmut Ahmet used offensive and foul language directed another vehicle whilst in Salmon Lane. Do you recall this?' The first question is obviously leading and it is inherent in the second that the route taken was via Salmon Lane, which the Claimant disputed.

56. Although it would have been preferable for Mr Twohig to ask more open questions, the rules which apply to the formal examination of witnesses, for example in a Tribunal context, do not apply to questioning by a lay person in a disciplinary investigation. If Mr Clark had disagreed with any element of the question put to him, he could easily have said so. His answers were clear and confident and were also consistent with the answers which he later gave when questioned by others. Among other things he stated that: 'Mahmut then leant out of the window and said something along the lines of what the fuck you doing, can't you see there is traffic?'

57. The Tribunal considers that the formulation of questions in this way reflected only Mr Twohig's lack of skill, not any bias on his part.

58. Mr Twohig interviewed the Claimant again on 6 April 2018. At that meeting he told the Claimant that he had spoken to Mr Clark who had confirmed Mr Galinis's account of the incident. The Claimant read from a pre-prepared, handwritten statement and provided supporting evidence. Mr Twohig considered that this material raised new questions, which he needed to investigate further.

59. As has already been set out above (at para 37) Mr Twohig interviewed a number of witnesses to explore with them points made by the Claimant, particularly as to who was travelling in which vehicle.

60. Mr Twohig attempted to interview the school crossing officer and spoke to her by phone on 23 April 2018. She did not recall the incident and did not wish to meet him. Mr Twohig asked her to describe herself and her description matched the description provided by Mr Galinis and Mr Clark.

61. The Claimant accepted in cross-examination that Mr Twohig followed up all the points he asked him to: he had followed up on a dispute about whether Mr Clark was in uniform; he had done all he could to work out who was in the vehicle with him; he had included in the appendix to his report all the material that the Claimant had supplied; and he had accurately recorded in his report all the key points the Claimant had made, including points in the Claimant's favour, such as the fact that the school crossing officer had no recollection of the incident.

62. Mr Twohig produced what he described as a 'provisional report', which he sent to Mr Wayre and Ms Vincent of HR on 2 May 2018. He concluded that there

was a case to answer. The date of 10 April 2018 on the draft report was a typographical error.

63. Mr Twohig summarised in his statement his reasoning for concluding that there was a case to answer: he noted that Mr Clark corroborated Mr Galinis's account of the incident; their descriptions of the school crossing patrol officer matched; although the Claimant denied that Mr Clark was in the vehicle with him and Mr Galinis, others confirmed that they were; the map which the Claimant had provided him with showing the route that he considered he was likely to have taken did not prove that the incident did not happen.

64. Mr Twohig frankly acknowledged that there were flaws in his report, for which he was later criticised in the report by Mr Wiggett: some of the interviews were wrongly dated; Mr Twohig had wrongly stated that he had no previous involvement with the allegation, when he had met with Mr Galinis on 6 February 2018.

65. On 11 April 2018 Michelle Vincent of HR notified the Claimant of an extension to the disciplinary investigation to 31 May 2018.

Ms Proudfoot's observations in June 2018

66. On 18 May 2018 Mr Wayre emailed Ms Vincent, asking whether they had received 'any further advice regarding Del's [the Claimant's] investigation and a way forward?' He followed this up with Ms Vincent on 23 May 2018:

> 'Can you please get some further advice on either closing this one down or going forward to a hearing? It's dragged on a bit and best it is finished off. Del is still away on sick leave and I would like to see a close to his sickness too. Your assistance would be much appreciated.'

67. That was the wrong approach: Mr Wayre was the commissioning officer and it was for him to decide whether the matter should go forward.

68. Ms Vincent replied promptly with her own detailed assessment of the evidence. In that analysis she raised a number of questions which she thought had not been addressed in Mr Twohig's report. In her last paragraph she concluded as follows:

> 'Based on 2 officer's words against 1, it would be reasonable for management to consider having this case proceed to a formal hearing for a panel to make a determination as to whether, on the balance of probability, the allegations are upheld or not. However, as the commissioning manager of the report, you need to decide what course of action you wish to take'.

69. Mr Wayre continued to sit on the fence. On 4 June 2018, he wrote to Ms Proudfoot forwarding the report, and Ms Vincent's comments on it:

> 'I have finally received a response back from Michelle regarding Del's investigation. When you get time, take a look through and let me know your opinion, I'm 50/50 on this'.

70. Ms Proudfoot replied on 14 June 2018:

> 'I agree with Michelle's comments. However, before this proceeds to hearing I think we need the investigating officer to answer the questions that have been raised. At the moment it doesn't feel like this has been [a] full and thorough investigation. Can you ask the investigator to revisit these issues?'

71. The questions Ms Proudfoot referred to in this email are the questions raised by Ms Vincent, not by Ms Proudfoot, who did not suggest questions of her own. In fact, in oral evidence she said that she had not read the report itself, only Ms Vincent's summary of it. The queries were by no means to the Claimant's disadvantage; they raised points which might have been in his favour and were directed at ensuring that the investigation was thorough. It was not Ms Proudfoot's role to take a decision; the only reason that she expressed an opinion at all was because Mr Wayre had asked her to do so.

72. The Claimant agreed that, at this point, Ms Proudfoot had never met him.

Further investigation

73. On 15 June 2018 Mr Wayre emailed Mr Twohig, telling him that Ms Proudfoot had asked for further investigation and highlighting the relevant points. Mr Twohig provided his response on 17 June 2018.

74. On 20 June 2018 Mr Wayre emailed the Claimant's TU representative, Kate Jenkins, copying in a number of managers. In this email he expressed the view that he felt there may not be the evidence to justify going forward to a disciplinary hearing and explaining the steps that he had recently taken, including consulting Ms Proudfoot. He informed Ms Jenkins that he hoped to reach a conclusion later in the week. The Claimant agreed in evidence before us that the email suggested that Mr Wayre was in two minds about whether to proceed.

75. On 20 June 2018 Ms Jenkins wrote to Ms Proudfoot querying why she was involved at all given that she was not the commissioning officer. Ms Proudfoot responded that Mr Wayre had sought her guidance and she had simply observed that the investigation needed to be full and thorough. It was not her intention to influence Mr Wayre's decision or the investigation.

The proposal that the Claimant accept a warning

76. Although the allegation in relation to this matter is no longer pursued, we deal briefly with the events in question for the sake of completeness.

77. Around 25 June 2018 Mr Wayre had a conversation with Ms Jenkins in which the suggestion was made that the Claimant might accept a six-month warning as an alternative to the matter proceeding to a disciplinary hearing. This arose as a result of a conversation he had had with Ms Vincent of HR, in which she merely suggested that this might be an option. We find that Mr Wayre adopted the suggestion because he saw it as a way of avoiding having to make a decision between the two competing accounts.

78. Mr Wayre suggested that Mr Payne was adamant that the matter should go to hearing. We reject that. We consider that, had Mr Wayre taken a decision that the matter should be dealt with in another way, Mr Payne would have

supported his decision, just as he later did when Ms Proudfoot came to that very conclusion.

79. In any event the proposal to the Claimant was wrongly handled. The Respondent's disciplinary policy contains a provision relevant to this proposal:

> 'Where the investigation entirely substantiates an allegation of misconduct and the employee agrees that on the evidence available any subsequent disciplinary hearing would endorse disciplinary action without qualification, a formal oral warning may be issued by the appropriate manager. The mechanism for this action will be a meeting between the manager, a HR & WD Business Partner, the individual and their representative. All parties must have had a copy of the investigating officer's report at least two working days prior to the meeting. The manager, a representative from HR and the individual must be in agreement on the issue of the morning…'

80. At the point when the warning was offered to the Claimant, the procedural steps outlined had not been complied with. Apart from anything else, neither he nor his TU representative had been provided with a copy of the report so that they could make their own assessment of it.

81. The Claimant rejected the offer, even though he had not seen the report. He confirmed to the Tribunal that, having now seen it, he would make the same decision again. By email dated 10 July 2018 he was informed that the matter would now proceed to a formal hearing.

82. On 18 July 2018 the Claimant alleges that there was a telephone conversation between him and Mr Wayre, which he reported to Ms Jenkins. In his account of that conversation he records Mr Wayre stating that his own preference was that the matter should be taken no further, that it was HR's advice that an offer of a six-month warning should be given and that he was also against that proposal. We find that Mr Wayre was again seeking to be all things to all people: there was nothing to prevent him halting the process, if that was his settled view.

<u>The application of the sickness absence policy between February and July 2018</u>

83. As we have already recorded, on 19 February 2018 the Claimant began a period of sickness absence. On 9 March 2018 Mr Wayre emailed an OH report to the Claimant and arranged an informal sickness absence review. The Claimant accepted in cross-examination that he did have a supportive discussion with Mr Wayre as a result of this email.

84. Other than that, little was done to support the Claimant whilst he was off sick.

85. There was confusion as to who the Claimant's line manager was during this period and, consequently, who was responsible for providing that support. In response to a direct question from the Tribunal as to what the Respondent's case was on who the Claimant's line manager was, Mr Ross told us that it was for us to make a finding on this. We consider that reflected the level of confusion among those instructing him.

86. On 21 March Mr Payne circulated an email in which he informed employees that:

> 'as from Monday, 26 March 2018 a new Interim Head of Service, Karen Proudfoot, will take over management of Markets, Neighbourhood Management, THEOS, ASB Team and CCTV. This service will form a new business unit to be known as community and enforcement. Roy Wayre (Markets), Daryl Edmunds (Neighbourhood Management), and Peter Allnut (CCTV), will report direct to Karen Proudfoot. ASB and THEO teams currently managed by Caroline Watts, Steve Cox, Anthony Galinis and Mahmut Ahmet will also transfer to Karen Proudfoot pending the appointment of a manager to oversee these teams and reporting directly to Karen.

87. In an email of 22 March 2018 Mr Wayre wrote to the THEO team informing them that as of 28 March 2018 Ms Proudfoot would be taking line management control on an interim basis of a number of teams and that he would be conducting a handover to her over the following three weeks. He informed them that he would be returning to the Markets and Street Trading Service.

88. This restructuring gave rise to a situation where the Claimant's previous line manager, Mr Wayre, was no longer responsible for him and the Claimant was reporting temporarily to Ms Proudfoot, although she was two levels above him in the structure and responsible for managing a large portfolio of teams.

89. There was, therefore, a *lacuna* in the direct management of the Claimant until, in July 2018, responsibility passed to Mr Alan Goode.

90. Ms Proudfoot's evidence was that she did not think that she was responsible for managing the Claimant's sickness absence. We find that, as Mr Wayre later told the CHAD investigator, Ms Proudfoot asked him to deal with the Claimant's sickness absence. He did not do so. The Claimant accepted in the course of cross-examination that there was confusion as to who his line manager was.

<u>The Claimant's grievance of July 2018</u>

91. On 17 July 2018 the Claimant sent a grievance to Mr Payne making allegations against Mr Wayre and Ms Proudfoot, of discrimination and failure to follow sickness absence procedures ('the July grievance'). The protected characteristic was not specified. He complained that, although the investigation had been extended to 31 May 2018, it was now mid-July and he still had not received any formal outcome. He accepts that he had an initial formal sickness meeting and a referral to OH but alleges that otherwise he had had no formal or informal support or contact. He had recently received a letter from HR informing him that his pay would be reduced to half on 3 August 2018.

92. On 1 August 2018 the Claimant sent an email to Ms Proudfoot stating that he would be returning to work on 3 August 2018 'by the pressure of management that my pay will be reduced'. On 2 August 2018 Ms Proudfoot sent an email to the Claimant confirming that Mr Payne had agreed to an extension of his full pay to the end of August 2018.

The meeting of 7 August 2018

93. On 7 August 2018 the Claimant attended a formal sickness absence review meeting with Mr Alun Goode and Mr Wayre.

94. At that meeting Mr Wayre informed the Claimant that there would be a disciplinary hearing on 10 September 2018, chaired by Mr Payne, to consider allegations of gross misconduct. These were set out in a letter of the same date. The fact that Mr Payne was going to hear the disciplinary meant that it was right for him to step back from involvement in the earlier part of the process.

95. The Claimant was informed of his right to be accompanied and to call witnesses. Attached was a copy of the investigation report.

The handling of the July grievance/the CHAD

96. On 8 August 2018 there was a meeting between the Claimant and Mr Payne to discuss the July grievance. At that meeting Mr Payne said that he would be hearing the grievance and that his preliminary view was that the Claimant was likely to succeed in his complaint because managers had not provided the contact and support required. On 13 August 2018 Mr Payne told the Claimant that he had appointed Mr Neil Crump formally to investigate the July grievance.

97. The Claimant returned to work on 21 August 2018. On the same day the Claimant made a Combating Harassment and Discrimination ('CHAD') complaint, which he submitted to Mr Tom McCourt. It related to the conduct of the disciplinary proceedings and allegations were made against six individuals: Mr Twohig, Mr Galinis, Mr Clark, Mr Wayre, Ms Proudfoot and Mr Payne.

98. Mr Payne then stood down the investigating officer he had appointed to deal with the July grievance; he himself could not remain as commissioning officer, nor determine that grievance, as he was now the subject of a separate complaint. That was a reasonable position for him to adopt. As a result, the July grievance was not separately investigated. A complaint about the handling of the sickness absence was, however, duplicated in the CHAD and it was investigated, and upheld, as part of that process.

99. On 30 August 2018 Ms Jenkins wrote to Mr McCourt saying that she had not received an acknowledgement of the CHAD from him. Mr McCourt replied that he had just returned from leave and would be meeting HR the following week; the Claimant was copied into this email.

100. On 3 September 2018 ACAS early conciliation began.

101. On 4 September 2018 a meeting between Mr McCourt and Catriona Hunt and Karen Davies of HR took place. At that meeting they discussed the CHAD. Mr McCourt agreed to change the composition of the disciplinary panel and rearranged the hearing to 9 October 2018. He also instructed Ms Proudfoot to undertake further meetings with Mr Galinis and Mr Clark in relation to the disciplinary allegations. She had taken over dealing with that matter because, at the end of August, Mr Wayre's contract had come to an end and she had decided not to renew it. His last day at work was 14 September 2018.

102. On 12 September 2018 Mr McCourt emailed Ms Jenkins, copying the Claimant in, telling them that he had discussed the matter with HR and would be arranging a meeting. The Claimant agreed that he subsequently met Mr McCourt on 24 September 2018.

103. On 18 September 2018 Mr Paul Morris emailed Ms Jenkins about the situation within the Respondent. We gave no weight to this email: we had no direct evidence from Mr Morris and, from the evidence that we did here, it was clear to us that he had complex disputes of his own with various members of the organisation.

The conclusion of the disciplinary investigation

104. On 20 September 2018 Mr McCourt wrote to the Claimant informing him of the new disciplinary hearing date (9 October 2018) and the new constitution of the panel, which would be chaired by Mr Ronke Martins-Taylor, sitting with Mr Mohammed Jolil. The letter reminded him of his right to be accompanied and to call witnesses.

105. On 3 October 2018 ACAS early conciliation ended.

106. On 4 October 2018 Ms Proudfoot emailed the Claimant to tell him that the disciplinary hearing scheduled for the following week was adjourned to allow her to clarify some aspects of the investigation. On 10 October 2018 she conducted further interviews with Mr Galinis and Mr Clark about the January 2018 incident. In the interview with Mr Clark he confirmed the route taken, but said that he did not think much of the incident and he did not think people would associate the Claimant with the Respondent. We find she conducted the interviews in an objective and forensic manner.

107. As a result of these enquiries, she concluded that the incident probably happened but that it did not amount to gross misconduct. We reject the suggestion made by Ms Mallick to Ms Proudfoot that she took control of the interviews with Mr Galinis and Mr Clark in order to avoid a finding of discrimination against them, which would have been serious for the Respondent. We found Ms Proudfoot to be a careful and credible witness and there is no basis for that suggestion.

108. In a letter dated 12 October 2018 Ms Proudfoot wrote to the Claimant as follows:

> ‘I have now received the investigating officer’s report and had an opportunity to review this. As a result of my review, I find that an incident as described would be unlikely to have brought the Council into disrepute and would not have constituted gross misconduct. Therefore, no further action will be taken. Accordingly, I now confirm that this matter has been concluded. I confirmed the details of this process, including the investigation report and notes from the hearing will not be placed or retained on your personal file.’

109. Ms Proudfoot told Mr McCourt what her conclusion was and he agreed with it. By contrast, Mr Payne told the Tribunal that he disagreed with it. He considered that, where there were two irreconcilable accounts of an incident, the best way to resolve the conflict was by way of a disciplinary hearing.

However, he accepted Ms Proudfoot's conclusion because, unlike Mr Wayre, she had at least made a decision and provided a resolution.

The proposed return of the Claimant to his substantive post

110. On 13 October 2018 the Claimant spoke on the phone with Ms Proudfoot. He then recorded the content of that discussion in an email of 14 October 2018 to Ms Jenkins. He told Ms Proudfoot that he was worried about returning to the substantive role with Mr Galinis and Mr Clark in post and with her as his line manager.

111. On 16 October 2018 Ms Jenkins wrote to Mr McCourt, asking that Mr Payne and Ms Proudfoot not take part in the Claimant's return to his substantive role but that his line management be moved to another person. In the same email Ms Jenkins recorded that:

> 'Mahmut is clearly of the view that the complaint against him by Anthony Galinis and Barry Clark was malicious and vexatious in nature. Therefore, as no opportunity has been provided by the disciplinary process to address this issue, we ask that this complaint is investigated ASAP. Also that Barry [Clark] and Anthony [Galinis] are removed from the service whilst the investigation takes place. It is important that management behave consistently when complaints are made.'

112. It is clear from the contemporaneous evidence, and from the Claimant's evidence before us, that he was asking not just that Mr Galinis and Mr Clark be moved to different teams, as had happened to him at the beginning of year, but that they be suspended from the service altogether, based on his belief that the original allegation was false and malicious.

113. On 17 October 2018 a meeting between the Claimant and Ms Proudfoot was scheduled to take place to discuss his reinstatement to his substantive post and to ask him to consider what support he would need. The Claimant declined to meet her. On 17 October 2017 Ms Proudfoot proposed a meeting on 23 October with Mr Aidan Ackerman, who had taken over line management of the Claimant. That meeting went ahead, although Ms Proudfoot attended only briefly. This was the first time she had met the Claimant.

114. The notes of the meeting confirm that at the outset Ms Proudfoot outlined the purpose of the meeting 'which was to return [the Claimant] to his substantive role including a period of adjustment to assist [the Claimant] in this process'. The Claimant accepted in cross-examination that, contrary to his pleaded claim, he was not told he would not be returned to his substantive post. Quite the reverse, Ms Proudfoot and Mr Ackerman were trying to get him back to that post in as supportive a way as possible. The notes record that the Claimant was asked to work from the sixth floor in Mulberry House.

115. On 30 October 2018 Mr McCourt emailed Ms Jenkins to tell her that he had commissioned an independent person, Mr Wiggett, to deal with the CHAD investigation. Because of other commitments, Mr Wiggett was not able to start immediately. However, Mr McCourt knew that he was an experienced investigator, whom he had used before and been impressed by. He thought it was in everyone's interest to wait until Mr Wiggett became available.

116. On 2 November 2018 the Claimant presented his ET1. There are no allegations in relation to the subsequent period. Our remaining findings are merely to confirm the eventual outcome.

The period after the presentation of the claim

117. By email dated 8 November 2018 Ms Proudfoot wrote to the Claimant copying in Mr Ackerman stating that:

> 'we are all keen for you to return to your substantive position and are trying to work with you to enable this to happen and I don't see that your complaint will prevent this from happening, particularly as you are unlikely to work with the officers concerned as they will be working in a different team on a different shift rota. My view is that the Toby Club and the THEO team are a safe place you to work.'

118. In his reply the Claimant rejected that view stating that it would be right to suspend them altogether from the service because they had given a 'false account'. We accept Ms Proudfoot's evidence that, having looked into the incident in some detail, she did not consider that they had given a false account. She did not consider it reasonable, or practicable from an operational point of view, to accede to the Claimant's request that Mr Galinis and Mr Clark should be suspended from the service in circumstances where she had arranged for the Claimant to be separated from them and when she did not believe that the original allegation was false.

119. We find that it was the Claimant's own choice not to return to his substantive post because he was dissatisfied with Ms Proudfoot's decision. Although it is understandable that, by this late stage, the Claimant was frustrated and resentful about the length of time it taken to resolve the disciplinary matter, we find that his conduct in respect of making his return to his substantive role conditional on the suspension of two other employees was obdurate and unreasonable.

120. In the same email Ms Proudfoot wrote:

> 'As explained on the phone when we spoke I have been informed that you have raised concerns that I was not previously aware of. To enable these to be managed effectively I have rescheduled the meeting to take place when the new Communities and Enforcement Manager, Aidan Ackerman, starts next week.'

121. On 7 November 2018 the Claimant had made a second CHAD complaint, dated 2 November 2018, against Mr Payne, Ms Proudfoot, Mr McCourt and HR.

122. On 15 November 2018 Mr McCourt formally appointed Mr Steve Wiggett as an independent investigating officer to undertake the investigation into the Claimant's CHAD of 21 August 2018. That investigation included an investigation into the July 2018 grievance. It is clear from the terms of reference that the question of whether Mr Galinis and Mr Clark had acted maliciously was also incorporated into the CHAD.

123. Mr Wiggett completed his investigation on 15 February 2019.

124. On 11 July 2019 Ms Radley wrote to the Claimant confirming the outcome of the CHAD. She acknowledged the lengthy delay, which she described as most regrettable. However, she recorded that the complaint of race discrimination was 'unsubstantiated through lack of supporting evidence'. Nor did the investigating officer find evidence to substantiate his allegations that any of the officers had colluded to remove him from his role. He rejected the allegation that either officer had acted maliciously, or in a discriminatory way, with regard to the January 2018 incident. The complaint that Mr Wayre and Ms Proudfoot had not adequately supported him during his sickness leave was upheld. By then both had left the Council.

The law

Time limits

125. S.123(1)(a) EqA provides that a claim for discrimination must be brought within three months, starting with the date of the act to which the complaint relates.

126. S.123(3)(a) EqA provides that conduct extending over a period is to be treated as done at the end of the period. The leading authority on this provision is *Hendricks v Commissioner of Police of the Metropolis* [2003] ICR 530, in which the Court of Appeal held that Tribunals should not take too literal an approach to determining whether there has been conduct extending over a period. The focus should be on the substance of the complaint that the employer was responsible for an ongoing situation or a continuing state of affairs in which an employee was treated in a discriminatory manner.

127. The Tribunal may extend the three-month limitation period under s.123(1)(b) EqA, where it considers it just and equitable to do so. That is a broad discretion. In exercising it, the Tribunal should have regard to all the relevant circumstances, which will usually include: the reason for the delay; whether the Claimant was aware of his rights to claim and/or of the time limits; whether he acted promptly when he became aware of his rights; the conduct of the employer; the length of the extension sought; the extent to which the cogency of the evidence has been affected by the delay; and the balance of prejudice (*Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] ICR 1194).

128. A failure to explain the delay does not preclude an extension of time but is likely to be a relevant factor, to which the Tribunal ought to have regard (*Abertawe* at para 25). There is no requirement for exceptional circumstances to justify an extension (*Pathan v South London Islamic Centre,* UKEAT/0312/13/DM at para 17).

129. The fact that the Claimant was pursuing internal resolution by way of a grievance is a factor which may be taken into account, although it is not determinative (*Apelogun-Gabriels v London Borough of Lambeth* [2002] IRLR 116 at para 16).

The burden of proof

130. The burden of proof provisions are contained in s.136(1) to (3) EqA:

> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**

131. The effect of these provisions was summarised by Underhill LJ in *Base Childrenswear Ltd v Otshudi* [2019] EWCA Civ 1648 (at para 18):

> **'18. It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in *Madarassy*. He explained the two stages of the process required by the statute as follows:**
>
> **(1) At the first stage the Claimant must prove "a prima facie case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the Tribunal could conclude that the Respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):**
>
> > **"56. … The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.**
> >
> > **57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. …"**
>
> **(2) If the Claimant proves a *prima facie* case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:**
>
> **"He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim."**
>
> **He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.'**

132. The Court of Appeal in *Anya v University of Oxford* [2001] ICR 847 (at paras 2, 9 and 11) held that the Tribunal should avoid adopting a 'fragmentary approach' and must consider the direct oral and documentary evidence available and what inferences may be drawn from all the primary facts.

<u>Harassment related to race/religion</u>

133. Harassment related to race is defined by s.26 EqA, which provides, so far as relevant:

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

> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
>
> **…**
>
> **(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—**
>
> **(a) the perception of B;**
> **(b) the other circumstances of the case;**
> **(c) whether it is reasonable for the conduct to have that effect.**
>
> **(5)The relevant protected characteristics are—**
> **…**
> **race**
> **…**
> **religion**
> **...**

134. The use of the wording 'unwanted conduct *related to* a relevant protected characteristic' was intended to ensure that the definition covered cases where the acts complained of were associated with the prescribed factor as well as those where they were caused by it. It is a broader test than that which applies in a claim of direct discrimination (*Unite the Union v Nailard* [2018] IRLR 730).

135. Elias LJ in *Land Registry v Grant* [2011] ICR 1390 (at para 47) held that sufficient seriousness should be accorded to the terms 'violation of dignity' and 'intimidating, hostile, degrading, humiliating or offensive environment'.

> **'Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.'**

Direct discrimination because of race/religion

136. S.13(1) EqA provides:

> **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.**

137. The conventional approach to considering whether there has been direct discrimination is a two-stage approach: considering first whether there has been less favourable treatment by reference to an actual or hypothetical comparator; and secondly going on to consider whether that treatment is because of the protected characteristic, here race/religion.

138. More recently, the EAT has encouraged Tribunals to address both stages by considering a single question: the 'reason why' the employer did the act or acts alleged to be discriminatory. Was it on the prohibited ground or was it for some other reason? This approach does not require the construction of a hypothetical comparator: see the comments of Underhill J in *Martin v Devonshires Solicitors* [2011] ICR 352 at para 30.

139. In *Reynolds v CLFIS (UK) Ltd* [2015] ICR 1010, the Court of Appeal held that a 'composite approach' to an allegation of discrimination is impermissible: the employee who did the act complained of must himself have been motivated by the protected characteristic (para 36).

140. The question of unconscious, or subconscious motivation, was considered by Lord Nicholls in *Nagarajan v London Regional Transport* [1999] ICR 877 at 885:

> **'All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs might be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race is the reason why he acted as he did. It goes without saying that in order to justify such an inference the Tribunal must first make primary findings of fact from which the inference may properly be drawn.'**

141. It is an essential element of a direct discrimination claim that the less favourable treatment must give rise to a detriment (s.39(2)(d) EqA). There is a detriment if 'a reasonable worker would or might take the view that [the treatment was] in all the circumstances to his detriment': see per Lord Hope of Craighead in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 at para 35. An unjustified sense of grievance does not fall into that category.

Victimisation

142. S.27 Equality Act 2010 ('EqA') provides as follows:

> **(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.**
>
> **…**

143. The test of causation in a victimisation complaint is whether the relevant decision was materially influenced by the doing of a protected act. This is not a 'but for' test, it is a subjective test. The focus is on the 'reason why' the alleged discriminator acted as he did (*West Yorkshire Police v Khan* [2001] IRLR 830).

Submissions

144. Both representatives provided helpful skeleton arguments; both supplemented them by oral submissions.

145. We have taken all the submissions into account and referred to them, above and below, where relevant. We mean no disrespect to Counsel by not setting

out in detail the submissions in what is already a lengthy judgment, save for the following brief summary.

146. Ms Mallick clarified the matters that she relied on in respect of each alleged discriminator as being the 'something more' from which the Tribunal could reasonably conclude that considerations of race or religion materially influenced the alleged discriminators. Ms Mallick argued in respect of them all that they were unconsciously, or subconsciously, influenced by the protected characteristics.

147. Mr Ross submitted that no persuasive theory had been advanced on the basis of which a finding of unconscious discrimination could be made. He argued that the Claimant's credibility was undermined by the extent to which his case had changed over time. He submitted that the allegations up to and including Issue 6(v) were time-barred.

Conclusions: time limits

148. Allegations 6(ii) to (v) are out of time. We have considered whether it is just and equitable to extend time. In considering that issue, we have regard to the following factors.

148.1. The length of the delay (between one and five months) was substantial.

148.2. In explaining the delay the Claimant relied in part on his period of sickness absence. However, no evidence was led that this rendered him unable to lodge proceedings, particularly as he had the assistance of his union.

148.3. He also relied on the Respondent's delay in concluding the disciplinary procedure and the grievances in July and August 2018. We find this a more compelling argument: he was entitled to assume that these procedures would be resolved within a reasonable period and cannot have anticipated the extent of the delay. To that extent, the Respondent bore some responsibility for the position he found himself in.

148.4. We do not consider that the cogency of the evidence was substantially affected by the delay. The witnesses' recollection of these events appeared to the Tribunal to be good. Most of the relevant decisions were recorded in contemporaneous documents. Most of the matters complained of were investigated, and decided upon, in the CHAD report in early 2019. The Respondent does not say it was hampered in reaching those conclusions by the passage of time. Mr Ross has not identified any other specific prejudice the Respondent would suffer if time is extended.

148.5. By contrast the prejudice to the Claimant of these claims not being heard would be significant.

149. Weighing all these factors in the balance, in particular our conclusions as to the balance of prejudice, we consider that it is just and equitable to extend time in relation to Issues 6(ii) to (v).

Conclusions: the issues

Issue 6(ii): In early February 2018 Mr Galinis and Mr Clark falsely alleged that, on the morning of 24 January 2018, the Claimant shouted and swore at a member of the public from a council vehicle while in uniform.

150. We have already found (para 41) that Mr Galinis's allegation was not false. Further, we have found (para 40) that Mr Clark did not make an allegation, in early February 2018 or at all; he merely responded to questions asked of him in the course of a formal investigation. The information he provided was not false. For these reasons this allegation fails against both Mr Galinis and Mr Clark.

Issue: 6(iv): An investigation into the alleged incident on 24 January 2018 was initiated by […] Mr Twohig and/or Mr Payne in late January/early February 2018.

151. We have already found (para 45) that Mr Twohig did not take the decision to investigate, it was taken by Mr Wayre and Mr Payne. The allegation against Mr Wayre has been withdrawn.

152. As for Mr Payne, it was accepted that, when he took this decision, he had not met the Claimant. It was not put to him that he knew, as a matter of fact, that the Claimant was either Turkish or Muslim; rather, it was put to him that he must have known that he was Turkish and Muslim from the Claimant's name, because he had worked in Haringey for nine years, an area of London with a large Turkish and Muslim population.

153. Mr Payne agreed that he had worked with many Turkish people while in Haringey; however, it had never occurred to him that the Claimant's name was a common Turkish name; he had not made assumptions about the Claimant's race or religion; if he had thought about it he might have assumed that the Claimant was Muslim, possibly Asian. We accept his evidence as truthful; it was carefully given and nuanced.

154. The only matter relied on by Ms Mallick as raising a *prima facie* case that Mr Payne's decision was materially influenced by race or religion was 'the fact that he denied knowing the Claimant was a Turkish Muslim even though he had worked in Haringey for nine years'. We understand Ms Mallick to be arguing that any person who had lived in Haringey for any period of time must be able to discern a name of Turkish and/or Muslim origin. We do not consider that that follows: some might be able to make that connection, others might not. Indeed, the Claimant in the course of cross-examination, stated that he did not think that Mr Payne would have realised that he was of Turkish national origin because of his name, only that he was a Muslim.

155. We understand Ms Mallick then to be asserting that, because Mr Payne must have had that knowledge, he was being untruthful when he denied it in evidence before us and we could infer from that lack of candour that race or religion played a part in his decisions.

156. We have already found that Mr Payne was telling the truth about his state of knowledge and so this submission fails on the facts. There was no evidence from which we could reasonably infer that Mr Payne's actions were materially

influenced by considerations of race or religion, whether consciously or unconsciously.

157. In any event, we consider that we can reach a positive conclusion as to the reason why Mr Payne asked for the matter to be investigated: he did so because he regarded it as potentially a very serious disciplinary matter. The fact that another manager might have taken a different view, and that Ms Proudfoot eventually did, does not mean that this was not his genuine reason at the time, which we find was in no respect influenced by considerations of race or religion.

158. For all these reasons this claim fails.

Issue 6(iii): On 16 February 2018 the Claimant was removed from his substantive post and replaced by a non-Muslim, white employee.

159. The Claimant's own belief is that this decision was taken by Mr Wayre and so, strictly speaking, the allegation was made against him (and then withdrawn). We have already found (para 51) that Mr Payne took this decision. Although not obliged to do so, we consider the position in relation to him.

160. As we have found above, there is no evidence from which we could reasonably conclude that Mr Payne's actions were materially influenced by race or religion. We conclude that the reason why Mr Payne proposed to move the Claimant from his team was twofold: so that he would not come into contact with Mr Galinis while an investigation took place; and so that the Claimant could remain at work without being suspended. He was acting in good faith in an attempt to balance the need to ensure a fair investigation, while enabling the Claimant to continue working. He could have suspended the Claimant in the circumstances, but instead took a more lenient step. The Claimant's race and religion played no part whatsoever, consciously or subconsciously, in Mr Payne's decision.

161. We accept Mr Ross's submission that the replacement of the Claimant by Mr Galinis is not detrimental treatment of the Claimant and cannot amount to an act of direct discrimination against him. In any event, we have already found that the reason why Mr Galinis was appointed because he was best placed to lead the team in the Claimant's absence.

Issue 6(v): Mr Twohig conducted a biased investigation into the disciplinary allegations relating to the incident on 24 January 2018. He asked leading and/or irrelevant questions of witnesses; and he failed to consider relevant evidence provided by the Claimant about timings and locations, and relating to the pedestrian crossing warden.

162. The Tribunal finds that Mr Twohig's report was a fair and balanced assessment of the evidence and that his conclusion was one which was plainly open to him on the evidence before him. Insofar as there were minor errors in the report, or the approach to the investigation, we conclude that these were caused either by inexperience or carelessness on his part, which he fairly acknowledged. He did not fail to consider relevant evidence. We have no hesitation in rejecting any suggestion that Mr Twohig's approach to the exercise was biased. We found him to be a conscientious individual, who had gone to considerable lengths to explore irreconcilable accounts.

163. For those reasons, this claim fails.

Issue: 6(vi): On 14 June 2018 Ms Proudfoot advised Mr Wayre to continue with the disciplinary procedure against the Claimant, despite the fact that she knew Mr Wayre did not consider that there was sufficient evidence

164. We find that Ms Proudfoot did not advise Mr Wayre to continue with the disciplinary procedure; she merely endorsed the view expressed by HR that further enquiries (which might be to the Claimant's advantage) should be undertaken.

165. Insofar as Ms Proudfoot was commenting at all, we conclude that she did not do so, as the Claimant alleged, in the knowledge that Mr Wayre 'did not consider that there was sufficient evidence'. At this stage Mr Wayre had told her that he thought it was '50/50', in other words that the question was finely balanced. It is right that in his later communication with the Claimant and his trade union (para 82) he expressed doubt as to the wisdom of continuing the disciplinary process, but that was not what he said to Ms Proudfoot in June 2018.

166. The events did not happen as alleged and this claim accordingly fails.

Issue 6(viii): […] Ms Proudfoot breached the sickness absence policy between February and July 2018. [She] failed to keep in touch with the Claimant, failed to provide support to the Claimant and/or to instruct HR to do so.

Issue 6(ix) The Respondent's HR did not provide support to safeguard the Claimant's welfare through his sickness absence from February 2018 in the way described above.

167. With regard to breaches of the sickness absence policy, no specific policy breaches were identified by Ms Mallick; in her closing submissions the only matter pursued was that Ms Proudfoot:

> 'failed to keep in touch with the Claimant. She did not provide support to the Claimant. It was her responsibility, she was his line manager.'

168. As a matter of fact, this is correct. At least between mid-March and July 2018 Ms Proudfoot was, formally speaking, the Claimant's line manager; she accepted that she did not keep in touch with him or arrange for HR to do so. She did ask Mr Wayre to do so, but he did not do so. The Claimant was badly let down in this respect.

169. As for Issue 6(viii), this allegation is no longer pursued against Mr Wayre. With regard to Ms Proudfoot, Ms Mallick explains why the burden should shift to the Respondent as follows:

> 'KP blamed RW for not managing C's sickness. She was his line manager and yet she denied it. A characteristic attribute of lying is hiding something. She is hiding her failure to support C and the possible motive that it was influenced by race/religion. It is implausible that in that time that others that she managed would not have been sick, yet R does not refer to anybody else where KP would have acted in the same way. An inference can be drawn.'

170. We consider that there is nothing in this which constitutes evidence from which we could reasonably conclude that race or religion played any part in Ms Proudfoot's failure to manage the Claimant's sickness absence, or to ensure that it was properly managed. We accept Mr Ross's submission that the suggestion that race or religion was a 'possible motive' is nothing more than a bald assertion.

171. We conclude that the reason why Ms Proudfoot failed to manage the Claimant's absence herself, and (unsuccessfully) tried to instruct Mr Wayre to do so, was because she had been assigned a very broad area of responsibility within the organisation, at a senior level, and did not regard it as her role to manage individual sickness absence on a day-to-day level.

172. As for Issue 6(ix), the reason why HR did not provide support was because it was not asked to do so; neither Ms Proudfoot nor Mr Wayre sought their assistance. Insofar as a claim was pursued in relation to this, we conclude that it fails for this reason. In any event, there is no evidence whatsoever on the basis of which the Tribunal could conclude that any act or omission in this respect by any individual within HR was materially influenced by considerations of race or religion. Ms Mallick did not even identify an alleged discriminator in her submissions.

Issue 6(x): HR failed to conduct an investigation in a timely manner into the Claimant's grievance of 17 July 2018.

173. We have already found that the reason why the July grievance was not separately investigated was because the allegations were repeated in the CHAD. It was investigated, and upheld, in that context. Part of the reason for the delay was because Mr Payne was originally going to lead on the investigation into the grievance but had to step down because the Claimant made an allegation of discrimination against him. As we have already found, the other reason for the delay was that Mr McCourt wished to appoint Mr Wiggett to investigate the CHAD, as he considered that he had the skills required to deal with such a complex matter. His confidence in Mr Wiggett was, in the Tribunal's view, amply borne out by the thoroughness of Mr Wiggett's eventual report.

174. There is no evidence from which we could reasonably conclude that considerations of race and religion played no part whatsoever in the delay by Mr Payne and/or Mr McCourt in dealing with the July grievance. In any event, the allegation is not made against them.

175. Insofar as the allegations levelled at HR, no individual discriminator has been identified at any point; no evidence was adduced from which the Tribunal could reasonably conclude that race or religion played any part in the actions or omissions of any individual member of the HR team.

Issue 6(xii): On 23 October 2018 Mr Ackerman informed the Claimant, on Ms Proudfoot's instruction, that he would not be returned to his substantive post.

Issue 6(xiii): Ms Proudfoot failed to take steps appropriately to facilitate the Claimant's return to his substantive post in the period up to the issue of the ET1 on 2 November 2018.

176. We have already found (para 114) that Mr Ackerman did not inform the Claimant that he would not be returned to his substantive post and this allegation fails.

177. We have already found (para 114) that Ms Proudfoot did not fail to take steps appropriately to facilitate the Claimant's return to his substantive post; she did her best to do so but was impeded by his unreasonable insistence that his return was conditional on the suspension of Mr Galinis and Mr Clark. For these reasons this claim fails.

178. For the avoidance of doubt, although it is accepted that the Claimant did a protected act in his CHAD, because we have found in the preceding paragraphs that the detriments did not occur, his claim of victimisation must also fail.

The Claimant's credibility

179. The Tribunal records its concern that there was a pattern, both at the time and in the course of these proceedings, of the Claimant making allegations of discrimination and then withdrawing them.

180. By way of example, in his second CHAD of 2 November 2018 he alleged discrimination against Mr McCourt. However, at a meeting on 27 February 2019 he told Mr McCourt that he had 'not meant to call him a racist'. We accept Mr McCourt's evidence that the Claimant 'said that he'd put me in as racist as he'd put everyone else in, so was only being fair.' On 5 March 2019 the Claimant informed Ms Lynn McKenzie that he had decided formally to withdraw the CHAD complaint against Mr McCourt, which he confirmed in an email of 2 April 2019.

181. Nonetheless, and despite not being raised as a pleaded allegation of discrimination, the Claimant then alleged in his witness statement that Mr McCourt had failed to contact him about his grievances and that this was an act of discrimination. That allegation was factually incorrect: the Claimant accepted in cross-examination that Mr McCourt held a meeting with him on 24 September 2018.

182. Allegations of discrimination are extremely serious. The Claimant's apparent willingness to make allegations of this sort, and then to abandon them when scrutiny reveals them to be without foundation, undermined the Tribunal's confidence in his evidence as to his belief that he had been subjected to unlawful discrimination.

183. On the other hand, the Tribunal can understand why the Claimant was deeply troubled by the length of time it took to resolve the disciplinary matter against him. It is plain to us that the Respondent's inefficiency and indecisiveness stoked his resentment and his fears as to his future within the organisation.

184. Although we have rejected the Claimant's claims of discrimination, the Tribunal records its view that, once the original allegation had been reported by Mr Galinis, it ought to have been investigated and resolved within a relatively short period of time. It was not: the disciplinary process was not concluded until some nine months later. In that respect the Respondent failed the Claimant badly. Part of the reason why the matter took so long to come to

a conclusion was because of Mr Wayre's indecision. We reject his evidence that he consistently expressed opposition to taking the matter forward and that he was overruled by Mr Payne. On the contrary we find that at each stage he vacillated and appeared unwilling to make a decision either way, despite being encouraged to do so by senior management. Ultimately, Ms Proudfoot brought the process to a halt, but not before the Claimant had experienced months of uncertainty, which caused him considerable anxiety.

Conclusion

185. For all the reasons set out above, the Claimant's claims of discrimination are dismissed.

Employment Judge Massarella

6 March 2020

APPENDIX: FINAL LIST OF ISSUES

The issues for determination, after clarification and the withdrawals referred to in the Judgment (which are shown struck out below) were as follows.

Time limits

1. ACAS early conciliation began on 3 September 2018. Any complaint in relation to a matter which occurred before 4 June 2018 is *prima facie* out of time.

2. In respect of acts or omissions occurring before that date, did they amount to conduct extending over a period, where that period ended on or after 4 June 2018?

3. If not, is it just and equitable to extend time in respect of acts or omissions occurring before 4 June 2018?

The protected characteristics

4. The Claimant is of Turkish national origin and is a Muslim. It was confirmed on his behalf that he does not rely on his colour as a protected characteristic.

The causes of action

5. The Claimant claims:

    (i) direct race discrimination (s.13 Equality Act 2010 ('EqA'));

    (ii) direct religious discrimination (s.13 EqA);

    (iii) harassment related to race (s.26 EqA);

(iv) harassment related to religion (s.26 EqA);

(v) victimisation (s.27 EqA).

Detriments: harassment and direct discrimination

6. The detriments/unwanted conduct relied on by the Claimant in respect of the claims are direct discrimination and harassment are as follows. The withdrawn allegations are shown struck out.

~~(i) The failure to investigate the Claimant's grievance about Ms Sharmila O'Flaherty, raised with Mr Wayre on 29 November 2017.~~

(ii) In early February 2018 Mr Galinis and Mr Clark falsely alleged that, on the morning of 24 January 2018, the Claimant shouted and swore at a member of the public from a council vehicle while in uniform.

(iii) On 16 February 2018 the Claimant was removed from his substantive post and replaced by a non-Muslim, white employee.

(iv) An investigation into the alleged incident on 24 January 2018 was initiated by ~~Mr Wayre and/or~~ Mr Twohig and/or Mr Payne in late January/early February 2018.

(v) Mr Twohig conducted a biased investigation into the disciplinary allegations relating to the incident on 24 January 2018. He asked leading and/or irrelevant questions of witnesses; and he failed to consider relevant evidence provided by the Claimant about timings and locations, and relating to the pedestrian crossing warden.

(vi) On 14 June 2018 Ms Proudfoot advised Mr Wayre to continue with the disciplinary procedure against the Claimant, despite the fact that she knew Mr Wayre did not consider that there was sufficient evidence.

~~(vii) On or around 25 June 2018 Mr Wayre proposed to the Claimant that he issue him with a six-month warning for misconduct, contrary to his original opinion that the Claimant had no case to answer.~~

(viii) ~~Mr Wayre and~~ Ms Proudfoot breached the sickness absence policy between February and July 2018. They failed to keep in touch with the Claimant, failed to provide support to the Claimant and/or to instruct HR to do so.

(ix) The Respondent's HR did not provide support to safeguard the Claimant's welfare through his sickness absence from February 2018 in the way described above.

(x) HR failed to conduct an investigation in a timely manner into the Claimant's grievance of 17 July 2018.

~~(xi) On 7 August 2018 Mr Wayre wrote to the Claimant informing him that there was to be a disciplinary hearing in the incident on 24 January 2018, despite knowing that the allegation was unmeritorious.~~

(xii) On 23 October 2018 Mr Ackerman informed the Claimant, on Ms Proudfoot's instruction, that he would not be returned to his substantive post.

(xiii) Ms Proudfoot failed to take steps appropriately to facilitate the Claimant's return to his substantive post in the period up to the issue of the ET1 on 2 November 2018.

7. There are no actual comparators; the Claimant relies on hypothetical comparators.

Victimisation

8. The protected act relied on by the Claimant for the purposes of his victimisation claim is his grievance of 22 August 2018. The Respondent accepts that this was a protected act for the purposes of these proceedings.

9. The detriments relied on in relation to his victimisation claim are the same as those set out above at paras 6(xii) and (xiii) above.