EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111949/2021

Final Hearing Held in Edinburgh by Cloud Video Platform (CVP) on 4 to 8 and 20 July 2022; members' meeting on 11 August 2022

Employment Judge: Russell Bradley
Tribunal Member: L Grime
Tribunal Member: A Grant

Johnson Oyewole — **Claimant**
In person

The Scottish Ministers — **Respondent**
Ms M McGrady
Solicitor

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is that: -

1. The claims of discrimination (direct and victimisation) were not presented within the period of three months starting with the last date to which they could relate, or within such other period as was just and equitable; accordingly,

2. The tribunal has no jurisdiction to determine the claims of discrimination which are therefore dismissed.
3. The claimant was unfairly dismissed. The respondent is order to pay to the claimant
    a. A basic award of ONE THOUSAND THREE HUNDERED AND THIRTY SEVEN POUNDS AND EIGHTY TWO PENCE (£1337.82); and
    b. A compensatory award of EIGHTEEN THOUSAND ONE HUNDRED AND FIFTY ONE POUNDS AND FORTY EIGHT PENCE (£18,151.48).

REASONS

Introduction

1. In an ET1 presented on 21 October 2021 the Claimant maintained claims of unfair dismissal and discrimination on grounds of race. He sought compensation and a recommendation. The claims were resisted. In accepting that it had dismissed the claimant the respondent relied on capability as its reason. The case was initially listed for a five day final hearing (4 to 8 July) to consider merits and if appropriate remedy. Those days were insufficient, albeit the evidence had concluded by the end of Friday 8. The case resumed on 20 July for submissions and concluded that day. The tribunal met on 11 August.

2. An indexed bundle was prepared prior to the start of the evidence. It contained 119 items and 492 pages. At our request, the claimant's schedule of loss was added and became **pages 493 to 496**. The paper copy of **page 182** (a training plan) was illegible. A better copy was emailed to us on 7 July.

3. The bundle contained material for and from a case management preliminary hearing which took place on 21 January 2022. It included the parties' agendas, the hearing Note and its various directions (**pages 73 -82**). The material also included a completed Scott Schedule (**pages 83-88**) and further information requested for and as supplement to it (**pages 89-96**). Within that material the claimant clarified that he made claims of direct discrimination and of

victimisation. He relied on various incidents during his employment for those claims. He also alleged that his dismissal was an act of unlawful discrimination.

4. The Note recorded the parties' agreement to the use of witness statements. It prescribed their format and content; and that they would be taken "*as read*". The respondent also produced supplementary statements for three of its witnesses notwithstanding that the preliminary hearing had not directed for them. The claimant had not objection to their use.

5. In the course of the hearing and at our request, the parties produced a timeline. Despite efforts it was not possible for them to agree it entirely. Areas of disagreement were marked on the final version which was lodged on 7 July. Also in answer to our request, a simple glossary was also prepared and lodged.

6. The tribunal took time to read the witness statements. Evidence began at 2.00pm on Monday 4 July.

7. At the conclusion of the evidence on 8 July we agreed that written submissions would be exchanged and lodged in time for the final day, 20 July. By 8 July the respondent had produced a 25 page written submission.

The issues

8. At our request, the parties produced an agreed list of issues on 6 July. Their issues for determination were:-

Unfair dismissal

1. Whether the Respondent had a fair reason for dismissal? The Respondent contends that the fair reason was the ground of capability under section 98(2) of the Employment Rights Act 1996.

2. Whether the Respondent had reasonable grounds to sustain a genuine belief in their stated reason?

3. Whether the Respondent carried out sufficient investigation upon which to form a genuine belief?

4. Whether the Respondent followed a fair procedure?

5. Whether the decision was reasonable in all the circumstances?

6. Whether the dismissal fell within the band of reasonable responses?

Direct racial discrimination

7. Whether the Claimant was treated less favourably than his comparators, Olga Maunsell and Imra Rasikevicuite? The first allegation of less favourable treatment is that training and support was provided to Olga Maunsell and Imra Rasikevicuite. This included regression training and a training package prior to them joining the UAT team. The second allegation of less favourable treatment is that Olga Maunsell and Imra Rasikevicuite took part in Land Inspection Selection Training Run project in March/ April 2019 and the Claimant was not involved in that project. The third allegation of less favourable treatment was that the Claimant was not being included in the UAT team and worked alone.

8. If so, was the less favourable treatment because of the Claimant's race?

Victimisation

9. Did the Claimant carry out a protected act under section 27(2) (d) of the Equality Act 2010 when he complained to Elaine McCambridge on 28 January 2020 regarding differential treatment between himself and Olga Maunsell and Imra Rasikevicuite?

10. If so, was the Claimant subject to detriment because he did this alleged protected act?

Time limits

11. Whether the alleged incidents are time barred?

Remedy

12. Whether the Claimant should be awarded compensation?

13. Whether the Tribunal should make a recommendation?

Findings in Fact

9. From the agreed timeline, the evidence and the Tribunal forms, we found the following facts admitted or proved.

10. The claimant is Johnson Oyewumi Oyewole. He is of Black African origin. He has a BSc degree in economics. He has MSc degrees from Glasgow and Napier Universities. The latter is in Business Information Technology. He passed the foundation level from the International Software Testing Qualifications Board (ISTQB).

11. The respondent is the Scottish Ministers. It is the legal entity which enters into contracts and which employs staff who may be assigned to the Scottish Government.

12. The Scottish Government operates with a number of Directorates. One of them is the Agriculture and Rural Economy Directorate (ARE). It has responsibility for, amongst other things, providing financial support to the agriculture and rural sectors.

13. The Common Agricultural Policy (CAP) is a subsidy system that supports predominantly farmers and rural land managers in Europe. Farmers carry out certain activities, apply to ARE, and then are paid out money based on meeting specific criteria. About 20,000 applications are made per year. The total paid out annually is about £650 million.

The role of User Acceptance Tester and probation for it

14. 26 February 2018 was the closing date for applications for the role of User Acceptance Testers (UATs) within the Scottish Government's Rural Payments and Inspections Division (RPID). The Division is, in turn, within ARE.

15. The job summary for the role (**pages 117-119**) noted that, *"Scottish farmers apply for various schemes and services using the Rural Payments & Services customer website. The User Acceptance Testing (UAT) team rigorously analyse this customer-facing website so as to assure sound functionality for our users. You will be part of a team that responds to stakeholder needs in a fast-paced, dynamic environment*." The summary set out that the essential criteria for the role included "*Experience in planning scripts into logical test cycles, documenting test results, including defects and progress. Experience of liaising with IT developers and system testers to resolve faults and identify possible resolutions and strong communication and analytical skills with the ability to present data and results in a clear and concise manner*." It provided further information via a link to a Person Specification (**pages 120-126**). Both the job summary and the person specification advised that the post would sit in the RPID Business Design team. That team is responsible for overseeing the payment of subsidies to Scottish farmers in line with EU regulatory law. Applications for various schemes and services are made using the Rural Payments & Services customer website.

16. The Specification recorded the specific duties of the role as being to; "*Review business requirements, user stories and functional flows with the Product Owners (business leads) and Business Analysts to ensure the requirements are complete; Participate in sprint meetings (daily scrums, pre-planning, formal planning and retrospective) and provide UAT feedback accordingly; Prepare high level and detailed UAT tests; Execution of tests and logging of defects during UAT testing and Report testing progress and any risks or issues to the UAT Lead & Manager*." (**page 121**)

17. The role was a permanent and pensionable appointment as a civil servant. The Specification advised that; an appointee would be required to serve a probationary period of 9 months; and confirmation of an appointment was

dependent on the satisfactory completion of the probation period in terms of performance, conduct and attendance.

18. On 23 August 2018, the claimant was invited for an interview/assessment for the post of User Acceptance Testing (UAT) role. He completed four tasks; a Technical Test, a Written Exercise, a Presentation and a Competency Based Interview. For the Technical Test, he was asked to create test scenarios and write test cases to test two different "*applications*". At the end he was told that if he met the Scottish Government's minimum requirement for the job and was offered employment, he would be provided with training to meet their testing standard.

19. The claimant was successful in his application for the UAT role. By letter dated 16 October 2018 he was offered permanent employment (grade B1) as a civil servant in the Scottish Government (**pages 127-138**). On 17 October the claimant accepted the offer. The offer letter said, "*You will be on probation for 9 months and expected to remain in the same post for that period from your start date. Your appointment will be confirmed at the end of this period if you have shown that you can meet the normal requirements of the job to an effective standard, and that your attendance and conduct have been satisfactory. Your attendance is likely to give cause for concern if you have more than 7 working days of sick absence, or there are concerns about any pattern of absences, during the probationary period. If you do not reach the required standard, or your attendance or conduct has been unsatisfactory, your probation period may be extended or your appointment terminated at any time during the probationary period. Full details of probation can be found on the Scottish Government intranet*."

20. His gross weekly pay was £552.62. The net version was £445.94.

21. The offer set out that unless dismissed on disciplinary grounds, staff with less than 4 years' continuous service had a minimum period of notice of five weeks.

22. The probation details were within the respondent's probation policy (**pages 354-356**). The policy begins, "*The purpose of probation is to provide a period*

during which we can judge whether a new employee is suitable for continued employment. Failure to satisfactorily complete your probation period may lead to termination of your appointment." Three of the four key requirements of the probation policy are, *"[1] Managers and employees must agree performance objectives at the outset of a probationary period. [2] Managers should explain the requirements that need to be met, and regularly monitor performance, attendance and conduct during the probationary period. [3] You must meet requirements set and comply with the principles and rules on conduct*." The probation process sets out that the probationer is to agree performance objectives when they arrive in post. It further sets out that the probationer is to have appraisal meetings with their line manager who is to complete two reports on them during the period.

23. According to the respondent's performance management process (**pages 487-488**) objectives should be specific, measurable, achievable, relevant and time-related ("*SMART*"). According to the respondent's performance management for probationers (**pages 352-353**), an interim performance appraisal is required four months after they start. It requires a final appraisal after nine months. It further prescribes that "*When a colleague takes up a post, they and their manager should agree objectives for the next four and nine months and meet on a monthly basis to discuss performance, including any difficulties meeting objectives*." The respondent has its own guidance on management of probationers whose performance is less than effective (**pages 343-344**). It envisages circumstances called "*partly effective*" and "*not effective*". It envisages the involvement of an HR People Advice and Wellbeing (PAW) officer.

24. The respondent sets out guidance for its managers where there is a requirement to discuss performance concerns (**page 374**). Its heading is "*Saltire*". It says, "*Managers will set out their areas of concern in a letter inviting their colleague to a meeting with them and the HR people advice and wellbeing officer. The purpose of the meeting is to discuss the performance, the basis of the concerns and the possible causes. It is also to agree an action plan to bring the colleague's performance up to an effective standard. The letter will explain*

that this is the first stage of a formal procedure aimed at helping the individual improve their performance and sustain it at an effective level. It will also be a first warning about the possible consequences of continued underperformance."

Start of employment and the role of a UA Tester (10 December 2018 to 3 February 2019)

25. On 10 December 2018 the claimant began employment with the respondent as a User Acceptance Tester. He worked at Saughton House, Broomhouse Drive, Edinburgh. His line manager was Simon Devlin, Head of Development Team. Mr Devlin managed the User Acceptance Test Team wherein the claimant worked. Mr Devlin had responsibility to ensure that the products and services being tested in UAT were fit for purpose and any risks were known and agreed by its Senior Management Team prior to release into a live environment. That team included a number of contractors, distinct from permanent staff. Prior to 10 December the team had included a number of permanent staff. By 10 December all bar one had been promoted and moved elsewhere. The rest of the UAT team were contractors. At that time, Mr Devlin reported to Brian Stevenson, interim deputy director RPID, Agricultural and Rural Delivery Division.

26. It is important for RPID that its products and services work to a high standard. The respondent has regular European Union audits based on the high level of monies distributed to its customers. The respondent is liable to a financial penalty (fine) from the EU per "*key control failing*". Fines start at 5% of £650 million and can increase in (5%) increments.

27. Reporting to Mr Devlin was Anil Kurra. He was a contractor. His job title was User Acceptance Testing Manager. Mr Kurra was responsible for managing the test team on a daily basis including the claimant. He had previously worked as a software tester. He was then promoted to UAT Test Lead. He was promoted to UAT Manager in 2011.

28. Contractors cannot "*officially*" manage permanent staff.

29. The User Acceptance Team was within the respondent's RPID. It was one of several "*test*" teams.

30. The UAT team was created in 2013. Its primary remit was to ensure that the products going into a "*live*" environment were fit for purpose. The UAT team was set up as independent from IT suppliers and Business As Usual (BAU) teams in order to provide high quality unbiased testing. A tester was required to understand the "*end-to-end journey*" of the user and what the expected outcome is. A tester required to; execute their "*test scripts*" against this journey; and provide evidence to show if the expected outcome is met or not. If the expected outcome is not met, the tester raises a "*software defect ticket*" which is then "*triaged*" by the product owner to confirm the impact and severity of the defect.

31. Mr Devlin explained to the claimant that; the application he would be testing was the RP&S Operational portal; and that it was very complex. The RP&S Operational portal is used by the RPID staff to process Single Application Forms (SAF) submitted by farmers to claim subsidy. The claimant understood that this was different from what was stated in the job advertisement that "*The User Acceptance Testing (UAT) team rigorously analyse this customer facing website so as to assure sound functionality for our users*." The claimant did not mention that difference at the time. The claimant understood that the public portal (the one used by farmers) was less complex than the operational portal. He accepted Mr Devlin's assurance that he would be trained sufficiently to test the operational portal.

32. For the first 10 days of his employment (by about mid-December 2018) Mr Kurra asked the claimant to read through an amount of training documentation. It contained all of the "*business processes*" which were necessary for the claimant to know and understand to be able to do the job of UA Tester. In that time the claimant did not have a computer. It was the claimant's view that without one it was not possible to practise what he had learnt from his training documentation. In his view it was not possible to remember what he had learnt from that documentation without that access. His training was overseen by

Linda Parker, a member of the UA Team. She was the claimant's nominated "*buddy*".

33. The expectation of Mr Devlin and Mr Kurra was that the claimant was an experienced tester. Their expectation meant that they assumed that the claimant understood how to prepare test scripts, execute them, document the results, and be able to raise and report defects. In Mr Devlin's opinion, this was all standard practice that an experienced tester would understand and know how to do. In Mr Kurra's opinion, the claimant should have known how to write test cases and carry out end-to-end scenario testing. Neither Mr Devlin nor Mr Kurra were involved in recruiting the claimant. They did not know what experience he had prior to him being employed. The claimant saw himself as a junior tester. Prior to his employment with the respondent he had less than two years' relevant experience.

34. The claimant's desk was adjacent to Mr Kurra's. They shared an open plan work area with other members of the UA Team. Mr Devlin was based in a different room at Saughton House.

35. Around this time, the claimant received training on "*Greening*" from Linda Parker. "*Greening*" is intended to improve the environmental performance of farming. Also before the end of 2018 another colleague, Alan Anderson, gave him training on how to register new business.

36. On returning to work in January 2019 the claimant still did not have a computer. A computer/workstation was issued to him in about the third week of January.

37. It is not clear what work the claimant did in January prior to it being issued. It appears that he received some training from various colleagues (see **page 163**).

38. In January 2019 Olga Maunsell and Irma Rasikeviciute (Olga and Irma) joined the UA Team. They are white Europeans. The claimant was aware of their origin when he met them. They were B1 permanent employees of the respondent. By that time, they had been employed by the respondent for about nine months. They were employed as software testers. In January 2019, they

joined the UA Team from the Application Support Team (AST). It is one of the teams managed in the IT Department of ARE. Olga and Irma worked intermittently with the UA Team in the early part of 2019. When they arrived they received training with the claimant on a number of issues related to the work they were to do. They were also involved in "*knowledge sharing*" with the UA Team. They told the claimant that since they started working for the respondent in the AST they had been doing "*Regression Testing*" in order that they could have a good understanding of the RP&S Operational portal and how it works.

39. Regression Testing is a specific aspect of testing. It is carried out when new code is deployed into an existing product. Its purpose is to ensure that the product or other products have not had their functionality broken as a result of new or amended technical services (code) being deployed.

40. Olga and Irma left the UA Team in about May 2019.

41. Mr Devlin understood that Olga and Irma joined the UAT team for a short period to be upskilled in a project known as Land Based Inspection Selection. Mr Kurra's recollection was that the claimant was involved in this training and was included in and worked on the project. His recollection was that the claimant had detailed training in the Land Inspection Business process along with Irma and Olga. His recollection appears to be supported by some entries within pages **175-177**, for example "*basics of Inspection Selection*." In contrast, the claimant said that he was the only staff member left out of it. Land Based inspections are checks on each scheme claimed on the Single Application Form (SAF) through onsite spot inspections.

42. There is no contemporaneous communication in the period between 10 December 2018 and 17 February 2019 from, to, or about the claimant within the bundle.

43. At the time of his employment with the respondent the claimant was a member of the Public and Commercial Services (PCS) trade union.

From 4 February 2019 to 8 March 2019

44. On 4 February 2019 the claimant met with Mr Devlin. They discussed his performance appraisal documentation. (**pages 186-197**). This discussion included the claimant's first performance objective which had been drafted by Mr Devlin. The first objective was recorded on **page 188**. It was to "*understand the greening scheme rules and business requirements in order to execute test cases*". The start and end dates were 5 and 19 February 2019. There were three elements prescribed. One was to provide a demo and overview to the test/lead manager. 10 days were allowed for it. Another was to execute 30 test cases in 5 days with evidence and documented results.

45. In the course of their discussion, Mr Devlin told the claimant that he was expected to "*stand on his own two feet" and/or that "no-one would spoon feed*" him, or words to that effect. That had a negative impact on the claimant's self-confidence. In his opinion, he had not had sufficient training to complete his first task. The respondent expected the claimant to take advantage of training, support and guidance from his colleagues. The claimant spoke with Mr Kurra about his perceived lack of training. He spoke with his contractor colleagues. They explained that they had not done a probationary period. The claimant spoke with both Bozek Przemyslaw (Test Lead) and Mr Kurra about the issue of selecting test cases. The claimant was told that; there were no test cases; and he must write and execute his own. The claimant did so despite his position being that he did not have enough knowledge. Mr Kurra was of the view that the claimant's training occurred in parallel with working on the first objective.

46. On 18 February 2019 Mr Devlin emailed Elaine McCambridge (PAW case officer) and Jane Stewart (PAW Manager) (**page 482**). In his email Mr Devlin; referred to a new recruit fully qualified and up to speed for a UAT Test role; said that it had become very clear that the person (the claimant, albeit not named) was struggling in post; and he wished to discuss it further with an HR staff member.

47. On 20 February Mr Devlin spoke with Elaine McCambridge about advice to do with the claimant's probation. Mr Devlin understood from that conversation that he should be setting objectives and providing feedback.

48. On 22 February, the claimant provided the demonstration to Linda Parker which was part of his first objective.

49. In the morning of 28 February, the claimant met with Mr Kurra to discuss feedback on the test cases he had executed.

50. Later that day, the claimant met with Mr Devlin to discuss progress and feedback on his first performance objective. In that meeting, the claimant asked Mr Devlin to allow him to do Regression Testing before doing training. He also asked to be allowed to work with UAT team after his training and before starting his second performance objective. Mr Devlin told him that would not be possible. The claimant told Mr Devlin about what he had learned of Olga's and Irma's probation experience and having done Regression Testing after they started their employment and before they had come to the UAT team for training. Mr Devlin said the claimant should not compare himself with them because his case was different.

51. It was the claimant's view that the respondent's policy which set out that objectives should be agreed meant that if he asked for training and it was "*within reach*" Mr Devlin should agree it. This was his attitude to Regression Testing. He believed it was relevant for him; it would have cost the respondent nothing for him to do it; he had asked for it; and Mr Devlin should have arranged it for him.

52. On 1 March and following their meeting, the claimant emailed Mr Devlin (**page 164**). In it he requested four things for "*application training*". He also set out four additional requests. None of the 8 items listed was to do Regression Testing. The requests followed Mr Devlin's question (at their meeting) for what the claimant thought was required for him to pass his interim probation period.

53. On 6 March (07:21), Mr Devlin emailed the claimant (**pages 159-160**) . He summarised their discussion from 28 February. He noted; the claimant having reported his lack of clarity of what he was expected to do and Mr Devlin's suggestion on that; his advice on Linda Parker's role for him; his view that the claimant was having difficulty with the overall testing process taking account of

the feedback from the test cases; and the claimant's acknowledgement of that difficulty. He set out that a recommendation after 4 months' probation could be to either terminate the employment or for it to continue for the next period (of 5 months). He noted the claimant's comment that at their meeting on 4 February the claimant had been frightened at Mr Devlin's suggestion of having to stand on his own feet. He noted their discussion to the effect that the respondent expected him to have testing experience as per his job description. He explained that support would be provided to understand the "*business*", but as the job was not as an apprentice, the training would not be to "*become a tester*." He noted their discussion to the effect that the next performance objective was not to be started until the claimant had digested and rectified the feedback on the completed test cases.

54. Soon after that same day (6 March 07.40) Mr Devlin appears to have replied to the claimant's earlier email of 1 March (**page 163-164**). In it he said he understood the "*application training*" request but did not understand what specific training was sought in the 4 additional requests. He suggested that they meet that day to discuss them. The claimant replied at 15.15 that day, referring to a meeting that morning (**pages 162-163**). In it he explained his experience "*so far*", reflecting the period from "*resuming*" work on 20 December 2018. There then followed a critique of his training expectations contrasting what had occurred.

55. The claimant emailed again that day (15:20) in reply to Mr Devlin's at 07:21 (**page 159**). He referred to their meeting that day (6 March) albeit it is not clear from any witness evidence that they met that day. In his email reply the claimant requested the same four things "*for the following trainings*". One of them related to "*Pillar 1 schemes*". In this email he added a fifth, " *(5) Testing processes and result documentation*".

56. There are two different schemes and applications that farmers can apply for to obtain funding. Pillar 1 (e.g. Basic Payments Scheme, Greening) are claimed based on the land owned or occupied. Pillar 2 (e.g. Forestry Grant Scheme,

Rural Priorities) are claimed based on the contract between the claimant and the Scottish Government.

57. In the evening of 6 March (21:21) Mr Devlin sought from Mr Kurra his comments on what training had been provided to the claimant by forwarding on the claimant's email of 07:40 (**pages 162-163**). On 8 March Mr Kurra commented by interlining in red (**pages 162-163**). In short, Mr Kurra recounted what specific training had been provided to the claimant and by whom. Mr Kurra said that in his view they (meaning himself and his colleagues) had provided enough training for the claimant to have achieved his first objective (**page 162**).

58. It is not clear whether Mr Devlin contacted the claimant with the information that Mr Kurra had provided to him. There is no evidence to suggest that he did.

59. It appears that the claimant finally completed his first objective on 8 March (**see page 188**). It is noted there (within the performance appraisal documentation) that in total the task took 19 days instead of the planned 10.

60. By that time, the claimant was aggrieved that Olga and Irma had done Regression Testing prior to arriving in his team in January. He had not raised that issue in writing with either Mr Devlin or Mr Kurra.

19 March to 22 May 2019

61. By email on 19 March (**page 166**) and in reply to a request from Mr Kurra, the claimant said that he had done training on the following (1) Registration of new business (Training by Allan); (2) SAF submission process for pillar 1 (Training by Linda); (3) Greening (Training by Linda); (4) started SAF processing with Olga and Irma but stopped because he had started working on his first objective. Training on penalties for SAF submission, late documents submission and under declaration of land parcel; and (5) a walk –through on Entitlement and payment module (Training by Pavan). In that exchange Mr Kurra also noted that the claimant had been executing test cases and completed his first objective, and so should have been familiar with the testing process and "*results documentation*". In reply (**page 166**) the claimant said he

had included a request for training on it because he had agreed it at his last meeting with Mr Devlin.

62. On Thursday 4 April Mr Kurra emailed the claimant (**pages 168-169**). It noted a discussion from earlier that morning. It related to training for and completion of the claimant's second objective. It noted that he was to start this objective the following Monday (8 April). It set out actions for completion of the task by 28 May. The start and end dates coincided with those fixed in the claimant's performance appraisal documentation (**page 189**). It noted the involvement of Mr Przemyslaw with the claimant's training plan. In reply to an email from Mr Przemyslaw, the claimant requested Pillar II training and explained why he believed he need it (**page 168**).

63. By 9 April Mr Przemyslaw had updated his earlier document called "*Inspections UAT Training*" (**pages 175-177**). It recorded training sessions on 22 March, then on 3 to 5 April. It showed the claimant as an attendee at all of them. It showed Irma and/or Olga attending all of them.

64. The second objective as recorded in the Performance Appraisal documentation was, "*Understand the Inspection selection for land, CG, XC, livestock business requirements in order to execute test cases: (clarification this is only for Land and Cross Compliance 09/04/19)*." (**page 229**)

65. On Tuesday 23 April the claimant set up a meeting to demonstrate what he had learned for his second objective.

66. On Thursday 25 April Mr Devlin emailed the claimant and Mr Kurra. It was copied to Linda Parker (**pages 180-181**). It suggested that there had been a discussion at least with Mr Kurra the previous day. It sought a training package for the claimant. It said that training should formally start the following Monday, 29 April. It asked for views on the number of days required for the training. This was called "*Inspection Selection*" training.

67. On 26 April as a result of his request a training package was put together for the claimant.

68. On 26 April, Ms Parker replied (**page 180 and page 182**) with a training plan. In her email she noted; "*re-training*" would take 7 days; that estimate was based on the result of a past demonstration by the claimant; the claimant's initial training was in conjunction with the same training provided to Olga and Irma over 10 days and that "*this is in effect a re-training package for*" the claimant; she had met with others that day (including the claimant) to confirm what she called the re-training package for him; and her emphasis to the claimant that it was "*up to him to put in the necessary effort and be more proactive during these training sessions, taking notes and asking questions*."

69. On 13 May Mr Devlin was recorded as the Reporting Officer for an In-Year Review dated 23 April for the claimant (**page 192**). By that date, the claimant was scheduled to have completed his first objective. Completion of the second objective was due by 28 May.

70. The "*Performance Mark*" was shown as "*Not Effective*", the lowest of 5 possible marks. In his summary, Mr Devlin; recorded the claimant's role and basic criteria expected of him in it; summarised his training in December and January, including training on the Greening business process in relation to his first performance objective; said that the claimant had not understood the training was in relation to the business processes and not how to enter data into the RP&S System, and could not perform the basic testing criteria expected of the role; recorded that despite feedback, it highlighted *"a basic lack of the fundamental test understanding that an experience tester would have*." He was marked as having achieved his diversity objective which said, "*I will treat my line manager, colleagues and everyone that I come in contact within Scottish Government with respect and dignity regardless of their race, religion, sex and sexual orientation. I will treat everyone equally without discrimination*."

71. On 21 May 2019, the claimant met with Brian Stevenson (his UAT countersigning officer). It appears that on 17 May, Mr Stevenson countersigned Mr Devlin's report. He endorsed Mr Devlin's recommendations (**page 193**). During their meeting the claimant; explained that Mr Devlin was treating him differently compared to Olga and Irma and was not giving him adequate

support that would help him to pass his probation; told him that he had asked Mr Devlin to allow him to do Regression Testing before doing training and to work with UAT team like Olga and Irma but that Mr Devlin said it would not be possible. The claimant said that; the RP&S Operational portal was too complex; he did not have a good knowledge of CAP business processes; and he faced challenges creating test scenarios as well as writing test cases because of his limited knowledge of the RP&S Operational portal and CAP business processes. Mr Stevenson agreed that he had not been given the correct support and promised that he would talk to Mr Devlin and Mr Kurra about his complaint. The claimant requested that he be permitted to discontinue with his second performance objective in order that his complaint could be taken into consideration before starting it afresh.

72. The interim probation performance appraisal was for the period 10 December 2018 to 10 April 2019.

73. On 22 May the claimant emailed to Mr Stevenson a copy of his interim probation report with comments and his signature (**page 198**). His comments say, "*At the time that I was told to start my first performance objective I did not have good understanding of Greening business process. I explained this to Simon (my line manager) at the meeting I had with him on 4th of February 2019. I also requested for more time and training before doing my first performance objective. However, Simon said I should go and do it and ask for assistance from my colleagues if I need help. My inadequate knowledge of Greening business process impacted negatively on my performance*." While the claimant's written comments set out some criticisms/suggestions about the approach to his first objective, there is no mention of a comparison with Olga and Irma. Nor is there any reference to Regression Testing or indeed to his meeting with Mr Stevenson.

74. In Mr Devlin's opinion, Regression Testing would have made no difference to the claimant's performance and the feedback he received because it was not part of his performance objectives and therefore would not be relevant to him. In his view there was no point in running Regression Test cases until the

claimant was clear about the relevant business processes in operation. In Mr Kurra's opinion, the claimant should have known what Regression Testing is and when and how to do it.

5 June to 11 July (outcome after Probation meeting with HR)

75. On 5 June, the claimant met with Mr Devlin. The next day, the claimant emailed him about it (**pages 202-203**). In the email the claimant; noted that despite assurances he had not been receiving feedback from Linda Parker on test cases he had written; expressed his disappointment that Ms Parker had reported a particular aspect of his work to Mr Devlin; explained (with examples) about the team helping each other out; noted Mr Kurra's opinion that the claimant was writing too many test cases in a day; noted their exchange about the number of days required to write, execute and document 100 test cases; and recorded his opinion that he was not getting the correct support to enable him to pass his probation.

76. On 6 June Elaine McCambridge wrote to the claimant (**pages 200-201**). She invited him to a meeting on 13 June. Its purpose was to discuss his Performance level. It noted line management's concerns about his performance. It noted that she had seen the interim probation appraisal marked *"not effective*." It reminded the claimant (under reference to his appointment letter) that if he did not reach a satisfactory level of performance his appointment would normally be terminated *"if it is clear that you will not reach the required standards before the end of the probationary period*." The letter was copied to Mr Devlin.

77. The meeting on 13 June was noted by Fiona McMillan. It was the claimant's first meeting with Ms McCambridge. On 18 June a typed version was prepared (**pages 206-209**). It is a fair representation of the discussion.

78. The note of the meeting of 13 June recorded that; Ms McCambridge explained her role; she reminded the claimant of the option to terminate his appointment albeit not something that would be decided that day; and referred to an email to Mr Stevenson which detailed concerns about his performance. She referred

to his interim appraisal and his "*not effective*" marking. In reply to that mark the claimant said; there had been issues; he had requested training which had not been provided; he had had little contact with Mr Devlin and was managed by Mr Kurra; he had been told that two colleagues would be training him over 3-4 months, and that it could be up to 6 months before he could do all tasks. He explained that after Christmas he had done a lot of reading and the "*compulsory training*" after which he was able to access a computer, which had been delayed. He explained his inability to practise his learning without the computer. He had raised with Mr Kurra his issue of a lack of training but had been referred to Mr Devlin about it, and about his objectives. He referred to his meeting with Mr Devlin on 4 February and their discussion about his need for training and not being "*spoon fed*". He explained his view that the tone of that meeting had been "harsh" and that he lost confidence and felt demoralised. He said that there were 16 members of the team; had little contact with Mr Devlin and had been told to go to Mr Kurra with any issues.

79. The note recorded that Ms McCambridge (under reference to the first objective) described the claimant as "*an experienced tester*" and his reply that he had demonstrated his capabilities at the original assessment centre. He said that he had asked to see the documentation relating to the role he was to undertake but was told that it was "*the same in every organisation*." In discussion about the team, the claimant explained that; he did not have a "*buddy*"; he was not included in the work of the team on a task; he felt very isolated and Mr Devlin "*says no to every request he makes*". He referred to two new members of the team who; came from another ARE area; were immediately set up for appropriate training; and given simple tests to do. He felt excluded and treated differently compared to them. He did not name them, albeit they were Olga and Irma.

80. Ms McCambridge asked if in February Mr Devlin had provided a structured training plan. The claimant explained that he had been asked what he needed but could not do so because "*you don't know what you don't know*."

81. The note recorded their discussion about his second Objective. The claimant said; the documentation was out of date; he had not been able to do processes from his introductory training without a PC; he had complained to Mr Kurra that he did not have the knowledge to complete SAF processing; he had joined another group for training which lasted 1 day; no further training was offered and as the task did not start until August there was a risk that he would forget what he had learned. He said that he did not agree with Mr Devlin's view of his performance as he did not have the relevant training. He further explained (with examples) that he could do the basics of the role but complained that; he was under constant pressure and should not have been left to work alone. He felt that the expectations of him as an "*entry level B1*" were unreasonable.

82. The note recorded the claimant explaining that; he had met Mr Stevenson; it went well and that Mr Stevenson was to have discussed the interim report with Mr Devlin.

83. The claimant referred again to the "*spoon fed*" comment and said that on his first day of working on his first objective he had been told he would be terminated if he did not perform effectively. He said that; all feedback was negative; he had not had the time to become familiar with tasks; and felt scared all the time. In answer to a question about what he needed to feel confident, he said being part of the team and having a buddy would help. He again queried the number of days given for his first objective. He said that Mr Devlin had told him he would have to stand his ground as he had been employed as an experienced tester.

84. The note recorded that at the end of the meeting Ms McCambridge said; the way forward had a few options including termination or an extension of his probation; she would write to him (which would be copied to Mr Devlin) and would be in touch in week commencing 17 or 24 June.

85. On Monday 24 June the claimant met again with Mr Devlin. It was a performance review meeting. During it they discussed the issue of inadequate time for the second performance objective that the claimant had raised earlier with Mr Devlin. He said that he had been writing more than 6 test cases per

day, and that Mr Kurra had told him that he was writing too many. The claimant told Mr Devlin what other UAT staff members had told him; that he needed to be patient to learn first before he could start doing tasks on his own because he had a lot to learn. The claimant pleaded with Mr Devlin to provide the correct support that would help him pass his probation. He explained that as the UA team was made up of 100% contract staff, he would become an asset to the respondent when he was a confirmed permanent staff member. Mr Devlin said he did not care if he was still employed by the respondent in two or three years' time, all he cared about was his probation.

86. On 1 July Mr Devlin emailed the claimant, copied to Mr Stevenson (**pages 211-213**). In the email he; referred to their meeting on 24 June; noted their discussion about the claimant's recent work; referred to an email sent by the claimant to him of 6 June and the amount of time taken to execute 100 test cases, the claimant's position being he needed 17 days to write and 20 days to execute them; noted the claimant's answer to the question that he could only do 5 or 6 per day and the claimant's reference to Mr Kurra's comments; referred to a meeting of all three of them on 3 May when it was "*covered*" that 25 days was more than sufficient time to do 100 test cases, that time having been extended from 20 days as a goodwill gesture; noted that Mr Devlin had asked Mr Kurra to join their meeting; recorded Mr Kurra's views on the expectations of testers; set out Mr Devlin's expectations of the claimant as to tests and timescales and in the situation he would need to discuss matters with Mr Stevenson; recorded that instead of the original 10 days for the first performance objective the claimant had had 33 days; and set out in a table a timeline of events from 3 April to 22 May. The table recorded:-

Task	Start date	End date	Total working days allocated
Inspection Selection training & practice	03/04/2019	19/04/2019	12
Inspection Selection demo	23/04/2019	23/04/2019	1

Time allocated to practice between initial training and before the start of additional training	14/04/2019	29/04/2019	4
Additional training	30/04/2019	08/05/2019	6
Additional Demo prep time allocated	09/05/2019	10/05/2019	2
Demo 2nd attempt	13/05/2019	14/05/2019	2
Total time taken to complete the Part 1 of the second objective			27 working days
Additional time given to practice Part 1 and before the start of Part 2 Objective	15/05/2019	22/05/2019	6

87. On 2 July the claimant replied and copied it to Mr Stevenson (**page 211**). He added some comments being; that his request for extra days had not been because of what Mr Kurra had said, but because he had discovered that after finishing writing the tests he did not have enough time; if he rushed he was concerned about quality, particularly where Mr Devlin had told him that if it was poor he would be marked "*not effective*"; he repeated his suggestion of being an asset to the respondent and Mr Devlin's lack of interest other than passing probation; noted Mr Devlin's question of how to help him, his reply being to be part of the team and to shadow another member of staff and Mr Devlin's comment that that was not possible; his reference to Olga and Irma, their arrival in the team in January and their training and inclusion in the team, and Mr Devlin's comment that he should not compare himself to them as they were "*confirmed full time staff*"; his emphasis on the importance of business domain knowledge; and Mr Devlin's apparent lack of care about discussions the claimant has had with other team members. The claimant did not dispute the content of the table. There did not appear to be a reply to the claimant from Mr Devlin.

88. On 11 July Ms McCambridge wrote to the claimant, copied to Mr Devlin (**pages 214-215**). It referred to their meeting on 13 June. She summarised the note from the meeting. She noted that she had met (separately) with both Mr Devlin and Mr Stevenson. It set out their agreement to look at how the claimant could be further supported. They would address his training needs and hold fortnightly discussions with him to review his progress. It recorded that (reflecting the discussions) she was content to allow the probation period to continue to the end of the 9 months so to 10 September 2019. No action was to be taken at that stage. Ms McCambridge relied on a combination of what she had been told by Mr Devlin and Mr Stevenson and her own judgement as to how the claimant had worked in the team. She did not have a mechanism or technical expertise to check if things said to be in place in fact were. In her view, it was not the role of HR to intervene. It is not clear what action immediately followed from the letter of 11 July.

August to about 11 November 2019

89. On 20 August the claimant met again with Mr Devlin. It was his end of probation meeting. The claimant was scored as "*Not Effective*". The respondent's explanatory notes set out that this mark should be awarded where there are serious concerns about the individual's performance. They give four examples where that mark may be appropriate. Mr Devlin arranged for notes to be taken. They could not be found and were thus not produced. The appraisal was recorded using pro forma documentation (**pages 226-238**). Mr Devlin signed it on 20 August. Mr Stevenson countersigned it on 2 September.

90. On 5 September, the claimant met Mr Stevenson for his final probation performance appraisal. The claimant understood it to be a Job Appraisal Review (JAR) meeting. During the meeting Mr Stevenson told the claimant that he expected that he should have been awarded a "*Partly Effective*" mark based on his improved performance in his second objective. Mr Stevenson later (10 September) sent an email (see **page 239**) to say he agreed with the mark that Mr Devlin awarded and explained why. He copied it to Ms McCambridge saying to the claimant that she would be in touch with him.

91. The claimant signed the performance appraisal documentation on 5 September. In it he recorded in some detail why he did not accept the "*Not Effective*" mark.

92. On 12 September, Ms McCambridge wrote to the claimant (**pages 243-4**). She invited him to a meeting on 18 September. Its purpose was to discuss the appraisal mark. The claimant attended.

93. The meeting on 18 September was noted by Amy Minto. On 30 September a typed version was prepared (**pages 245-247**). It is a fair representation of the discussion. The note of the meeting recorded; that the claimant did not accept his mark; the claimant's explanations and views on why he had been given the score; his comments that Mr Devlin had spoken differently with him (in a negative tone), he still felt isolated and not included in the team; Ms McCambridge's views on the expectations of an "*experienced test analyst*"; and her repetition of the options available about which she would write to him.

94. On 8 October Ms McCambridge wrote to the claimant, again copied to Mr Devlin (**pages 248-249**). She referred to their meeting on 18 September. She said that "*exceptionally*" she had decided to extend his probation up to 9 March 2020. The primary reason for doing so was that the claimant had shown progress since the interim meeting.

95. On 10 October the claimant met again with Mr Devlin and Mr Stevenson. No notes from it were produced. The meeting was followed by a series of emails between Mr Stevenson and the claimant between 10 and 14 October **(pages 250-253** reading them in reverse). All of them were copied to Ms McCambridge and Jane Stewart. In the first of them Mr Stevenson noted his intention to move away from working in a training scenario to working formally, on the IT system with the UAT members, meaning a reduced level of supervision and an opportunity to display improvements witnessed towards the end of the claimant's probation. Also to "*build the evidence base required to show him to be an Effective performer*". Mr Kurra was to meet him and agree a work objective aligned to the current work of the team to cover a 4 week period and

then provide him (Mr Stevenson) and Mr Devlin with an evaluation for review, based on the evidence collected.

96. On 11 October the claimant met with Mr Kurra and Mr Devlin. The claimant replied to Mr Stevenson just after it (**page 252**). He recorded his understanding that his work was to be based on training and knowledge he had gained since starting, which included Pillar 1 (only). He then said that Mr Devlin had (i) told him to work on Pillar 2 and (ii) refused to allow him to work on Pillar 1. He asked Mr Stephenson to look into this issue. Mr Stevenson replied later that morning (**pages 251-252**). He reminded the claimant of the intended 4 week cycle and saw no problem in asking him to look "*at a new area*." The claimant also replied at about 1.23pm (**page 251**). He said that; he had not got training on Pillar 1 but had some knowledge of its business processes; said he could apply it to that work; and he had asked that one of the two employees working on Pillar 1 could be moved to Pillar 2 as they had more knowledge of it than he did, but Mr Devlin had said no. In a brief reply also that day Mr Stevenson said that they were looking for the claimant to work on an area where he could utilise his training, which may be a new area, which was a "common aspect" for a UAT tester. The claimant's brief reply (on 14 October **page 250**) suggested that when team tasks were allocated consideration was always given to knowledge and experience. The implication was that the most recent allocation of work to him did not take account of his own. It was clear from Mr Stevenson's reply (within about 30 minutes) that he was aware of the claimant having contacted HR that day. He reiterated the respondent's rationale for the work being allocated as it had been.

97. In Mr Kurra's view Pillar 1 tasks had the more complexity and highest business value. They required a lot of co-ordination and communication with several other teams to make Pillar 1 payments on time to farmers. They involved all 21,000 cases and hundreds of rules. There was ministerial and public pressure to make Pillar 1 payments by the end of the year. He said this had been clearly explained to the Claimant. Mr Devlin shared his opinion on the question of the comparable complexity of the two Pillars. The pressure on the Team in the October and November was considerable in order that payment deadlines

were met. The claimant was offered work on Pillar 2 because it was not so time critical.

98. On 15 October, the claimant met again with Mr Stevenson. No note of the meeting was produced. The claimant's recollection of it was that; he had explained his concerns to Mr Stevenson (that what he was being asked to do was a continuation of what happened in his first and second performance objectives); he told Mr Stevenson that Mr Devlin later told him that he wanted the claimant to work on Pillar 2 schemes in order that he could learn it and because Ms Parker was off sick; and he told Mr Stevenson that it would be impossible for him to learn Pillar 2 schemes within two weeks and then start working on the extended probation task immediately after training. His recollection was that Mr Stevenson; advised him that if he did not start work on the extended probation task it would be a breach of terms and condition of his employment and his contract could be terminated as a result; advised him to meet Mr Kurra so that he could organise training for him; and promised to organise a meeting to resolve concerns with Mr Devlin.

99. After this meeting the claimant agreed to undertake the particular piece of work. Mr Stevenson emailed the claimant that day after it (**pages 255-256**). Its focus was on the claimant's explanation for him not being prepared to start his latest objectives. It referenced an email (or emails) said to have been sent by the claimant to HR about his concerns. They were not produced. Mr Stevenson reiterated the respondent's position in relation to the allocation of tasks.

100. On 23 October, the claimant replied to Mr Stevenson to inform of the latest developments (**page 255**). It updated Mr Stevenson on training and testing. It informed that he would not be able to meet the latest condition given to him by Mr Kurra.

101. Also on 23 October, Ms Stewart replied (**pages 258-259**) to the claimant's emails to her HR colleagues. It prompted an exchange with the claimant which culminated in a meeting between them on 28 October. No note of the meeting was produced. The claimant's recollection of it was that he; explained that Mr Devlin treated him differently compared to Olga and Irma; told her that they

had been allowed to do Regression Testing before training and were included in the UAT team when it was working on projects, whereas he was not given the same opportunity; and she had told him that she could not do anything to help him but he was to resolve the issue with Mr Devlin. Ms Stewart emailed the claimant that day, 28 October, after the meeting (**page 257**). It set out; her explanation of the interaction between his managers and objectives; her suggestion of writing to them with his concerns about lack of training; and a reminder of the initial probationary period and its 6 month extension and support for him in it. It made no mention of Olga and Irma or his comparison of his treatment with theirs. The bundle did not contain a reply from the claimant. There was no evidence that he did reply.

102. On or about 11 November 2019 Mr Kurra created a report called "*Technical Assessment for JO's performance in UAT Team*". The report was **pages 260-268**. Mr Stevenson had asked Mr Kurra to give the claimant a fresh task to complete to assess his ability to be part of the UAT team. The purpose was to allow him the opportunity to demonstrate what skills/knowledge he had learned and developed in the previous 9 months. The claimant had four weeks to complete this task, two weeks for training and two weeks to complete it. In the claimant's opinion, that time was very inadequate and he could not finish the task. The UAT team provided him with training and documentation and asked him to prepare the test cases. This is the standard procedure for allocation of all work to the UAT team members. The technical assessment was based on Pillar 2 tasks.

103. Mr Kurra introduced "*Product Owners*" to the claimant and advised him many times to speak to them. The Product Owners' team also reviewed the test cases and provide signoff prior to the start of the formal test execution. In Mr Kurra's opinion the main problem was that the claimant was unable to communicate with the Product Owners. He believed that he was afraid to speak to them in case his lack of experience was exposed. In Mr Kurra's opinion, a technical assessment is not common. He had never dealt with a similar situation before.

104. The report documented the results of the claimant's performance. The report indicated that; the claimant did not have the proper knowledge or experience to execute test cases; and he was only able to complete 25% of the task. In Mr Kurra's opinion the technical assessment and the evidence gathered during the assessment period, showed that the claimant's performance was not meeting the standards that he would expect from an experienced UAT tester.

105. After the technical assessment was completed, Mr Stevenson sent a recommendation to HR that the claimant's employment should be terminated. Mr Stevenson left the organisation shortly afterwards. That recommendation was not in the bundle.

November 2019 to mid-January 2020

106. On 17 November 2019, Charles Keegan (Portfolio Development and Mr Devlin's new line manager) spoke with the claimant and Kevin Higgins his trade union (PCS) representative. Mr Keegan asked the claimant to provide evidence to support his claim that he had been treated differently (from Olga and Irma). The claimant did not do so. The claimant said that he should have been given more training and time. The evidence available to Mr Keegan showed that colleagues had provided one to one training and spent a lot of time and effort trying to improve his performance. No notes of the discussion were produced.

107. In December 2019 the claimant was absent from work by reason of illness (stress) for two weeks. It is not clear what work he was doing in the time that he was at work. From the hearing bundle (as spoken to by witnesses) there was no communication between the parties until a meeting in January 2020.

20 January 2020 to 2 July 2020

108. On 20 January 2020 Ms McCambridge emailed the claimant to invite him to a meeting on 27 January. In his reply, the claimant said he would be accompanied by Kevin Higgins, PCS Policy Officer (**pages 272-273**).

109. On 27 January 2020 the claimant met again with Ms McCambridge. The purpose of the meeting was to discuss his performance during the extended probation period. The meeting was noted by Jenny Smith. On 31 January a typed version was prepared (**pages 274-276**). It is a fair representation of the discussion. The note of the meeting recorded that the claimant was accompanied by Ryan Gordon, his trade union representative. The note recorded that; the claimant had not seen the Technical Assessment document until the previous Friday (17 January); he did not agree that he had only completed 25% of the task; he felt set up, had been given difficult tasks to deliberately fail his objectives, and was unhappy at his treatment; he had felt very stressed and his GP had advised him to take time off work. He said that he had written everything down in a document which he subsequently emailed to Ms McCambridge. In the claimant's view, he had put forward his concerns in the meeting but nothing was done about them. The note recorded that the meeting ended with Ms McCambridge's advice that she would write with her outcome in the following working week.

110. The claimant's document was **pages 285-287**. It is not clear from it or from any other evidence when he sent it. It is likely that he sent it to Ms McCambridge shortly after the meeting on 27 January. It recounted the claimant's exchanges with Mr Stevenson, Mr Devlin and Mr Kurra in October about his task. It detailed discussions among them in the period 10 to about 15 October. He compared his training to that of Olga and Irma. He alleged that Mr Kurra "*intentionally changed it to Pillar 2 R & E so as to make it more difficult for me*."

111. On 28 January the claimant emailed Ms McCambridge (page 271). In his email he said, "*I forgot to say this yesterday. Irma and Olga are Application Support Test Analyst. They are tester like me and are both B1 grade like me. When they joined my team in January 2019, they told all of us that since they joined, they have been doing regression testing. Regression testing is executing test cases that have been previously executed to see if the system still function properly. In this case, they will be given test cases which they will execute. What this does is that it gives them good understanding of how the system works. After that, they joined us to learn about the business processes and*

SAF application processes. Furthermore, after each of their training session; they will be told to look for sample test cases of what they have learnt on Enterprise Tester (ET) to deepen their understanding. ET is where all the test cases are saved. I have requested from Simon in the past to allow me to have the kind of training and support being provided to Irma and Olga. Simon said no, that I should not compare myself with them (Irma & Olga) because my case is different. In addition, my ET account has been disabled since last year June. The approach that was taken in the case of Irma and Olga if I have been given the same opportunity, the outcome of my probation would have been different." The claimant regarded this as a formal complaint. The email made no reference to discrimination. It made no reference to the claimant's race, or that of Olga or Irma. He believed that what he alleged in it was discrimination. He accepted that it did not refer to the question of race. His view was that an allegation of race discrimination was implied in it. With the benefit of hindsight, he should have expressed it clearly. The claimant did not take steps to progress what he saw as a formal complaint.

112. By this time, the claimant was discussing the situation with a representative of his trade union. They agreed that things were "*not right*". The claimant's impression was that his representative did not know how to help him. He believed that he had talked to Ms McCambridge on his behalf. He could not recall if his representative had reported back to him from those discussions.

113. Ms McCambridge did not write to the claimant as per her undertaking at the meeting on 27 January.

114. After January 2020, Mr Devlin did not give the claimant performance objectives. His position was that he had concerns and a duty of care about the claimant's welfare. He did not want to put him into a situation that would be stressful he had been on sick leave for stress due to his work and then was received counselling sessions. At the same time, members of the UAT team were visiting their doctors with work related stress as a result of providing training and feedback to him. Mr Kurra's recollection was that Mr Przemyslaw had to have some psychiatric sessions as a result of being blamed by the

claimant for the state of his training. In Mr Devlin's view, the situation could not continue as it had been. In or about February, the claimant had a number of counselling sessions after contacting the respondent's Employee Assistance Service. The counselling related to and followed on from his period of absence in December.

115. It is not clear what work the claimant did between February and July 2020. He had not been given objectives. It is likely that he was required to work from home from about the end of March 2020 as a result of the COVID pandemic.

116. Between 22 June and 2 July there was an exchange of emails between Ms McCambridge and Mr Devlin concerning the claimant (**pages 489-492**). On 22 June Ms McCambridge; said that a decision (exceptional) had been taken to further extend the claimant's probation to the end of September 2020 after legal advice and further discussion; and asked that Mr Devlin give serious consideration to providing meaningful work against which he could be measured in that period. On 2 July, Mr Devlin said, "*please just confirm that option you are taking forward is for permanent redeployment in the organisation for Johnson and there is no expectation for him to return to the UAT team regardless if he fails or passes his probation period*." Ms McCambridge understood Mr Devlin to mean, clearly, that irrespective of the outcome of his probation he would not be employed in the UAT team. In Mr Devlin's opinion, the claimant had received significant training above and beyond what other past and present members of the team had received. This included enhanced training on the business processes. This was because from feedback after demonstrations carried out by the claimant it had been necessary. On 23 June Mr Devlin had said that he would not be setting objectives for the claimant (see **page 491**).

8 July to 16 September 2020

117. Between 8 and 29 July Ms McCambridge exchanged emails with Tracy McIntyre, Deputy Director RPID concerning the possibility of the claimant doing a "*unique piece of work*" led by a different line manager (meaning not

Mr Devlin) (**pages 277-278**). It is apparent from that exchange that Mr Keegan was involved in attempting to source that work.

118. On 24 July the claimant met with Mr Keegan. At that meeting, Mr Keegan told the claimant that he wanted to move him to another team. The claimant said that he would like to stay in UAT. Mr Keegan told him that he should forget about UAT. Mr Keegan told him about roles in (i) Business Support & Assurance Team (BSAT) and (ii) Information Governance Team (IGT).

119. Mr Keegan introduced the claimant to Ms Morna (BSAT manager). On 29 July 2020 he met her. After discussing the BSAT role with her he realised he did not have enough experience to take it on. He told Ms Morna that he was not a match for the role. On 10 August 2020 the claimant emailed Mr Keegan (**page 279**). He said that he had discussed the BSAT role with Ms Morna; that based on the job description his experience was not suitable for it. He also said that the role in Information Security would be more suitable if it were available.

120. On 21 August the claimant emailed Ms McCambridge (**pages 282-283**). In it he said that he had met the BSAT team leader but he was not a good match for that post. He said that he did so because he had not heard from her after his email of 28 January.

121. On 26 August 2020 the claimant met Ian Johnson (IGT manager). After discussing the IGT role with him he was of the view that his experience was suitable for it. On 28 August, the claimant emailed Mr Johnson (**page 284**). In it he said; he had read the job description; he liked the job and would be happy to join his team.

122. On 2 September the claimant met again with Mr Keegan who told him that a move to IGT would not be possible at that time because Mr Johnson was trying to re-organise his team which might take up to six months. Mr Keegan asked him to; move to the BSAT team; help it in any way he could; that team needed someone urgently; and needed help before the role in IGT became available.

123. On 16 September, the claimant emailed Ms McCambridge again (**page 281**). In it he said that Mr Keegan had told him that he wanted him to move to BSAT

while waiting for Mr Johnson to complete the re-organisation of his team. The claimant moved to that Team that day. In his view there was nothing he could do but agree to the move. While he had made it clear that he had no experience for the role, he did it in order to help out the BSAT. Ms McCambridge replied the next day (17 September) (**page 281**). She sought the name of his new line manager. She assumed he would be starting in his new role immediately. The claimant replied that day to advise that his new line manager was "*Johnston Fiona*" (**page 280**). Ms McCambridge then confirmed (27 September, page 280) that on her return from holiday she would discuss matters with Ms Johnston and then write to him to confirm his extended probation backdated to its start date.

124. His job title was Risk Assurance and Fraud Support. It was at the B1 grade. It was within the RPID: Risk Assurance and Fraud Team, in turn within the ARE directorate.

125. In Ms McCambridge's view the claimant was moved from his UAT role for two reasons. First, Mr Devlin was not willing to provide him with work objectives because in his view the claimant could not achieve them. Mr Devlin was simply not willing to have the claimant back in his team. Second, the subsidiary reason, the respondent had taken a decision that no probationer would be dismissed during the pandemic.

<u>September 2020 to 3 March 2021</u>

126. Gordon McMiken, Risk Assurance and Fraud Adviser was the claimant's line manager after 16 September 2020. He worked in the BSAT team. In their first meeting, the claimant explained that he did not have experience to do the job and would need training and his support. Mr McMiken told him that there was no training for the role. Instead, he would be "*learning on the job*".

127. On 6 October, the claimant attended an Accreditation Committee meeting with Mr McMiken. Mr McMiken had told him to take notes. He did not expect him to record everything. After it the claimant said he had recorded nothing. The meeting had lasted 2 hours. At his B1 grade, Mr McMiken had expected him

to be able to attempt to take minutes during it. On 19 October, Mr McMiken emailed the claimant about it (**page 484**). He described the meeting as quite intense. He said that the tempo had been high. He noted the claimant's comments that; he had found it difficult to write anything; he felt that he did not have the experience or skills to do that at that time; he felt that when he had attended more meetings he would develop these skills; but at that time he was not in a position to note such intense discussion. He then said, "*Please don't worry about not being able to capture all of the discussion during the meeting. The purpose of the minutes is to record 3 things; 1- decisions made, 2- action points and 3- who will action these*." In his witness statement, Mr McMiken said that his email had expressed his disappointment at the claimant not having taken notes. In answer to questions from the tribunal, he accepted that it did not do so.

128. On 30 October 2020 Ms McCambridge wrote to the claimant (**pages 288-290**). It referred to their meeting on 27 January 2020. It summarised matters since their meeting on 18 October 2019. Her decision was to extend his probation period for a further three months. That period was to run from 30 October (the date of the letter) until 29 January 2021. The extension to the probation period was said to be "*exceptional*". The decision was based on; the report from November 2019; the information provided by the claimant in the January 2020 meeting; and the pandemic situation which prevailed at the time. It confirmed that an alternative post had been secured "*in order to give you the opportunity to demonstrate that you can meet the expected standards*." It advised him that an "*extended performance appraisal report will be called for at the end of the extended probation period. Your appointment may be terminated at any time during the extension if it becomes clear that you will not be able to reach the required standard of performance before the end of the extended probationary period. Your appointment may also be terminated for misconduct or if your attendance level is unsatisfactory*." The letter contained a right of appeal, to be exercised by 13 November. The letter did not explain what could happen at the end of the probationary period. The letter recognised the delay in writing to him, that delay being some 9 months. The letter did not contain any explanation for the delay other than a reference to "*circumstances*". The letter did not refer

to the claimant's email of 28 January. It did not deal with any of the issues raised by the claimant with Ms McCambridge in January. With the benefit of hindsight, Ms McCambridge's view was that she would have suggested to the claimant that he raise a grievance about those issues, including a complaint about a lack of training and support. She accepted that with the benefit of hindsight she could have investigated the claimant's concerns based on his email (**page 271**).

129. The claimant did not appeal the decision to further extend his probation period.

130. On 30 October, Ms McCambridge emailed Gordon McMiken (copied to the claimant) to advise of her letter to the claimant that day (**page 291**). Ms McCambridge noted the end date for the probation period (29 January 2021). She sent a link to guidance for a final report. The link begins, "*http://saltire/my-workplace/performance.*" That link is what is reproduced at **page 374** of the bundle.

131. On 17 November 2020 the claimant met with Mr McMiken. Mr McMiken appears to have taken a brief hand note of it (**page 292**). It was not referred to in his witness statement. It records, "*Objectives to confirm*." It also records, "*Bereavement leave*." That appears to refer to the death of the claimant's father in the course of that month. During the meeting, Mr McMiken told the claimant that he should not worry about any performance objectives because all the tasks he has been assigning to him since he joined BSAT were what he needed to pass my probation. The claimant told Ms McCambridge of this in an email to her on 26 November (**pages 293-294**). It appears that her reply was on 21 December (**page 293**). It noted the claimant's intention (for annual leave and his father's funeral) to reduce his time at work in January 2021 to about a week. Ms McCambridge therefore extended the probation period by a further month, thus to 28 February 2021.

132. On 8 December the claimant met with Mr McMiken. During the meeting, the claimant was given a document containing his performance objectives. Mr McMiken told him that everything he put in them were things he had been doing except for one and he had nothing to worry about. While not clear, it appears

that those objectives were set out under 3 headings, being "Support the team to deliver objectives", "*Improvement work*", and "*Engagement with SG colleagues*" (see **pages 298-301**). No evidence was given about those headings or the detail under each.

133. Meantime, the claimant met Mr McMiken again on 9 December. Again, Mr McMiken appears to have taken a brief hand note of it (**page 295**). It appears to suggest the claimant's comment that he had had good support from Mr McMiken and other members of the team. It also records, " *Lessons learned – feel good about minute writing – 1st meeting poor …gave tips which helped. Feel good about that. Training? Not much available for minute taking*". It records the word "*Objectives*" alone. It is not clear whether the claimant's Objectives had been agreed by that date.

134. It appears that the claimant was not at work for the whole of January 2021.

135. In February 2021, the claimant undertook a "*Staff Changes and RP&S access*" task. He had previously completed a similar task in November 2020. In November, he had reviewed the staff who had left the Scottish Government. In Mr McMiken's view, the claimant did not perform well in the February task. It was almost identical in nature to the earlier task but focused on staff who had moved internally within the Scottish Government. The November task was to pick out staff with privileged access roles from a list, then identify their line management from a list taken from the Staff Directory information. The February task was to find staff who had moved or left post to confirm that their access permissions were updated. The data sets were very similar. The claimant worked on it for about 2 weeks. He reported to Mr McMiken having identified 7 staff members. Mr McMiken checked his work. The claimant should have identified 89. In Mr McMiken's opinion the claimant should have recalled from his previous experience what to look out for. One of the staff moves he failed to highlight was his own move in September 2020 to BSAT. The claimant was not provided with additional guidance prior to undertaking the task in February because he had previously completed the November task with a slightly different set of data. Based on his experience the claimant knew that

the BSAT team did not deal with such task. He believed that there was software which did it. He was asked to do it manually from spreadsheets. Mr McMiken explained that it was given to the claimant to do so as to avoid contacting another team to obtain the data. Mr McMiken did not follow the process with the claimant as set out at **page 374** about the concerns that he had about the claimant's performance. There was no letter inviting the claimant to a meeting; there was no action plan to improve his performance.

5 March to 14 June 2021 (dismissal)

136. On 3 March 2021 Mr McMiken met with the claimant. It was his performance review. Prior to the meeting the claimant had sent to Mr McMiken a list of tasks undertaken during his probation period with BSAT. It listed 8 items. On 3 March Mr McMiken had signed the Performance Appraisal documentation (**pages 296-313**). On each of the 3 objective headings, the claimant was marked, respectively, "*Partially achieved*", "*Achieved*" and "*Partially achieved*". The overall Performance Marking score was "*Partially achieved*." Mr McMiken awarded this score because, in his opinion, the claimant had; tried but failed to deliver consistently the standard of performance expected of the B1 grade; delivered some acceptable work but showed weaknesses in overall performance; and required input from peers or managers on a regular basis to ensure agreed objectives were met.

137. The claimant disagreed with his score. He believed it should have been marked as "*Effective*". He set out 9 points as his reply to it (**pages 314-315**). It is not clear whether any of his managers saw them.

138. On 22 April 2021 the claimant met again (virtually, by Teams) with Ms McCambridge. The meeting was noted by Jenny Smith. Because of technical issues, it was adjourned and resumed on 30 April. On 5 May a typed version was prepared (**pages 316-320**). It appears to show a correction/comment by the claimant. It is probably a fair representation of the meeting. The claimant was accompanied by Kevin Higgins his PCS representative. It is not clear how or when the claimant was invited to the

meeting, albeit the notes refer to a previous "*information pack*" having been sent to him. The note recorded the latest extension of the probation period running from 30 October 2020 until the end of February 2021. It recorded the discussion on the probation report from Mr McMiken, including the claimant's views on his marks. In the claimant's view he had not been given the opportunity to meet the standards expected of the role. It recorded that at the conclusion, Ms McCambridge advised that issue a "decision letter". She noted her three options being (i) no further action and confirmation in post (ii) a further extension and (iii) dismissal.

139. The note recorded that the claimant said; he did not agree with Mr McMiken's marking; said that he had had only two catch-up meetings with his line manager; he felt he had not had any support or training and had to learn "*on the job*"; his line manager knew he did not have any experience of the bulk of his work; neither his line manager nor his countersigning officer (Fiona Johnston) had ever raised any issues with him; and was shocked to hear his final probation mark. The note recorded that Ms McCambridge was to check with the claimant's line manager about the claimant's assertion that he did not know the criteria used to determine his final marking or what it meant.

140. On 14 June, Ms McCambridge emailed a letter to the claimant (**pages 327 and 321-326**). The letter advised of the immediate termination of his employment. It set out her reasons. She reviewed the claimant's performance over the whole period of his probation. She recognised that from 30 October 2020 he was in a role being an alternative to that for which he had been recruited. She set out at length her comments on the claimant's latest performance review documentation. In summary and while accepting that his line management (Mr McMiken) could have managed the performance aspect of his extended probation period in a more structured way, she agreed with him that over the latest 3 month period, he was not able to deal with the more complex tasks asked of him. She concluded that; there were no further measures that could be taken to improve his performance to the required standard; the difficulties experienced within both roles suggest that he was unlikely to be able to demonstrate effective performance in any other B1 post that may be available;

and expected that he would be unable to evidence the required level of performance during any further extension. She advised of his right of appeal, within 10 working days.

141. Her letter said that he would be paid in lieu of the five week period of notice. He was not required to work it.

142. Prior to deciding to dismiss the claimant, Ms McCambridge did not check with Mr McMiken about any of the issues raised by the claimant in their meetings of 22/30 April.

143. While the dismissal of the claimant had been considered earlier than June 2020, the respondent did not do so for at least three reasons. First, Ms McCambridge had had a change of managers and as a result had not been given the necessary authorisation to proceed with a dismissal. Second, the respondent had decided against the dismissal of probationers during the COVID pandemic. And third, because of the implications of the "Black Lives Matter" movement. This was a reason why Ms McCambridge decided not to dismiss the claimant in January 2020.

144. Ms McCambridge accepted that the role from which the claimant was dismissed was a suitable alternative for him only because it was at the same B1 grade as the role for which he had been recruited. She accepted that, on reflection, it may have been fairer to restart the claimant's probationary period in this alternative role. She did not give consideration to that at the time. In Mr Keegan's opinion, someone in a graded role in one team should be able to carry out the same graded role in another team once they have had appropriate training.

145. By email dated 21 June the claimant intimated his wish to appeal the decision to dismiss him. The email attached an "*appeal statement*." It was not produced.

146. On 29 July 2021 the claimant attended an appeal hearing. It appears to have been noted by Lucy Pullar. It appears that a typed version was prepared was prepared that day (**pages 329-332**). The appeal was heard by Roddy Macdonald, deputy director, Head of Higher Education and Science Division.

At the hearing the claimant was again accompanied by Kevin Hughes. Mr Macdonald did not give evidence at this hearing.

147. On 19 August, Mr Macdonald appears to have written to the claimant with his decision on the appeal (**pages 334-336**). It appears to recount the claimant's (three) grounds of appeal and Mr Macdonald's comments on each. In its conclusion, it does not expressly reach a conclusion on the appeal grounds.

148. From 19 July the claimant returned to part-time work at a charity. Since his dismissal, he has not sought work as a software tester. He has not done so because he believes that (i) in the period since 16 September 2020 when he moved to the BSAT team he would have lost most of his skills (ii) at any interview he would need to explain why he lost his role with the respondent and (iii) that explanation was likely to impede his ability to secure similar work. In the 51 weeks between 19 July 2021 and 10 July 2022 the claimant earned £12,376.34 net. His average pay in that period is therefore £242.67 per week. His employer contributes 3% of his pay to an auto enrolment pension scheme. No evidence was given about his gross pay from that work.

149. Under reference to a selection of adverts for jobs from those within **pages 375-481**, the claimant had either not seen or not applied for any.

150. Early conciliation began on 3 September 2021. A certificate was issued on 1 October. It named the Scottish Government as the prospective respondent. No issue was taken that the correct respondent is the Scottish Ministers.

151. On 21 October 2021 the claimant presented an ET1 form.

152. The claimant's trade union representative told him about the process of applying to ACAS after the appeal hearing.

Comment on the evidence

153. The making of findings of fact was not assisted by the number of documents within the bundle which were not spoken to by any witness in their evidence. While that is not uncommon, in this case several "*chain*" emails between the claimant and a respondent's witness (presumably relevant material) were not

spoken to at all. Allied to that was the issue of contemporaneous correspondence referring to, for example, a meeting, yet a witness not referring to it. For example, in his email on 21 August to Ms McCambridge (**page 282**) the claimant referred to a meeting that had been arranged with Mr Keegan. While the claimant's witness statement refers to the meeting (paragraph 33), in neither of his statements does Mr Keegan refer to it at all. We say more about this below.

154. The respondent lodged supplementary witness statements albeit not provided for in earlier case management. By the time they were lodged, the respondent and its solicitor had seen the claimant's witness statement. The respondent said that it had done so because in its view it was "*appropriate to provide supplementary witness statements, rather than leading the examination-in-chief during the hearing. We consider that this approach provides the Claimant with fair notice*." What the statements did not do was to rebut assertions of fact within the claimant's witness statement. We were left in the rather unsatisfactory position of having the claimant's unchallenged evidence on some matters which may have been relevant and contentious.

155. While we appreciate that the timeline was produced at our behest (and therefore quickly) it was not entirely accurate. For example, it said that on 22 May 2019 the claimant met with Mr Devlin where the latter undertook the interim probation performance appraisal. Reference was made to four paragraphs within Mr Devlin's witness statement (63-66) and one (paragraph 15) of the claimant's statement. None of those paragraphs vouches a meeting on 22 May. Further, it was agreed that on 30 October 2020 (**pages 288-290**) Ms McCambridge wrote to the claimant to confirm the three month extension of probation to 29 January 2021. The timeline source is said to be the claimant's statement at paragraph 40. However, that paragraph does not refer to the letter or that date. A related issue was that the bundle index contained inaccuracies which could have been misleading. For example, **pages 285-287** were indexed as the claimant's statement regarding the extended probation period and dated 3 September 2020. The document was undated and it became clear from the (limited) evidence about it that it was written and sent

much earlier, probably in January 2020 and related to an earlier probation period. In another example, **page 284** was indexed as an email of 28 August 2020 from the claimant "*accepting new role*". In fact that email referred to the Information Governance role in which the claimant was interested but which he was not offered.

156. We found it surprising that where (i) very early on in his career (within 2 months) the claimant's line manager began to have concerns about him and (ii) HR advice had been sought and given, very few notes were taken of discussions or meetings with the claimant. For example, Mr Devlin's evidence was that in early February 2019 they were meeting weekly or fortnightly. For very few of their meetings were notes produced. Similarly, Mr Keegan's evidence was that he met with the claimant and his trade union representative in November 2019. There was, again, no note produced from that meeting nor was there any follow-up email correspondence.

157. We were invited by the respondent to accept that; its witnesses were credible; the claimant was neither credible nor reliable; and where there was a dispute between the parties on issues of fact to prefer the respondent's witness evidence.

158. We found Mr Kurra to be broadly credible and reliable albeit the exercise of testing his evidence was limited by the use of written witness statements and very limited cross examination. In exchanges with the claimant Mr Kurra tended to be excitable. On more than one occasion he "*talked over*" the question. This had the effect of reducing the quality of his evidence as it descended into an argument with the claimant.

159. We found Mr Devlin also to be, in the main, credible and reliable with the same caveat. On one issue we did not accept his evidence as being wholly accurate. His evidence was that "*From January 2020 to August 2020, I did not give Johnson performance objectives. I had concerns and a duty of care as his manager about his welfare. I did not want to put him into a situation that would be stressful for him as he had just been on sick leave for stress due to his work and then was receiving counselling sessions. At the same time, I had members*

of the UAT team visiting their doctors with work related stress as a result of providing training and feedback to him." Taking account of Ms McCambridge's evidence (particularly about her exchanges with Mr Devlin in June 2020 at **pages 489 and 491**) in our view a major factor in Mr Devlin's decision not to give the claimant performance objectives was his view that the claimant was not able to do the job and could not return to the role irrespective of the outcome of any extended probation period.

160. Mr Keegan's evidence was in large measure not crucial to the issues. That said we had no reason to doubt his credibility. But his reliability was questionable in one area. His evidence was that he met with the claimant on 19 May 2020 "*and one other time.*" The claimant (both in his witness statement and on the timeline) said they had met on 24 July. We did not accept that they had met in May. First, there is no contemporaneous record in the bundle of anything in May 2020. Second, the claimant's email to Ms McCambridge (17 August, **page 282**) said, "*I am writing to inform you about new development in my team. I got an email from Charles Keegan on 20th of July requesting that we meet up for a chat. We arranged a meeting for 24th of July. At the meeting, Charles told me that he wanted me to be moved into another team. He introduced me to Business Assurance Team (BSAT)*." In our view it is more likely than not that this text suggests that the meeting between them on 24 July was their first meeting. It was not suggested to the claimant that his email misrepresented the position. Third, in his witness statement Mr Keegan made no reference to a meeting on 24 July and said his diary had no record of the date of an "*other meeting*".

161. We found Ms McCambridge to be both credible and reliable albeit subject to the same caveat. Her credibility was enhanced by making self-deprecating concessions and accepting that with hindsight she would have handled certain aspects of her dealings with the claimant differently. She was understandably coy but ultimately candid about Mr Devlin's unambiguous position on refusing the return of the claimant to his team irrespective of the outcome of his probation elsewhere.

162. The questions of Mr McMiken were very limited. Given the ultimate significance of his appraisal of the claimant (**pages 296-313**) to the decision to dismiss him it was surprising that the document (by page references) was not referred to in his written statement. It was only in answer to questions from the tribunal that he suggested that we should read the whole report.

163. The claimant's witness statement and his witness evidence was in the main reliable. That said, he had a tendency to exaggerate. For example in his witness statement he said that in January 2019 he hoped that he would continue his training but "*this did not happen*." It is clear from our findings that training continued after January 2019. Similarly, his evidence is that he was "*promised"* a number of things by various managers. No other evidence supports the idea that promises were made to him. He alleged that Mr Kurra intentionally changed a task to Pillar 2 "*so as to make it more difficult for me*." There was no evidence to suggest why Mr Kurra did so. This allegation appeared to us to have no factual basis. Mr Kurra gave a credible explanation for the change. The claimant said that he believed that he had been the subject of a "*kind of deception*", that he had been "*taken in*" by Mr Devlin and specifically he had been "*tricked or forced*" into starting an objective. That suggests some deliberate attempt by Mr Devlin. While the claimant may believe that now, there is nothing to suggest that either he believed it at the time or that it had any basis. We did not find credible the suggestion that from 13 June 2019 (see his Scott Schedule, **page 84**) that his complaint to Ms McCambridge of being treated differently compared to Olga and Irma was a complaint of discrimination on grounds of race. The relevant passage from the note of that meeting (**page 207)** says, "*In January two new members of staff joined the team and they were immediately set up for the appropriate training. They came from another ARE area and JO says he has been treated differently to them. He said that these two members of staff were given simple tests to do and again he was excluded*." It is not a credible position to suggest that this is a complaint of unlawful discrimination. Equally, it is not credible to suggest (after having taken advice from his trade union and met with Mr Keegan about the issue) to suggest that his email of 27 January (**page 271**) "*implied*" such a claim.

Submissions

164. Both parties lodged written submissions. The respondent had lodged its 25 page submission prior to the end of the last day of evidence, 8 July. Ms McGrady also produced a skeleton. She made an oral submission in addition.

165. The claimant lodged and intimated a two page final submission. He also made a short oral submission.

166. We mean no disservice to either party by not repeating their submissions. We are grateful for what they said in writing and orally. We have taken them into account.

167. For the respondent, Ms McGrady's written submission dealt with matters under 7 headings. Her skeleton concentrated on 5 of them, albeit not in the same order. To the extent relevant we note the respondent's submission when deciding the issues.

168. The claimant's written submission identified aspects of the evidence which he said supported his claims of being subjected to direct discrimination and victimisation. On the issue of the fairness of his dismissal he focussed on (i) his claim that had he been treated like his comparators (allowed to do regression testing) he would have passed his probation within UAT and would have not been moved to BSAT (which he said was unreasonable) and would thus have not been dismissed; and (ii) Mr McMiken did not discuss his concerns which was contrary to policy and thus rendered his dismissal unfair.

The statutory framework

169. Section 13(1) of the Equality Act 2010 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.*"

170. Section 27(1) and (2) of the 2010 Act provides, *"(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."

171. Section 123(1) of that Act read short for present purposes "*provides proceedings on a complaint* [under the Act relating to work] *may not be brought after the end of—(a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the employment tribunal thinks just and equitable.*" Section 123 (3) provides, "*For the purposes of this section—(a) conduct extending over a period is to be treated as done at the end of the period*."

172. Section 136 of the Act provides, "***Burden of proof*** *(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 …*"

173. Section 98(1) of the Employment Rights Act 1996 provides that *"In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—(a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*"

174. Section 98(4) of the Act provides "*Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case*."

175. We took account of the law (statutory and caselaw) to which reference was made in submissions and other case law to which we refer below.

Discussion and decision

176. We reminded ourselves of three features in this case which are important and linked. First, the premise of a probation period of nine months is that ordinarily by its end the respondent will have decided to either confirm the appointment or end the contract. It follows that any dismissal would, ordinarily, not be liable to a claim that it was unfair. Unusually in this case, the claimant's employment continued for 2 years and six months, all as a probationer. Second, (as prescribed in the claimant's offer letter) if confirmation in post were to occur it would be into the post for which the employee was recruited. In this case, that was in the role of User Acceptance Tester within the RPID Business Design division. But by the time of the decision to dismiss him it was clear that he could not be confirmed in that role. Third, and while there was repeated reference within the evidence to the respondent's belief that the claimant was an "*experienced tester*" (and employed on that basis) he did not describe himself as such. It was clear that by 2 July 2020 and even if he had not been dismissed, he could not have been appointed to that post. Mr Devlin had made his position clear by that date. Indeed, as early as 13 May 2019, Mr Devlin had said "*I have awarded a Not Effective marking based on that Johnson is employed as an experienced tester, yet has not managed to demonstrate the basic requirements of testing as detailed for his 1st performance objective*."

177. It is convenient to set out our decision on the issues out of order compared to the agreed list and also out of the order that the respondent dealt with them in its submission.

Time limits on the claims of direct discrimination

178. In our view the jurisdictional question of time bar should be considered first when deciding the claims of direct discrimination. In the circumstances this requires a consideration of the substance of the allegation that the claimant's dismissal was an act of discrimination. The respondent identifies four

allegations of less favourable treatment, the last being dismissal. As the respondent recognised at paragraph 153 of its written submission that claim is "*in time*." In our view the appropriate questions in deciding if the claims of direct discrimination are in or out of time are:-

1. Was the dismissal of the claimant an act of direct discrimination?

2. If so, was it the end of a period of conduct which extended from the time of the first allegation, namely the lack of training and support that was provided to the comparators (Olga and Irma) and included the other two allegations of discrimination in that time? In his Scott Schedule the claimant alleges that this first allegation occurred in March 2019.

3. If question 1 or question 2 is answered in the negative, is it just and equitable to extend time in relation to each of the three other allegations?

179. In our view, the dismissal of the claimant was not an act of direct discrimination. A summary of his position within the Scott Schedule is that if he had been given the same opportunity that was given to Olga and Irma and allowed to do regression testing, he would have passed probation at the first attempt. As a result, there will not be any need to extend probation or move him to another team. The inference is that "*but for*" the failure to give him that same opportunity, he would not have been dismissed. In our view, there are two flaws in the claimant's argument. The first is that he has not shown that the failure to afford him that opportunity was "*because of*" his race. We say more on this below. The second is that he has not shown that his dismissal was "*because of*" his race. There is no evidence at all that supports a finding that the claimant's race played any part in Ms McCambridge's decision to dismiss him. We therefore answer the first question "*no*".

180. Moving to the next question (3) it is in our view not just and equitable to extend time in relation to each of the three other allegations. From the case of

Robertson v Bexley Community Centre (t/a Leisure Link) [2003] I.R.L.R. 434 (to which the respondent referred) we take the following basic principles:-

1. If the claim is out of time, there is no jurisdiction to consider it unless the tribunal considers that it is just and equitable in the circumstances to do so. That is essentially a question of fact and judgment for the tribunal to determine;
2. When considering the exercise of its discretion, has a wide ambit within which to reach a decision;
3. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time;
4. The exercise of discretion is the exception rather than the rule.

181. Some of the frequently relevant factors are set out in the well-known case of ***British Coal Corporation v Keeble*** [1997] IRLR 336, EAT, though they are neither a checklist nor a substitute for the statutory wording. They are nevertheless helpful in many cases. The Tribunal must have regard to all the circumstances of the case. They include the length of and reasons for the delay, the extent to which the cogency of the evidence is likely to be affected by the delay, the extent to which the party sued has cooperated with any request for information, the promptness with which the claimant acted once they knew of the facts giving rise to the cause of action and the steps taken by the claimant to obtain appropriate advice once they knew of the possibility of taking action. A tribunal does not need to consider all of those factors in each and every case and in some cases certain factors may have no relevance at all.

182. Two factors which are almost always relevant the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (***Southwark London Borough Council v Afolabi*** 2003 ICR 800).

183. On our findings, on 17 November 2019, Mr Keegan spoke with the claimant and Kevin Higgins his trade union (PCS) representative. Mr Keegan asked the claimant to provide evidence to support his claim that he had been treated differently. He did not do so. There is no dispute that on 27 January 2020 the

claimant met with Ms McCambridge, again with a trade union representative, this time Ryan Gordon. The claimant's case is that the next day he made a formal complaint to Ms McCambridge which complaint (he now says) was that he was being discriminated against on grounds of race. By that time, all three incidents had occurred which became the first three allegations. On the claimant's case the respondent should have known that by 27 January 2020 he was complaining of direct discrimination. Early conciliation began on 3 September 2021, about 19 months later. We agree with the respondent's submission that the claimant has not provided any explanation for the passage of that period before starting early conciliation. His trade union was involved for him since November 2019. While the claimant's evidence about his interactions with his union was quite vague, it was clear that by 27 January he had sought and got their opinion on the situation at that time, describing it as "*not right*." With or without the benefit of advice from his union, it is the claimant's case that by 27 January 2020 he believed he was the victim of discrimination. There is no explanation as to why the period of about 19 months passed before formally exercising his rights about that claim. In his oral submission the claimant said that he believed that his trade union had been trying to resolve "*everything*" without escalating things but two points occur to us. First, there is no evidence that would support such a finding. Second, if that were correct it may be that his trade union were at fault in not reporting to the claimant the outcome of those efforts and (more importantly) in not advising him of the time limits applicable at the time.

184. The agreed issue number 11 is; whether the alleged incidents are time barred? In our view and relative to the claims of direct discrimination they are time barred because; dismissal is not an act of unlawful discrimination and cannot be the end of a period such that the earlier allegations are in time; and it is not just and equitable to extend time relative to the earlier allegations given the absence of any explanation for a delay of some 19 months.

The claims of direct discrimination

185. Even if we had decided that these claim was in time, we concluded that they would not have succeeded. The respondent referred to the recent Supreme Court decision in the case of ***Efobi v Royal Mail Group Ltd*** [2021] I.C.R. 1263 which considered section 136 of the 2010 Act. The court held (and confirmed) that there was a two-stage process for analysing complaints of discrimination, whereby, at the first stage, the burden was placed on the claimant to prove, on the balance of probabilities, facts from which an employment tribunal could conclude, in the absence of an adequate explanation, that an unlawful act of discrimination had been committed. At paragraph 26, Lord Leggatt noted that it had been previously authoritatively decided that the tribunal is not limited at the first stage to consider evidence adduced by the claimant. The court also held that the burden of proof was the same as under previous anti-discrimination legislation notwithstanding the wording of section 136. Taken at its highest, the claimant in this case has shown "*less favourable treatment*" when compared with Olga and Irma. But there is no evidence from any source to suggest that that treatment was because of a difference in race. Despite extensive coverage in his written case (see **pages 83-96**) the claimant says his claims can be inferred from (i) the fact of different treatment and (ii) the fact of difference of race. Put shortly that is not enough at the first stage of the analysis.

186. Separately (albeit not material to our decision) we found it hardly credible that his formal complaint of 28 January 2020 "*implied*" a claim of race discrimination. If (as his case now is) he was complaining of race discrimination at that time, we were of the view that it was more likely than not that he would have said so expressly at the time. We were left with the conclusion that on the balance of probabilities, the email was not a complaint of race discrimination. We are reinforced in that view by the fact that the racial origin of Olga and Irma is not even clear from that email. On one view the complaint could have been of discrimination on grounds of sex.

Victimisation

187. Issue 9 is the proper place to start a consideration of the claim of victimisation. The claimant says he made an allegation conform to section 27(2)(d) by sending the email of 28 January 2020 to Ms McCambridge. The respondent referred to the decisions of the Employment Appeal Tribunal in three cases, the last being ***Fallah v Medical Research Council and anor*** UKEAT/0586/12/RN. In its discussion, the EAT refers to the decision of the Court of Appeal in ***Waters v Commissioner of Police for the Metropolis*** [1997] ICR 1073 as to the starting point in defining what a protected act is. The EAT in ***Fallah*** also refers to ***Durrani v London Borough of Ealing*** UKEAT/0454/2013 to which the respondent also refers. From ***Fallah*** we take two points. First, the allegation relied on need not state explicitly that an act of discrimination has occurred. All that is required is that the allegation relied on should have asserted facts capable of amounting in law to an act of discrimination by an employer within the terms of the section (now section 27). Second, a tribunal should look at all the circumstances carefully including the oral evidence so as to see the context in which the alleged "*protected act*" was made in order to decide if it was indeed one. In this case the context includes; what was said and not said in the email; the fact that both prior to and after 28 January 2020 the claimant had the opportunity to provide further information on his allegation that he had been treated differently but did not do so; and the fact that despite regarding it as a formal complaint the claimant did not take steps to progress it or enquire after it. Of particular relevance in our view is the absence of reference to any protected characteristic (but obviously race) where the claimant had previously achieved the respondent's diversity objective. In our view the allegation made in the email of 28 January 2020 did not assert facts capable of amounting to an act of discrimination. There is no assertion of different treatment.

188. We comment on two other matters. First, even if the email of 28 January 2020 was a protected act, there is no evidence at all which supports a finding that the alleged victimisation (being forced to take the role in BSAT) was "*because of*" the protected act. The answer to issue 10 is therefore "*no*". Second, even if

it was "*because of*" that act, the victimisation occurred on 16 September 2020. It is on the face of it out of time, and for the reasons set out at paragraph 183 above, it is not just and equitable to extend time from that date so that the claim would be in time by September 2021. The answer to issue 11 applied to the claim of victimisation is "*yes*".

Unfair dismissal

189. We decided that the respondent had shown that its reason for dismissing the claimant was capability and thus a "*fair*" reason as per section 98(2) of the Employment Rights Act 1996.

190. It is convenient to consider issues 2 to 6 together. We concluded that the dismissal was unfair. In ***Abernethy v Mott Hay and Anderson*** [1974] ICR 323, the following guidance was given by Lord Justice Cairns, "*A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him which cause him to dismiss the employee*." Those words were approved by the House of Lords in ***W Devis & Sons Ltd v Atkins*** [1977] AC 931. In ***Beatt v Croydon Health Services NHS Trust*** [2017] IRLR 748 Lord Justice Underhill observed that Lord Justice Cairns' precise wording was directed to the particular issue before that court, and it may not be perfectly apt in every case. However, he stated that the essential point is that the 'reason' for a dismissal connotes the factor or factors operating on the mind of the decision-maker which caused him or her to take that decision – or, as it is sometimes put, what 'motivates' them to do so.

191. We reminded ourselves that we must not substitute our decision as to what was the right course to adopt for that of the respondent (***Iceland Frozen Foods v Jones*** [1983] ICR 17).

192. In this case the decision-maker was Ms McCambridge. The range or band of options available to her was limited to three. They were (i) taking no further action thus confirming the claimant in post (ii) extending the probation period again and (iii) dismissal (see **page 320**). At the time of the decision to dismiss, Ms McCambridge knew that she could not confirm the claimant in the post for

which he had been recruited. By that time (and indeed from 2 July 2019) she knew that irrespective of the outcome of the latest extension to the probation period the claimant could not return to his role in the UAT team (see Mr Devlin's email of 2 July, **page 490**). Confirmation in post by the time of her decision to dismiss in June 2021 could only have been in the BSAT post or in another Band 3 role. We heard no evidence about the possibility of the latter. Ms McCambridge also knew by the end of August 2020 that the claimant's opinion was that he was not a good match for the BSAT post.

193. In our view, a reasonable employer would, prior to a decision, have checked with the claimant's line manager Mr McMiken. A reasonable employer would have asked him about the various issues raised by the claimant in the meetings in April 2021. In particular, a reasonable employer would have checked, prior to a decision to dismiss; whether they had had only two catch-up meetings with the claimant; what support and training had been provided, particularly where she knew that he did not have any experience of the bulk of his work; whether he or Fiona Johnston had ever raised any issues with the claimant; whether the process set out on **page 374** had been followed (particularly where it had been Ms McCambridge who referred that policy to Mr McMiken and she accepted that Mr McMiken could have managed the claimant's performance in "*a more structured way*"); and about the claimant's assertion that he did not know the criteria used to determine his final marking or what it meant. A reasonable employer would not have taken the decision to dismiss the claimant without having checked for further information given the claimant's position at the April meetings. The respondent had not carried out sufficient of an investigation prior to the decision to dismiss (issue 3).

194. Separately, in our view, a reasonable employer would, in light of the information which Ms McCambridge had in June 2021, extended the probation period to 14 December 2021 in order that the claimant had the same opportunity to "*pass*" on the BSAT role as he had in the UAT role. We say this for a number of reasons. First, she herself accepted in evidence that with the benefit of hindsight it may have been fairer to restart the claimant's probationary period in this alternative role but did not give consideration to that at the time. That

(coupled with the month's grace of January 2021) would have taken the period in the BSAT role to 14 December 2021. Second, the role, team, work and objectives were very different from the role for which he had been recruited. The BSAT role was to all intents and purposes a new role for the claimant. It was a role for which the claimant had no experience. Third, it was a role which the claimant himself had said was not a good match for him. Fourth, (based on the information which was available to Ms McCambridge in June 2021) a reasonable employer would have concluded that the claimant had not been managed so as to have received sufficient training or support to achieve his objectives. Further, a reasonable employer would have, in the circumstances, concluded that the claimant should have been permitted a period of ten months in this new role, as he had been in the role for which he was originally recruited (with an additional month to take account of his absence in the whole of January 2021). Finally, this was (expressly) an option available to Ms McCambridge at the time.

195. Separately again, a reasonable employer would have left out of account in the decision to dismiss from the BSAT role the claimant's performance in the UAT role. The letter of dismissal is headed "*Performance during extended probation*". It begins by referring to the April meetings where they discussed his performance during that period. That discussion was about performance in the BSAT role. However, the letter expressly refers to "*two periods of extended probation*" and her view that the claimant had not been able to evidence performance at B1 level "*in two posts over a 30 month period*". Ms McCambridge knew by the time of her letter of 30 October 2020 that the claimant could not return to the UAT role. Her "*exceptional*" decision was to extend probation but in the different BSAT role, which decision was appealable. A reasonable employer would have viewed it as a new start in a new role.

196. In the circumstances which prevailed at the time of that decision (April to 14 June 2021) a reasonable employer would have extended the probation period by a further six months (from 14 June) and not dismissed the claimant. The dismissal was not within the limited range available to the respondent at that

time (issue 6). It was not reasonable in all the circumstances. (issue 5). The respondent did not have a reasonable basis on which to sustain its belief (issue 2). Nor had it followed a fair procedure (issue 4).

197. We should say something about the appeal. We attached very little weight to that process. In the first place, the only relevant material was not spoken to by the appeal hearer. We could attribute little if any weight to Mr Macdonald's rationale for refusing the appeal because he did not give evidence about it. Ms McGrady's explanation for that was to say that the Claimant did not contend that any unfairness arose from the appeal. With respect, that misses the point. Section 98(4) requires a tribunal to consider the question of the fairness of a dismissal taking account of the whole procedure undertaken by the respondent. Ms McGrady asked us to take account of Mr Macdonald's views and decision in the appeal. We cannot properly do that without his evidence.

Remedy

198. The agreed basic award (subject to any deduction) is £1337.82

199. The parties agreed that; the claimant's gross pay per week was £552.60 the net version being £445.94. They also agreed that the effective date of termination was 14 June 2021, which was a Monday. There is no dispute that the claimant was paid in lieu of the five week period of notice.

200. The claimant took up part time employment exactly 5 weeks after his dismissal on Monday 19 July 2021. From the schedule of loss his average net pay weekly from that role was £242.67. Accordingly the claimant's net weekly loss of pay (which has continued since 19 July 2021) is £203.27.

201. The claimant calculated pension loss on the "*seven steps*" model. His calculation was based on the premise that there was "*no chance*" that he would have stopped working for the respondent until his retirement age. The respondent took no issue with that model being an appropriate method of calculating it. On the claimant's analysis his net annual loss of pension benefit was £12,200.37. Again, the respondent took no issue with that amount. We have set against that the value of the claimant's current employer's pension

contributions. Based on an annual net pay of ££12,619.01 we estimate that the gross equivalent is £12,772.00. 3% of that sum is £383.16. The value of the employer contributions in 41 weeks is £302.11.

202. The respondent argued the claimant has failed to mitigate his loss. On this question we took account of principles contained in ***Cooper Contracting Limited v Lindsey*** UKEAT/0184/15/JOJ now reported at [2016] ICR D3 being:-

    1. The burden of proof is on the wrongdoer; a claimant does not have to prove that he has mitigated loss
    2. What has to be proved is that the claimant acted unreasonably; he does not have to show that what he did was reasonable
    3. There is a difference between acting reasonably and not acting unreasonably
    4. What is reasonable or unreasonable is a matter of fact
    5. It is to be determined, taking into account the views and wishes of the claimant as one of the circumstances, though it is the Tribunal's assessment of reasonableness and not the claimant's that counts
    6. The test may be summarised by saying that it is for the wrongdoer to show that the claimant acted unreasonably in failing to mitigate.

203. In our view, the respondent has not discharged its burden. It has not shown that the claimant acted unreasonably in taking and retaining his current role and declining to apply for the roles suggested by it. In our view the claimant's explanation for not applying for similar roles was credible and reasonable.

204. In its submission the respondent sought a "*Polkey reduction*" so as to reduce any compensatory award to nil. It argued, "*In the event that the Tribunal is of the view that the procedure followed by the Respondent was unfair (and is also not with me that to follow a fair procedure would have been futile) it is submitted that nothing has been identified that would have made a difference to the outcome. The Claimant would still have been dismissed in the same way, and accordingly any compensatory award should be reduced to nil to reflect the*

chance that the Claimant would have been dismissed in any event, had a fair procedure been followed."

205. "*A "Polkey deduction" has these particular features. First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done."* And *"the Tribunal has to consider not a hypothetical fair employer but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly, though it did not do so beforehand*." ***Hill v Governing Body of Great Tey Primary School*** [2013] ICR 691. On this issue we took account of what had been said in ***Software 2000 Ltd v Andrews*** [2007] ICR 825. In particular

    1. The question should be approached as "*a matter for the common sense, practical experience and sense of justice of the employment tribunal sitting as an industrial jury*";

    2. "*If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself*".

206. The respondent argued that a fair procedure would have been futile. We do not agree for the reasons set out above. The respondent in its submission did not identify any evidence adduced by it on which it relied to support its subsidiary argument that "*nothing has been identified that would have made a*

difference to the outcome" and "*the Claimant would still have been dismissed in the same way*." We did however have regard to all of the evidence when considering this question including the claimant's evidence. In the case of ***Contract Bottling Ltd v Cave and another*** [2015] I.C.R. 146 the then President (Mr Justice Langstaff) discussed, under the heading of "***General Principles***", how the question of a ***Polkey*** reduction might be addressed. He recognised that a relevant issue when considering the question of whether or not an employee would have remained in receipt of the same income from the same job are "*the chances of a job not continuing, whether by the employee's choice or the employer's choice or decision*." He noted that it had become conventional to express this in terms of a percentage but it could also be done by assessing a period of weeks as the appropriate amount of compensation. In our view, on the assumption that the respondent would have acted fairly even though it did not do so beforehand it would have fairly dismissed the claimant by 29 March 2022. That date is the end of what would have been the additional period of 6 months' probation from 14 June (so, 14 December 2021) plus a further 15 weeks, which was the period of time between the end of the probation period in the BSAT role and the respondent's decision to dismiss him.

207. We reached that view for the following reasons. First, the BSAT role was one which the claimant himself consistently said at the time was one for which he had no experience. It was not the role for which he had been recruited. Second, the claimant did not want to do that job. On his own case, he had been forced into it by Mr Keegan. Third, even if his performance in an extended probation period had improved to the point of "*achieving*" objectives, it is clear that he could not have been retained in the job for which he had been recruited. It was not clear that there was a permanent job available elsewhere in that eventuality. In our view, if the respondent had provided the "*standard*" probation period (plus one month) then taken the same time to decide matters as it did in 2021, then dismissal would have occurred by 29 March 2022.

208. There were 41 weeks between 19 July 2021 and 29 March 2022. In that period the claimant's loss of earnings was (41 x £203.27) £8,334.07. In that period his

loss of pension benefit was (£12,200.37/52 x 41) £9,619.52. Against that we have set the value of his current employer's pension contributions in the same period, £302.11. The claimant sought £500 for the loss of his statutory rights. We award that sum for that loss. The total compensatory award is therefore £18,151.48.

209. The claimant sought an uplift of 20% because the respondent "*did not follow ACAS Code to investigate my complaint and address same which would have prevented my dismissal from service*." We have not awarded an uplift for the following reasons. First, and despite Ms McCambridge's hindsight view, we do not accept that the claimant genuinely raised a grievance in January 2021. Paragraph 32 of the Code provides that an employee, "*should raise the matter formally and without unreasonable delay with a manager who is not the subject of the grievance. This should be done in writing and should set out the nature of the grievance*." While it is possible to discern a complaint in the email (**page 271**) the claimant (who had involved his union by that time) did not formalise it as a grievance as such. Notwithstanding the duty on an employer to arrange a formal meeting "*without unreasonable delay after a grievance is received*" (paragraph 33) it must have been obvious to the claimant that had not happened, yet nothing since the email done by the claimant could be regarded as an attempt to progress his complaint. Indeed, the claimant's evidence was that he understood that his union was trying to resolve the issue. Second, the claimant has not identified any provision of the Code said to have been breached. Third, the claimant has not made out any argument that the respondent's conduct was "*unreasonable*". Finally, we do not accept the premise that the alleged failure resulted in his dismissal.

210. We made no recommendation as the claim of discrimination does not succeed.

Employment Judge: Russell Bradley
Date of Judgment: 16 September 2022
Entered in register: 20 September 2022
and copied to parties