Reserved Judgment

THE EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Ms M Heerah	Secretary of State for Justice
Heard at: London Central	**On**: 15 to 19 May; and 22 to 23 May, 12 July, 3 August 2017 (in chambers)

Before: Employment Judge Pearl
Members: Ms J Cameron
Mr S Soskin

Representation:
Claimant: Mr R Bhatt (Counsel)
Respondent: Ms L Prince (Counsel)

JUDGMENT

The unanimous Judgment of the Tribunal is that all the claims of direct race discrimination, victimisation and harassment fail and are dismissed.

REASONS

1 By ET1 received on 17 May 2016 the Claimant made claims of race discrimination. Other causes of action were raised and we omit here cataloguing the various interlocutory decisions that have been made during the course of the proceedings. By the outset of this hearing, there was an agreed list of issues, which is annexed marked 'A'.

2 In resolving the issues we heard from the Claimant; and Ms Ambrose, Ms Davies, Mr Bowen, Mr Edwards, Ms Hubbard, Mr Matharu and Ms Robinson. We have also studied documents running to about 830 pages, together with a further file of documents submitted by the Claimant.

Facts

3 At the commencement of the hearing, both counsel stated that many of the facts are agreed, but that there is little agreement about how they should be interpreted. We need to emphasise that it is not the function of the tribunal to determine each and every dispute of fact that can be detected between the parties. What follow are the necessary factual findings for our resolution of the issues. Those issues include 16 specific items of detriment or less favourable treatment. There was detailed cross examination of all the witnesses, including the Claimant, and both parties rely on inconsistencies or contradictions that have emerged during the course of the hearing or within witness statements. The Claimant's case is that the Respondent's evidence is suspect, in part because of those inconsistencies, and that a prima facie case for discrimination, victimisation or harassment has been made out. The Respondent submits that none of the claims are well-founded and that the burden of proof does not pass to it.

4 The Claimant is a Senior Probation Officer ("SPO") who has been employed by the Respondent, or predecessors, in London since 1991. She remains in their employment. In November 2008 she was 'seconded' to a unit which became renamed as the Serious Further Offences team ("SFO").

5 In about June 2014 there was a major restructuring process called Transforming Rehabilitation ("TR"). Some probation functions, including fieldwork, were transferred to arm's length companies. The Claimant, however, remained in the specialist SFO team and that team was not privatised but continued as part of the National Probation Service ("NPS"). In October 2013 and March 2014 she raised two written grievances.

6 Ms Davies is currently Head of Public Protection for the London division of the NPS and she has worked in the London Probation services for 39 years. Her responsibility for the SFO is one of a number of responsibilities that come under her remit, which she describes as huge. This responsibility began in 2010. She directly line managed Ms Ambrose, who in turn managed the SFO team and the Claimant, as well as staff across eight prisons in London. Ms Davies was the second line manager for the Claimant. She explains that in April 2014 there was a fundamental change because Probation Trusts were replaced by the NPS and the outside companies known as CRCs.

7 Ms Robinson is Deputy Director of NPS in London and assumed this post on 1 June 2014. She is a senior manager and currently has responsibility for over 15,000 offenders who are judged to be high risk, as well as over 1300 staff. She has been a senior leader since 2005. She described her overall experience to us and we are satisfied that she was able to speak with authority about the matters we now turn to. She told us that a "holding position" was adopted after TR (i.e. April 2014) in relation to staff that were on secondment. This came about because terms, conditions and practices had, as we understand it, to be blended with those obtaining in the civil service. She told us that some policies came into effect after TR but that until they were formulated they worked to what were known as the legacy policies. The new set of harmonised policies only came into existence on 1 June 2016. It was agreed before TR that people would stay where

they were, but they would no longer be described as being on secondment. A pragmatic view was taken. Fixed term secondments would be allowed to expire and although people were encouraged from this date to move on, it was not enforced. The position was the same in relation to those people who are on an extended secondment, as was the Claimant. She referred a number of times to the legacy policy and we accept that, generally, management did not enforce mobility so that people were compelled to move around. She said this happened in other divisions but it did not affect the staff she was responsible for. We have little doubt about the accuracy of the evidence she gave us. It was put to her that she had overplayed or overstressed the question of mobility to which we will turn in the next paragraph; and it was also suggested to her that in due course in the chronology, when she came to deal with the Claimant's appeal, she deliberately ignored the possibility of a finding of race discrimination because it would be embarrassing or inconvenient. She denied these suggestions and we will return to this when we come to the appeal.

8 The mobility issue relates to the old policy or practice when someone such as the Claimant was moved into a post on what was described as secondment. All of the Respondent's witnesses have said that there was an expectation to move on; and the rationale was, simply, that in a specialist post of this sort, employees were expected to move after the secondment had finished. The purpose of moving was (a) to allow others to move into these areas of specialism; and (b) to enable the post holder to return to the field (for example to a Court or prison environment) where they could usefully employ and disseminate their specialist knowledge. However, the Claimant had long gone past her initial term of secondment and it had been extended up to the point of TR. The question has arisen whether TR gave her a right to permanency, in such clear terms that the long-standing and existing expectation that staff on secondment would move on was, in reality, abandoned. The Claimant has no substantial evidence to rely upon and asks us to make this finding, largely as a matter of inference. The witness evidence from the Respondent is, in our view, more concrete. We accept that in the legacy period after April 2014, and up to June 2016, there was no abandonment of the encouragement or expectation for secondees to move around. The reasons we have set out above, we find, still obtained and there was no good reason why such employees should not return to the field if an appropriate post could be found. As we have indicated, there was no compulsion employed, at least in the SFO area, but these findings are important for the understanding of what occurred after April 2014.

2013

9 On 20 August 2013 (page 121) the Claimant received a letter from an HR adviser. This recorded that her secondment in the SFO team had previously been extended to September 2013 and that this had to be reviewed. The end date could be extended until the end of October 2013 and she was informed of six current available vacancies at band five. On 21 October 2013 the Claimant raised a grievance which we have in the bundle between pages 151 and 155. She complained about the short notice that she had been given and also that the notified posts were largely unsuitable. She said that she was being treated differently because other SPOs were not being asked to move. She said there

was no equality. She also said that she was being discriminated against in relation to band four posts that had been offered to her, these being a band beneath her current grade.

10 Management accepted the Claimant's argument that she should not be moved at that point. The next day, 22 October, Ms Davies wrote saying that as the organisation was "… so close to splitting … [we] felt that it was not appropriate to move you at this point and a decision will be made in writing to you that your secondment will continue for now." On 22 November 2013 HR wrote to the Claimant at page 164 saying that "… the planned move from the SFO team which was due to take place, is no longer going ahead and therefore you will now remain in your current position." It is clear that there was an informal discussion initially on 11 October; that on 16 December the Claimant asked for the grievance to be taken forward formally; and that it did proceed in that way. However, this entailed the Claimant submitting a second grievance on 27 March 2014.

2014

11 This grievance was in substantially the same terms as the earlier one although there was some amendment to the outcome that the Claimant desired. The outcome letter is dated 16 June 2014 from Mr Davies, Trust Secretary LPT. We were not taken to the outcome letter and it does not form an allegation in the claim.

12 Ms Howson was the Claimant's line manager until October 2014. In the list of issues the claim is made that Ms Davies reduced communication with the Claimant following the grievance of October 2013. No specific allegation to this effect is made in the period October 2013 to October 2014. It was in that latter month that Ms Davies became the Claimant's line manager on a temporary basis. She fulfilled this role until Ms Ambrose arrived in March 2015. Further, when she had taken over in October 2014, there is no specific allegation made against Ms Davies until the beginning of the next year. However, the Claimant does maintain that after October 2013 there was what she terms "a noticeable reduction" in Ms Davies's communication with her. This is too generalised to support any findings that we can make and it has received virtually no attention in evidence.

2015

13 In January 2015 the Claimant maintains that Ms Davies did not ask her to chair a meeting when she ought to have done so. Mr Edwards was asked to chair the meeting. The Claimant is more senior than Mr Edwards and she says that she lost out on the opportunity to diversify her skills. We have no reason to doubt the evidence that was given to us by Ms Davies. The Claimant made no complaint about this at the time. Ms Davies says that she was out of the office when she had to approach the team to find somebody to chair a meeting in her absence. She could only ask the people who were present. We accept this.

14 On 16 March 2015 Ms Ambrose became the Claimant's line manager. She came to the UK from South Africa in 2000 and became a permanent probation officer in October 2001. She was promoted to the band six SPO position in March

2015. The first meeting between the two women has given rise to complaint against Ms Ambrose. It was on 24 March 2015 and it was described in the electronic invitation as an "initial meeting." We accept Ms Ambrose's evidence that she held the same meeting with her other reports. The Claimant was asked how long she had been in the team and said 5½ years (she had in fact been there longer) and Ms Ambrose asked why this was, given that secondments were time limited. We find that this meeting had the consequence that the two of them got off on the wrong foot. Ms Ambrose, as we accept, believed that the Claimant was on secondment and was surprised that she had been in the team so long. The Claimant, for her part, thought that Ms Ambrose was trying to get rid of her. Ms Ambrose asked her whether she would like to be supervised monthly, bi-weekly or weekly. Supervision does not of itself connote performance that is lacking and is a term used to describe regular meetings with the manager. Nevertheless, the Claimant did take the conversation amiss, because she thought that Ms Ambrose might be hinting at performance issues. We are satisfied that she had no such thought in mind, but the mistrust is evident in the Claimant asking her whether she was trying to get rid of her?

15 On 31 March 2015 there occurred a major disagreement between the Claimant and her manager and this is relevant to issue 3(i). The Claimant formed the view that Ms Ambrose was over-scrutinising one of her pieces of work at her computer. The Claimant was employed largely to deal with reviews of probation files that have involved further serious offences being committed. She asked for a quiet meeting with Ms Ambrose away from the workstation and the Claimant's account is set out in paragraphs 39 to 41 of her witness statement. On any objective view, this was another fractious conversation between the two of them. The Claimant told Ms Ambrose that she was being too closely supervised and micromanaged. From the Claimant's own account it is evident that they each accused the other of watching the other. At one point the Claimant states that she told Ms Ambrose that "I had heard things about her and that I wanted to give her the benefit of the doubt, but that unfortunately she was proving the rumours to be true." We find, on the basis of what the Claimant told us, that the rumours were that Ms Ambrose treated black employees less favourably than others and that the Claimant had heard this before Ms Ambrose took over. She alleges that Ms Ambrose raised her voice at one point and we suspect that she may have done so given the context of a heated interaction between them. We are also of the view that in all probability the relationship had at this point broken down and it is notable that the Claimant refers to a "toxic, oppressive and hostile environment" that she alleges had been created by her line manager.

16 On 23 April 2015 (page 243) the Claimant asked Ms Ambrose if a review that she was working on could be converted to a sessional review, as they are termed. When these are allocated they are completed by the SPO outside normal hours and are paid as overtime. The relevant issue here is 3(k), alleged lack of sessional review work allocated to the Claimant by Ms Ambrose. The manager's explanation is set out at paragraphs 69 to 71 of the witness statement. This particular review was already overdue and Ms Ambrose accepts that she did not agree that it could be dealt with as a sessional.

17 On 7 May 2015 Ms Ambrose notified the Claimant of a job vacancy and this elicited the response that: "I was aware of this but although the job itself would interest me, I don't want to be living out of hotel rooms and away from home. However thank you."

18 Another vacancy was notified to the Claimant by Ms Ambrose on 27 May in these terms: "this came out while you were on leave, and I wanted to make sure you didn't miss it …"

19 We next turn to allegation 3(j) which is the unequal allocation of work to the Claimant following Ms Jarrett's sickness absence. The Claimant was one of three in the team and the other two were Mr Edwards (white) and Ms Jarrett, who is black. The Claimant's account in her witness statement sets out the disparity in duties that she saw on the rota and also the short email correspondence, but it omits any relevant context. Ms Ambrose deals with matters in paragraphs 77 to 82 of her statement. Ms Jarrett was out of the office undergoing surgery, between June and August. She did work on the Risk Escalation Rota ("RER"). Ms Ambrose has stressed throughout her evidence that she worked hard to devise a rota and we accept that it was not an especially straightforward task. Further, the Claimant had asked not to be given RER duties for more than two consecutive days and took the view that the same should apply to Mr Edwards. In an attempt to balance the allocations, the rota she came up with had one extra day's duty per month allocated to the Claimant, and this was over two consecutive months.

20 On 3 June 2015 the Claimant wrote an email pointing out the two extra duties that had been allocated to her. She also dealt with the allocation of Mondays and Fridays and noted that this was "slightly more equitable." She ended by asking for the rota to be reviewed. Although Ms Ambrose has characterised this email as rude and disparaging, that is an over-reaction, although we accept that she was very frustrated to receive the complaint (because of the time that she had spent on devising the rota.) After a polite chasing email from the Claimant, she responded on 9 June: "I look forward to seeing the new rota as you propose a more equitable distribution of duty." The Claimant responded the same day with proposed changes and Mr Edwards agreed to this (he now worked on one occasion for three days in a row.)

21 Issue 3(g) (Ms Ambrose giving an objective that the Claimant should apply for other posts; and her subsequent decision to put a line through this objective rather than completely deleting it in the document). This refers to a meeting between the two of them on 9 July 2015.

22 The broad finding we make is that there was some discussion of the rota issue that we have dealt with above and they then moved on to talk about work load. The conversation turned to the status of the Claimant's position in the team after TR and it is clear, as we find, that Ms Ambrose still thought that the Claimant was on secondment. At page 277 is the email of 15 July that the Claimant raised to record her version of the discussion. It is evident that Ms Ambrose held a letter dated 2013, but that the Claimant said that she had a later letter which she (the Claimant) would look for during her forthcoming leave. Ms Ambrose stated that she had seen nothing in the file and that nothing had been handed over by Ms

Howson. The suggestion that has emerged in evidence that Ms Ambrose was being disingenuous about this at the meeting has no foundation and is inherently improbable.

23 The discussion went on, in the Claimant's note, to deal with two options. The first was based upon the secondment having ended. The second was based upon a possible restructuring of the SFO work. In understanding the tone of this meeting and also how the discussion progressed, we have also looked at pages 585 to 586 which sets out an account by the Claimant and augments some of what is stated in the 15 July email. It is important to read that email as a complete document. When we do so, we are able to find that the first option was based upon the Claimant being, in effect, on secondment. She would be looking at other posts and she expressed an interest in the extremism unit. We find that as a result of the Claimant's interest Ms Ambrose managed to stop the advert for the extremism unit from going out, and this was the evidence we received from Ms Hubbard, who had placed the advert. The second option involved a potential restructuring and Ms Ambrose is recorded as saying that there would be interviews for the new central team and that existing members would not simply be co-opted to that new team. This is the reason that she is recorded as conveying to the Claimant that it would be better if she moved rather than be pushed out: it was an express reference we find, to the second restructuring option which might leave the Claimant at a disadvantage. It is unlikely, on the balance of probabilities, that she used the words 'pushed out'. The explanation she gives at paragraph 30 of her statement is, in our view, to be preferred. She was telling the Claimant that in a future scenario the Service might have to move her.

24 The note also confirms that they spoke again the next day, 10 July, and that Ms Hubbard (Assistant Chief Officer) had told Ms Ambrose that she was unhappy with the Claimant being transferred to that unit. The reason was that there had been strong interest shown in the post and people had to apply. Further, she disagreed with people moving from one specialism to another. Ms Hubbard is recorded as stating, at least in words attributed to Ms Ambrose, that she would not speak to the Claimant about the post unless she had applied for it. This is not agreed by Ms Hubbard, and she has stated that she was happy to speak to the Claimant (or anyone else) after the advertisement had gone out. This seems likely. Ms Hubbard was clear in her oral evidence that those currently in specialist posts were able to apply for this particular job in the extremism unit. She also confirmed that it was Ms Ambrose who had caused the advert to be stopped temporarily; and that she had been enquiring on behalf of the Claimant. Ms Ambrose asked Ms Hubbard if it was possible for the Claimant to move into the extremism post. We find that this is what happened and that Ms Ambrose was seeking to assist the Claimant.

25 Before the Claimant went on holiday, Ms Ambrose offered the Claimant a sessional review (issue 3(k)). This had also been discussed on 9 July. The Claimant refused the offer of one of these reviews on the basis that she was about to go on holiday. She makes the claim that the offer was deliberately given to her at a time when Ms Ambrose knew she could not accept. As to whether this inference can be drawn is something we will return to in our conclusions.

26 The Claimant makes the claim that various emails she sent to Ms Ambrose called for a a response and she received none. Going back a little in the chronology, on 3 June 2015 (page 257) she updated Ms Ambrose about her office laptop which had to be rebuilt and had been taken away that afternoon. We do not consider that any sensible criticism can be made of Ms Ambrose for failing to respond. The position is different on 3 August 2015 when the Claimant wrote again to her with a laptop problem. Here, (page 303) she was telling her manager that she could no longer access CRC cases and that this had impeded her ability to do the risk escalation duty work. She said that she had referred the matter to IT support but she asked that their response be chased up again and she wanted to be set up for dual access on the work. There was no response to this email.

27 On 3 August the Claimant wrote an email with two short paragraphs to Ms Ambrose. The first paragraph notified her that she had been summoned to do jury service in September. The second noted that she had not received a response to the earlier notes of the meetings that she sent on 15 July and she said she was forwarding it again in case Ms Ambrose not received it. She ended by saying "if I could have a copy of the letter that you have that would be helpful."

28 On 4 August she wrote again to Ms Ambrose and said that she would be able to talk to the acting SPO about a role at HMP Wandsworth before she went on leave. This email does not form any part of the Claimant's case and we have not been told how matters proceeded.

29 On 6 August Ms Ambrose wrote to the Claimant at page 289: "Hi, I wanted to make sure you didn't miss this given how close you are to taking annual leave. It appeared in today's managers bulletin." An advertisement and job description were attached.

30 On 4 September Ms Ambrose wrote in these terms: "I have found this opportunity on Civil Service Jobs and thought you might be interested. Check it out by clicking…" A few hours later she wrote again and said: "please note the ACO ad that is out at the moment. It might be something you may be interested in. It is based at Mitre House."

31 On 4 September the Claimant sent again to Ms Ambrose the email of 3 August about the laptop and asked for her access to see CRC cases to be checked. There was no response to this email and on 7 September she wrote and said she had not heard from Ms Ambrose and would therefore complete risk escalation duty from home.

32 On 10 September Claimant wrote to Ms Ambrose at 9:22 pm. She was on jury service. In essence, she was recording that both Ms Davies and Ms Ambrose now accepted that secondment had come to an end when TR occurred; and that she could now "stay in the team." This meant that she did not have to apply for other posts. About an hour later she wrote again at page 310. The Claimant was saying she wanted the objective placed on her SPDR (concerning the application for other posts) to be removed. She then went her on to deal with the notification of posts that been advertised. "On another note: thank you for the emails

regarding posts being advertised. However, I do receive the same information, by email, at the same time as you and everyone else. I am concerned that the continuous emails from you regarding other positions outside the unit for eg one sent by you at 07.23 on 4/9/15 and a further email on the same date at 13.45, gives a subtex[t] that you do not want me in the team."

33 She went on in the next paragraph as follows. "Further, it is also my view that together with the recent poor handling and miscommunication of the situation around my supposed secondment to the team, the subjective objective you placed on my SPDR and other incidents i.e. shouting at me on two occasions on 31/3/15 and 24/4/15; giving me more duties on the Risk Escalation rota to cover Jean's absence and how this was resolved; not responding to the majority of emails that I may send you since you have arrived, amount collectively to bullying and harassment. It may be that this is possibly not your intention but you may wish to consider the impact of your behaviour on others, the effects of which should not be under estimated. I am therefore bringing this to your attention in the hope that now you are aware this will no longer continue. Thanks." The Claimant accepted in evidence that she did not refer either to race or to discrimination. The evidence we find credible is, further, that Ms Ambrose and the Claimant spoke about the SPDR face to face after the Claimant returned to work; and Ms Davies, who had been copied in, spoke to Ms Ambrose and left the matter to her to deal with.

34 At page 325 is the SPDR entry that is contentious. Ms Ambrose struck through the words "apply to suitable positions upon completion of secondment to the SFO unit." The Claimant's case is that this is an item of discrimination, harassment or victimisation because the words ought to have been entirely removed rather than merely struck through in a way that shows the original text. On 11 October she asked Ms Ambrose to remove the objective as opposed to putting a line through it: page 320.

35 A further dispute arose in November. Ms Jarrett, the third member of the team, had been ill for about three months over the summer and she returned on compressed hours. This arrangement then ended, but she was still not part of the rota for Mondays. This was for "reasons personal to Ms Jarrett": paragraph 92 of Ms Ambrose's statement. She had earlier agreed with the Claimant and Mr Edwards that they would cover during the sickness period and following; and she did not consider reverting to them at this point as the arrangement seemed to be working well.

36 On 30 November the Claimant wrote to her: "I understand that Jean is no longer working compressed hours. Is there a reason why Jean is not rotated to cover Mondays given this development." She then wrote on the same day to Ms Jarrett saying that she had asked Ms Ambrose why Ms Jarrett was not covering Mondays and that her enquiry was "in the spirit of fairness and transparency…" Ms Jarrett responded within the hour (page 338) in a short reply from which we can infer a degree of irritation and even some sarcasm. On 4 December the Claimant replied to her at page 339. She said that there had never been a trial period when, perhaps, there ought to have been. "It is my view that was a failure on the part of the manager." She went on to make various other criticisms of management, particularly in relation to not consulting with herself or Mr Edwards.

We would add that on the basis of the evidence received, the Claimant was writing these emails on her own behalf and was only copying in Mr Edwards as a matter of courtesy. She also copied it to Ms Ambrose.

37 Ms Ambrose was affronted when she received the Claimant's email, not least because she thought that her managerial authority was being undermined. She spoke to her manager, Ms Davies, and the latter agreed. Ms Ambrose then met the Claimant. We find that Ms Ambrose felt strongly that the Claimant had corresponded with her colleague in inappropriate terms and it is probable that she raised her voice during this discussion and in the course of rebuking the Claimant. Although they disagree about the precise terms used, Ms Ambrose accepts that she described her behaviour as "completely unacceptable." She told her that she was trying to bully Ms Jarrett into altering the arrangements and we have no doubt that she used the terms 'unprofessional' and 'undermining.' She demanded that the Claimant apologise to Ms Jarrett in public, given that she had allegedly bullied her in public. Whatever words were used she made it clear, we find, that this was, in her view, a reasonable management instruction. It follows that a refusal to apologise publicly might have disciplinary consequences for the Claimant.

38 Ms Ambrose followed up with the email of 7 December at page 340. This stated that the Claimant's email was "… unprofessional, undermining and bullying…" and in breach of the Civil Service Code of Conduct. She said that a repeat of the behaviour would be dealt with under the disciplinary code; and that the instruction still stood.

39 On 9 December the Claimant submitted her third grievance and the text at pages 344 to 348 needs to be read in full. She ticked boxes for discrimination, harassment, bullying and victimisation on grounds of ethnic origin. At page 346 she set out that the entire course of conduct she has described in the grievance amounted to discriminatory treatment.

40 Mr Matharu dealt with the grievance. He is the Head of Performance and Quality for the NPS, London. It was Ms Davies who asked him to hear the grievance as an independent manager. It was the first grievance that he had dealt with within NPS, although he has dealt with them previously in the probation service. The allegation is made by the Claimant that his conduct of the grievance investigation was discriminatory or harassment or victimisation. He met with the Claimant on 22 December 2015 and the outcome of 29 January 2016 is at pages 412 to 414. The grievance was partially upheld although the definition at page 413 needs to be noted, viz that this means some elements of the grievance were resolved as per the employee's required outcome. Mr Matharu accepted the evidence Ms Ambrose gave, that she often forwards job opportunities to team members, colleagues and friends "… and was able to give me examples of alerting all members of the team to job opportunities either by email or verbally." He then noted that the emails had ceased once the Claimant made this request. He thought that after 10 September the discussions between the Claimant and her manager ought to have been more formalised; and that her feelings about bullying and harassment should have been addressed directly. This led him to conclude that "how you have been made to feel" required resolution and he recommended mediation.

41 He dealt in summary form with his various investigations about workload. In relation to the risk escalation rota he saw no evidence of any inequity in the period October to December 2015, because Mr Edwards, the comparator, had done one extra duty. This would, nevertheless, benefit from mediation as well. He considered that the Claimant's 4 December email had the potential to cause upset or impact negatively on Ms Jarrett. He accepted that there was no intent to cause upset to colleagues on the Claimant's part.

42 The summary was as follows. "In summary, whilst I do believe there has been a breakdown in communication and your working relationship with Ms Ambrose, my investigation does not lead me to conclude that Ms Ambrose has acted in a way that amounts to harassment, bullying and discrimination. I cannot see that a formal warning has been issued in relation to the email matter. Whether this was handled in the best possible way by both parties is questionable and that is why I believe that this does need to be explored further in Mediation. I would want one of the desired outcomes of Mediation to be for both parties to reach consensus on the validity of the previous management instruction to apologise to your colleagues. Further, I would hope that the process of Mediation will help you rebuild your relationship with Ms Ambrose and ensure that she is aware of the impact of her behaviour is on you, and vice versa; and that you are both able to appreciate and understand the circumstances that have made, or might in future make, you feel victimised." The specific recommendations can be seen at page 414 and the last of these reads: "5. In addition I also strongly recommend that both parties undertake the Unconscious Bias training (e-learning as a minimum) available through CSL. The e-learning only takes an hour and the course will help participants understand unconscious bias and how it affects attitudes, behaviours and decision-making."

43 The Claimant submitted an appeal on 8 March 2016. Ms Robertson was the appeals officer. The grievance appeal hearing was on 6 April 2016 and the Claimant was represented as she had earlier been at the grievance itself. Mr Matharu was called to give his evidence and it is clear from the detailed notes that his reasoning was set out at length to Ms Robinson; and that he was also questioned about it. One of the matters he made clear was his view that the management instruction to apologise should be withdrawn. We omit making further reference to the detailed notes. These include the closing statement from the Claimant in which she made it plain that she was not content with some of the answers that Mr Matharu had given.

44 The next matter to record is a contemporaneous complaint that the Claimant made to Ms Davies on 12 April 2016 at page 501. "After some reflection overnight, this is to register my disappointment that you failed to acknowledge me, a member of your department yesterday at approx 13.55 at Borough High Street. This is when we saw each other as we were on the same side of the street but walking in the opposite direction. I said "hi" to you as you approached and you ignored me and looked the other way." In response Ms Davies said: "Sorry Marie did not see you was probably rushing as usual on my way to MoJ when you next in we can talk. As you can imagine things somewhat fraught with the pressure of

SPDR. I apologise but did simply not see you as you can see by the time of this email working long hours at the moment." (Some of text corrected.)

45 Ms Robinson's appeal outcome letter of 14 April 2016 is at pages 502 to 505. We extract some of the conclusions. She was of the view that being sent the job opportunities by email was neither bullying or harassment, but was supportive management. As to the mobility dispute, she stated that a line manager could legitimately consider the mobility of staff and team members. She said the staff in specialist roles had been expected to progress and move to other areas of the service. This was not bullying or harassment. There was no pattern of unwanted or inappropriate behaviour. She noted Mr Matharu's finding that Ms Ambrose at his hearing had demonstrated a tendency to raise her voice. She accepted that management had in April 2015 missed an opportunity to address her concerns raised in emails, either formally or informally. Ms Davies would be reminded of her responsibilities as second line manager. Of the 4 December email to Ms Jarrett, she also thought that the tone and detail was inappropriate and that there had been a breach of Ms Jarrett's confidentiality. Ms Ambrose was right to challenge the Claimant about it. Her email can be seen as "insubordination of management and unacceptable behaviour." She also thought it misunderstood the flexible working policy. A team-wide collective agreement was not necessary and the responsibility for flexible work arrangements was with the line manager.

46 We omit the detailed further conclusions concerning the management instruction warning and also workload. The conclusion was that the Claimant had not been treated unreasonably and had not been diminished by Ms Ambrose's actions. The appeal was partially upheld in respect of the failure to respond to her email of 10 September 2015 but otherwise it was rejected. Ms Ambrose had been off sick with a serious condition from February 2016.

Other findings

47 Sessional reviews. We have touched on this topic in paragraphs 16 and 25 above. These reviews were allocated to employees for completion outside normal working hours and those undertaking them were paid additional remuneration. Mr Bowen was a reliable and accurate witness, in our estimation. He is a Business Service Manager in the London division. He is an administrator and is not a probation officer. He was instructed by his manager to allocate these reviews. The excess cases are called 'sessional work' and are undertaken as overtime. Some of the people qualified to do this work were not currently part of the SFO team. Mr Bowen maintained a schedule of the reviews. He had no right, as we find, normally to allocate reviews himself, without management instruction.

48 We accept that the SFO team members had no prior entitlement to the reviews. Mr Bowen's description of the system in paragraphs 15 to 18 of the witness statement seems to be unimpeachable. From 4 October 2014 to March 2015 there was no manager in post to instruct him on the allocation of reviews. (Ms Howson had previously given him instructions.) He did not know about the workloads. For this period he had to allocate reviews outside the team: paragraph 24. Further, no team member asked him for a sessional file. Indeed in February

2015 he passed one of the Claimant's reviews to Ms Flynn, outside the team, and the Claimant found this to be of assistance to her (page 209A).

49 After Ms Ambrose took over in March 2015, she was allowed to allocate a review to herself, so as to get a feel for the work. She accepts that it was several months before she offered the Claimant a sessional file. Paragraph 58 and following of her witness statement describe the system that she adopted for allocation generally: "how I allocate them depends on the capacity of people to take them and the complexity of the files… and business concerns…" She tried to balance the spread of complex and less complex files. She also regarded the Claimant as particularly experienced and therefore capable of handling the more complex cases.

50 Ms Ambrose offered a sessional review to the Claimant in July, after the Claimant had raised the question. The allegation now pursued is that this was disingenuous because Ms Ambrose knew that the Claimant was going on holiday, however there is no basis for such a finding. On the contrary, the SFO team was under pressure and the evidence is clear in this regard - see paragraphs 64 to 65 of Ms Ambrose's witness statement, which we find to be accurate. She had not wished to add to the workload of either the Claimant or Mr Edwards. The business rationale also suggested that the non-team members completed the shorter reviews more cheaply. Ms Ambrose only allocated files to the Claimant or Mr Edwards once they were clear of their backlog. She was trying, consciously, not to overload the Claimant. Race was, we find, an irrelevant consideration.

51 After February 2016 Ms Ambrose was absent and Mr Bowen reverted to his previous practice of only allocating sessional reviews to team members when they asked. Ms Jarrett asked and was given one. The Claimant on 11 April wrote to Mr Bowen: "… I remain available to complete sessional reviews to support the team." He responded by saying he would soon give her the next one on the list. She said she wanted to choose which review to take: page 508. Mr Bowen did not respond and perhaps that was an oversight. In evidence he was adamant that the Claimant could have looked on the system and chosen a file. The suggestion put to him that he did not want to allocate a review to her has no support anywhere in the evidence. We find that he was content to do so, but that the Claimant did not follow up her last email.

52 Ms Francis's situation has been brought into the case. In April 2011 she applied for the post of Assistant Chief Officer. She was an SPO. She failed in this promotion and subsequently succeeded in a tribunal claim for direct race discrimination, heard in November 2012. She is a black employee. The recruitment exercise in question involved nobody who features in this case. In April 2015 Ms Ambrose, as we have noted, took an SFO review for herself. The SPO involved in the case was Ms Francis. Ms Ambrose considered that Ms Francis had not properly understood the MAPPA process. Ms Francis objected when this appeared in the subsequent report and part of her complaint was about the behaviour of Ms Ambrose during an interview. Specifically, she alleged that she had raised her voice at various points. She wrote a complaint to Mr Denman, Assistant Chief Officer, Barnet, Brent and Enfield. The outcome was that some

text in the report was removed. This text had suggested a 'learning point' for Ms Francis.

53 A further matter we should turn to relates to issue 3(l) and the lack of any response to the Claimant's email dated 10 September 2015: see paragraphs 32 and 33 above. Ms Ambrose is clear that she did not respond because she thought it inappropriate to do so: paragraph 87 of her statement. She gives various reasons and also says that she had a conversation when the Claimant returned to the office after jury service. This was about the SPDR objective that was one of the matters of complaint.

54 We turn to the 'slotting in' claim at paragraph 3(o). The Claimant relies on two white comparators, Ms H and Ms A. She says that Ms A was slotted into a role and that Ms H had a number of moves and was in essence in the same position as the Claimant. The Respondent says that neither employee was comparable.

55 We find that Ms H's position is not comparable and the evidence is that she could not do her original job (in the field) because her security clearance was removed. She was slotted into a temporary post and, after this, an emergency post. After security matters had been agreed with the Borough Commander, she returned to a job in the field. None of this is comparable to the Claimant's position and their circumstances were not broadly the same or similar. As to Ms A, her secondment ended and she was slotted into a court role. The Claimant's secondment had not ended in similar circumstances and the two situations are not comparable. The Claimant was on secondment until TR and was then a permanent member of the team: see paragraph 32 above.

56 There was an intricate dispute about emails in the risk-escalation box. The Claimant believes that her emails were opened quicker and/or more often than Ms Jarrett's or Edwards's. The evidence for this contention is weak. If it happened, it is difficult to see why this was a detriment to the Claimant. She was a highly experienced SPO who was entrusted with some of the heaviest cases. In any event, we doubt that the allegation is factually correct. We accept that the sender of an email could not be identified in this particular arrangement, until the email was opened. The Claimant requested read receipts, but the other two did not usually do so. The factual basis for the claim is not made out.

<u>The Law</u>

57 Section 13(1) of the Equality Act 2010 provides that 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. Race is a protected characteristic.

Section 23(1) provides that: "On a comparison of case for the purposes of section 13 … or 19 there must be no material difference between the circumstances relating to each case."

Section 27 of the 2010 Act in its material part provides that A victimises 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. A protected act includes making an allegation (whether express or implied) that [the alleged victimiser] or another has contravened the Equality Act.

Section 26 provides that "(1) A person ('A') harasses another ('B') if – (a) A engages in unwanted conduct related to a relevant protected characteristic and (b) the conduct has the purpose or effect of –

(i) violating B's dignity; or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B …

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account – (a) the perception of B; (b)n the other circumstances of the case; (c) whether it is reasonable for the conduct to have that effect."

Section136(2) provides that: 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. It is then provided that this subsection does not apply if A shows that A did not contravene the provision. This provision is mirrored in the antecedent legislation and there is no discernible difference in statutory intent.

As to burden of proof, the older law in **Igen Ltd v Wong** [2005] IRLR 258 still applies and the guidance is as follows (all references to sex discrimination apply equally to all the protected characteristics):

" (1) Pursuant to section 63A of the Sex Discrimination Act 1975, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of section 41 or 42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.
(2) If the claimant does not prove such facts he or she will fail.
(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.
(4) In deciding whether the Applicant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
(5) It is important to note the word 'could' in section 63A(2). At this stage the

Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a Tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.
(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the SDA.
(8) Likewise, the Tribunal must decide whether any provision of any relevant code of practice is relevant and, if so, take it into account in determining such facts pursuant to section 56A(10) SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.
(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.
(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.
(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.
(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

There was further analysis of the burden of proof provisions made by Elias J in **Laing v Manchester City Council** [2006] IRLR 748, as well a re-consideration of burden of proof issues by the Court of Appeal in **Madarassy**. This case has confirmed the Laing analysis. In particular, we refer to paragraphs 56 to 58 and 68 to 79. Paragraph 57, in relation to the first stage analysis, directs us to consider all the evidence. "'Could conclude' … must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it." All the evidence has to be considered in deciding whether there is a sufficient prima facie case to require an explanation.

Submissions

58 We are grateful to Counsel for their detailed written submissions, supplemented orally. Where relevant we refer to some of these below.

Conclusions

59 The first claim of direct discrimination (paragraph 3c) is Ms Davies reducing communication with the Claimant following the 2013 grievance. This includes ignoring the Claimant, avoiding eye contact with her, deliberately not asking her to chair the meeting of January 2015 and deliberately ignoring her in the street. We agree with the Respondent's submission that the early allegation is vague and we have little basis for making any reliable finding that Ms Davies greeted the Claimant less often or was less friendly. However, in relation to two allegations we are clear that the Claimant fails to establish the necessary basis for this claim. First, she was not asked to chair the meeting because she was not on the premises. In our view she has formed the belief that she was being discriminated against, but there is no substance to the allegation. Second, the incident in Borough High Street elicited the immediate response from Ms Davies that she had not seen the Claimant. She apologised. We see no reason to disbelieve her and the findings we make stop short of providing any basis for upholding this claim. The Claimant fails to establish a prima facie case.

60 The second matter under this head is paragraph 3d. We will also deal with 3k. Mr Bowen's evidence was entirely accurate and there is no possibility of there having been any discrimination in the period October 2014 to March 2015: see paragraph 48 above.

61 After Ms Ambrose took over (3k), the Claimant fails to establish any fact upon which a tribunal could find or infer direct discrimination. We expressly endorse the Respondent's submissions on pages 15 and 16 and we not do repeat them, or the statistical analysis of sessional reviews that negatives any suggestion of race discrimination. We reject the criticisms of the Respondent's evidence to be found in the Claimant's closing submissions and the overall suggestion that there were material inconsistencies that are indicative of discrimination. Viewed in context, we have reached the opposite conclusion.

62 These claims are also pursued as victimisation. There are three protected acts claimed: (a) the grievance of October 2013; (b) the formal grievance of 27 March 2014; and (c) the email of 10 September 2015. There are a number of issues around the victimisation claims. The parties disagree as to whether they are protected acts, as defined. They disagree whether Ms Ambrose knew of the first two grievances. They disagree about the reason for the acts of detriment alleged.

63 The October 2013 grievance and associated email are at pages 151 to 155. The context is the particular circumstance of the Claimant's ongoing secondment and the major reorganisation that was taking place. This is made plain by the opening paragraph of the email. The Claimant said she was being treated differently to other SPOs on secondment. She claimed 'discrimination' and in the fuller account she again opened with her detailed circumstances on secondment. Viewed against the wider context, the claims of different treatment and discrimination do not necessarily imply race discrimination. It can be reasonably seen as an allegation of less favourable and unfair treatment, when compared to the other SPOs. We are inclined to accept the Respondent's submission that

these first two grievances do not imply a contravention of the Equality Act. There is insufficient evidence to draw the inference that Ms Davies believed that the Claimant had done a protected act. However, we would not wish to detract from the clarity of our conclusion that, even if these are to be characterised as protected acts, they did not lead Ms Davies to subject the Claimant to any detriment or were the reason for any detriment: see paragraphs 58 and 59 above. As to Ms Ambrose, the claim at (k) has no foundation, for reasons we have already given. The Claimant fails to establish facts that are sufficient to amount to a prima facie case. As a further conclusion, we do not accept that her denials of knowing about the first two grievances must be seen as incorrect, but we regard this as a subsidiary point.

64 Paragraph 3(f) is the questioning of the Claimant on 24 March 2015, as recorded at paragraph 14 above. The Claimant fails to establish facts that overcome stage 1 of Igen. The totality of the evidence and our findings rule out any realistic possibility that the question was related to race in any way. We accept that Ms Ambrose thought that the Claimant was on secondment. It is not open to the tribunal to find that the question was either because of, or related to race, and the burden of proof does not pass to the Respondent. The same conclusion applies to the claim of harassment. We do not consider that Ms Ambrose has been inaccurate or dishonest in saying that she held a similar conversation with others. In any event it was a natural question to ask.

65 The related part of this claim is that the question about supervision is also actionable as direct discrimination, harassment or victimisation. This again does not arise on these facts. The Claimant misunderstood what was being raised and has at some point come to the conclusion that Ms Ambrose was trying to get rid of her, when the reality is that she was trying to assist her when she raised the topic of supervision. There is no detriment.

66 Paragraph 3(g) captures the SPDR objective and the decision to strike through, rather than delete the text. The reality here, as recognised by Mr Bhatt's closing submissions, is that the Claimant believes that Ms Ambrose was trying to remove her from the SFO team. If so, she believes the reason to be either her race, or related to race or to a previous protected act. We reject the allegation made about Ms Ambrose's motivation and we conclude that she was not seeking the Claimant's exit. We refer, among other findings, to paragraph 23 above. The Respondent's evidence was that there was a general expectation that employees in specialist roles would move on. We dealt with this extensively in paragraph 8 above. Mr Edwards, who was not in management, gave evidence which we accepted and which endorsed and matched the evidence of other more senior witnesses. The Claimant fails to establish a prima facie case for direct discrimination, harassment or victimisation. The crossed through words cannot support any claim in the context of these conclusions. Unfortunately, the claim is symptomatic of the relationship breakdown.

67 Paragraph 3(h) is the email correspondence about other job opportunities and a related alleged comment. We see no basis on which the claims could impose any burden of proof on the Respondent. The forwarded adverts, for example, follow from our findings about Ms Ambrose's state of mind concerning

the secondment. There is no sensible basis for inferring or finding that this could be related to race or any aspect of race, or to any grievance. The claim is asserted on the basis that these acts continued the course of discriminatory conduct which, inter alia, led Ms Ambrose to want the Claimant to leave the team. This is not how we would characterise any part of the evidence. The same conclusion applies to the comment "conveying" the meaning that she would be pushed out. Given our findings in paragraph 23, this claim also fails in its various respects.

68 3(i) is the allegation concerning rude and aggressive behaviour. These allegations engage more than the heated meeting of 31 March 2015 and amount to a course of conduct which the Claimant elsewhere says was all designed to get her to leave. Specifically, it is said to be on the grounds of race, or harassment or victimisation and what is said by the Claimant in closing is that Ms Ambrose behaves this way toward black employees. The case of Ms Francis is relied upon to support that contention. This in turn, if correct, would corroborate the rumours that the Claimant had earlier heard.

69 While it is true that Ms Francis's written complaint suggests some discrimination, the evidence that another black employee had alleged that Ms Ambrose raised her voice is not enormously relevant. In particular, Mr Edwards confirms that Ms Ambrose can become "a bit animated". The rude and aggressive behaviour allegation has to be viewed against the background of a poor relationship between these two women. It is undoubtedly the case that the Claimant mistrusted Ms Ambrose and it is feasible that, on occasion, the latter raised her voice, and she acknowledged that she sometimes did so. Otherwise we have little evidence on which we can properly find (or infer) that her behaviour was less favourable treatment because of race or that it was related to race in any way. Even less could it be related to a protected act. Overall, the evidence is diffuse and the tribunal has difficulty making any factual determinations that could pass the burden of proof to the Respondent.

70 3(j) is the allegation of unequal allocation of work following Ms Jarrett's absence. It is a very weak allegation because, factually, the rota was not straightforward; and after the Claimant raised her issue about it, it was amended. There is in the facts we have set out, and also in the wider context, nothing that could suggest that the initial rota was either related to race or compiled because of race or had any connection with a protected act. The facts raise no prima facie case.

71 3(l) is the failure by Ms Davies and Ms Ambrose to respond to the email of 10 September. The evidence overall establishes that in all probability Ms Ambrose did speak to the Claimant about some aspects of her complaint, but she made no notes and this deprives her evidence of chronological precision or detail about the matters under discussion. It is common ground that she did not reply in writing and we understand Mr Matharu to be critical of Ms Ambrose for the slack way in which she dealt with the email. This is a long way from saying that the Claimant's claims for direct discrimination, or harassment or victimisation have passed the test of a prima facie case. Given the structure of her email (eg no reference to race or discrimination and also the terms of the last sentence) her

case has to be that the lack of a written response is either because Ms Ambrose would have responded to a person of a different race; or in some way related to race; or was because of a protected act. In our view, this is artificial and unrealistic. Ms Ambrose was, we conclude, inclined to deal with matters informally, but she would have reacted in this way in identical circumstances (Including the previous chronology) whatever the employee's race. If her way of dealing with it now seems a little slipshod, which it does, there is nothing to suggest discrimination, harassment or victimisation.

72 3(m) is Ms Ambrose's reaction to the email to Ms Jarrett of 4 December 2015. Our findings are at paragraphs 35 to 38. The claims of either direct discrimination, harassment or victimisation are unsustainable. Ms Jarrett did not appreciate the email; and Ms Ambrose was considerably affronted and annoyed. None of this has any connection with the Claimant's race. Two senior managers in the grievance and appeal process took a similar view, as we have recorded. There is nothing in the evidence to suggest that they were being disingenuous or evasive and we would conclude the opposite. The claims do not overcome the first stage of Igen.

73 3(n) claims victimisation and direct discrimination in the alleged failure properly to investigate the grievance and also deal with the appeal. However, in submissions Mr Bhatt says this is victimisation. He says that the approach of Mr Matharu and Ms Robinson was flawed, because they "simply took LA's word for whether she had sent job vacancies to other team members." They should have pressed Ms Ambrose to disclose the emails. The reason they did not do so is because they feared, if they had investigated properly, that they would have to uphold the complaint of discrimination.

74 Additionally, the Claimant has alleged a culture of racism and it is at least inferred in this part of the claim that the two managers were covering up a possible finding they would be bound to make if they looked at matters properly. Ms Prince is correct to gloss this as 'closing ranks' and not taking the grievance seriously. Therefore, the managers' failure to do so is said to be because of the nature of the Claimant's grievance and amounts to victimisation.

75 We are obliged to look at all the facts we have found in the round. The Claimant must either establish, or we must find, facts from which a properly directed tribunal could either find or infer victimisation, ie subjecting her to a detriment because of the doing of the protected act. In the circumstances of this claim, we would have to reject Mr Matharu's evidence as inaccurate, whether because he was knowingly covering up his victimisation, or because he was deluding himself into thinking he had carried out a fair investigation when, in reality, he was, possibly subconsciously, steering clear of areas that might embarrass the organisation. We do not conclude that this is what he was doing. The investigations were reasonable and he was not unsympathetic to some aspects of the grievance. He was adamant in cross examination that he took the complaints seriously and also that he was trying to see if there was evidence of bullying, harassment or race discrimination. We accept the accuracy (as well as the strength of feeling) of his concluding remarks: "Bad p.r. was not in my mind. It was not a consideration at all. If I discovered discrimination I would expect it to be

dealt with. I am not going to be responsible for a cover-up or an exercise to avoid a bad press." We regard him as having been accurate in his evidence and we conclude that on this aspect of the claim, no prima facie case has been made out.

76 As to Ms Robinson, the same conclusion is just as clear. She has given a weight of evidence about the job vacancy emails and the expectations about mobility: see paragraph 7 above. She said, and we accept, that she would expect managers to send such emails to staff. She added that she has done so herself. She knew of the practice and had received one herself. Nor was there any evidence of a need to force the Claimant out of the unit. Against this background, seeking documentary proof that Ms Ambrose had sent similar emails in the prison system was of no relevance to her. The suggestion that her failure to follow this line of investigation raises any prima facie case, is impossible to sustain, not least when it is remembered that at the time of the appeal Ms Ambrose was seriously ill and away from work.

77 3(o) is also inherently weak as a claim of victimisation or discrimination. This relates to the extremism job and the surrounding circumstances. The Respondent concedes that the Claimant was told that she would need formally to apply for band five roles in other teams and could not be slotted in. All the relevant witnesses agreed that this was the policy and it was clearly established before us. The two comparators were not in substantially the same position and are not comparators for the purposes of the Act. The differences are highly material. The specific act of victimisation alleged is the Claimant being told that she would have to apply for roles and this claim necessarily fails as no facts have been established that could sustain it.

78 There is an associated claim here which we deal with, although it seems to be outside the list of issues. The Claimant alleges that Ms Hubbard victimised her by requiring the Claimant to apply for the 'extremism' post; and, further, by refusing to speak to her about her interest in the role. These allegations may not have been made when Ms Hubbard wrote her statement. When put to her in cross examination she said that she was unaware of the protected acts of 2013, 2014 or December 2015. We have no reason to doubt this and it defeats the victimisation claim. The suggestion that she must have known of them and that, therefore, she regarded the Claimant as a problem employee is pure supposition, has no evidential support and was denied convincingly. However, we should go further, as Ms Hubbard insisted she would have said to anyone else that they had to apply for this role, as the normal open competition recruitment process applied. We have accepted that evidence. She was not prepared to consider anyone being 'slotted into' this specialised post.

79 The second limb of this claim is that Ms Hubbard was deliberately disadvantaging the Claimant by saying that she would only talk to the Claimant after she had submitted an application. The evidence that she said this (when she denies it) is very insecure and the probability is that she would speak to her, or anybody else, once the advert had been published. In the view of the tribunal, it is notably unrealistic to suggest that an experienced SPO would expect to have to make an application before having a conversation about the post. The direct discrimination claim cannot succeed in transferring the burden of proof as there is

no evidence to infer that Ms Hubbard would have acted differently in the case of a white SPO in the same circumstances. In any event, whatever she said to Ms Ambrose for onward transmission to the Claimant cannot be victimisation if she knew nothing of protected acts.

80 3(p) is claimed as harassment as well as victimisation or direct discrimination and relates to the failure to respond to emails. Mr Bhatt at one stage describes this as a further example of 'mistreatment' and it is evident that it partially depends on previous aspects of the claim having been made out, although it needs also to be treated as a free-standing allegation in its own right. However we regard it, Ms Ambrose's failures connote no direct discrimination or victimisation on a conscious or unconscious basis. The six emails run from July to December 2015.

81 The first, of 15 July, required no response as the Claimant recorded the recent conversation and ended by asking for a response if she had missed anything. This falls away. The second asked for an IT issue to be "referred up" and it is not clear that the failure to reply is a matter of criticism. The third is the more substantial email of 10 September (paragraphs 32 and 33 above.) It ends with the expressed hope that Ms Ambrose will cease and desist her behaviour. It is, to that extent, confrontational, and a reply would have been very sensible, but the failure to do so is not a matter that, in the context of all the evidence, amounts to a prima facie case of direct discrimination. There is no link to any protected act. The failure does not relate to race. Ms Davies was copied in, but is even further removed from any realistic claim. She spoke to Ms Ambrose and Ms Ambrose did speak to the Claimant. However, Mr Bhatt makes submissions based on the email not having been responded to in any meeting point by point. None of this is of great assistance to the tribunal. The claim is that the two managers were engaging in acts of discrimination, victimisation or harassment when they (or Ms Ambrose alone) chose not to write. It is not a realistic claim in our view. From the decision not to write, but to speak to the Claimant, we would infer no tortious conduct under any of the three statutory provisions.

82 We agree that the fourth email (page 316) and the sixth (page 381) called for no specific response. This leaves 30 November 2015, a two-sentence email that asks whether there is a reason why Ms Jarrett was not rostered for Mondays. As matters transpired, events moved on to the more contentious 4 December email from the Claimant. Ms Ambrose's statement and evidence betrays some irritation that the Claimant was interfering in matters that did not concern her, but is a long way from inferring that the failure to reply (before matters escalated a few days later) was because of her race, any protected act or was related to race. We regard it as fanciful to draw such an inference.

83 3(q) is alleged close supervision. The factual allegation for these claims is not made out – see paragraph 56 above.

84 3(s) is being given more complex cases. This claim wholly fails. The Claimant was given complex cases as a tribute to her experience and judgment. She was the most senior team member. It is not a detriment, it has nothing to do with her race or any protected act.

85 3(t) is said to be the delay in clarifying whether the Claimant was on secondment. This has substantially been dealt with above. The confusion was considerable and has been dealt with satisfactorily by the Respondent's witnesses. Viewed in the context of all our findings there is no possibility of any prima facie case arising, in either of the three tortious claims made.

86 Therefore, none of these claims succeed on their merits. There is an alternative limitation defence raised by the Respondent. As the Claimant has claimed that six named employees of the Respondent have, in the broadest sense, discriminated against her, and has failed to establish these claims, there is no continuing act. This means that, as Ms Prince submits, between 6 and 10 of the claimed detriments are out of time. The question of extending time does not arise on our findings. If it did, we would have ruled that it is not just and equitable to extend time, where such an extension was sought. The Claimant had previously brought tribunal proceedings. Most of her complaints are said to arise after the decision in her 2014 grievance, in June. She says she then researched matters and concluded that she was already out of time. She made no claim. There was then a further period of delay before she brought proceedings in 2016 for the alleged discrimination she experienced from October 2014 to March 2015. She relies on her poor health but the evidence that this was the reason for taking no action is difficult to accept. From March 2015, she says she experienced further discrimination after Ms Ambrose became her manager, but again, for the third time, took no action and was only galvanised to do so after December of that year. These are not persuasive arguments for extending time on a just and equitable basis and we would have declined to do so, had the issue been a live one.

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Employment Judge Pearl
31 August 2017

ANNEX A

IN THE LONDON CENTRAL EMPLOYMENT TRIBUNAL Case No: 2206113/2016

BETWEEN:

MS MARIE HEERAH

Claimant

-and-

THE SECRETARY OF STATE FOR JUSTICE

Respondent

AGREED LIST OF ISSUES

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1. The claims before the Tribunal are:

   a. Direct Discrimination because of race as defined by s13 Equality Act 2010 ("**EA 2010**"), contrary to s39(2)(d) EA 2010;

   b. Victimisation as defined by s27 EA 2010, contrary to s39(4)(d) EA 2010;

   ~~c. Discrimination arising from a disability as defined by s15 EA 2010, contrary to s39(2)(d) EA 2010; and~~

   ~~d. Whistleblowing (detriments) pursuant to s47B Employment Rights Act 1996) ("ERA 1996").~~

A. DIRECT ~~DISABILITY~~ RACE DISCRIMINATION (S13 EQA 2010)

1. Was the Claimant treated less favourably by the Respondent?

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

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44A

3. With respect to paragraph 1, the acts of less favourable treatment alleged by the Claimant are:

   a. ~~In 2013 the Respondent's decision to end the Claimant's secondment to what is now the SFO team;~~

   b. In 2013 HR's attempts to coerce the Claimant into accepting a Band 4 role after the ~~Claimant was informed that her secondment was ending;~~

   c. Ms Davies reducing communication with the Claimant following the 2013 grievance;

   d. Ms Davies and Mr Bowen's decision to allocate sessional review work to other members of staff following Ms Howson's departure;

   e. ~~On 17 March 2015 Ms Ambrose asking the Claimant for proof of her car insurance;~~

   f. On 24 March 2015 Ms Ambrose questioning the Claimant as to why she had been in the SFO team for 5 ½ years and the implicit suggestion that the Claimant required extensive supervision, which was effectively a criticism of her;

   g. Ms Ambrose's decision to include as an objective in the Claimant's SPDR that the Claimant should apply for other posts, and her subsequent decision to merely put a line through this as opposed to deleting it completely;

   h. Ms Ambrose's persistent emails to the Claimant of other internal/external job opportunities, and her comment that it would be better if the Claimant moved rather than be pushed out;

   i. Ms Ambrose's rude and aggressive behaviour towards the Claimant which included shouting at her at various occasions;

   j. The unequal allocation of work to the Claimant following Ms Jarrett's sickness absence;

   k. The lack of sessional review work allocated to the Claimant by Ms Ambrose;

   l. Ms Davies and Ms Ambrose failing to respond to the Claimant's email of 10 September 2015;

   m. Ms Ambrose's reaction to the Claimant's email to Ms Jarrett on 4 December 2015;

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n. Failing to properly investigate the Claimant grievance of 9 December 2015 both at the initial stage and during the appeal process;

o. On 17 March 2016, Ms Davies told the Claimant that she would need to formally apply for Band 5 roles in teams other than in an offender management team as opposed to simply being slotted in;

p. Ms Ambrose failing to respond to the Claimant's work related emails;

q. Ms Ambrose closely supervising the Claimant's work;

~~r. The Claimant being ostracised by her work colleagues;~~

s. The Claimant being given more complex cases; and

t. Ms Ambrose delayed in obtaining clarification as to the position regarding whether the Claimant was on secondment or not.

4. With respect to the issue of whether or not any less favourable treatment has been suffered, the Claimant (who is black and is from Mauritius) relies upon the following comparators:

   a. David Edwards (white British);

   b. Kathryn Hunt (white British);

   c. Claire Ansell (white British);

   d. Hypothetical comparator.

B. <u>VICTIMISATION (S26 EA 2010)</u>

1. Do the following acts qualify as protected acts pursuant to ss27(2)(c) and/or (d) EA 2010:

   a. 21 October 2013 informal grievance;

   b. 27 March 2014 formal grievance;

   c. The Claimant's email to Ms Davies and Ms Ambrose on 10 September 2015; and

   d. 9 December 2015 formal grievance.

2. The Claimant relies upon the alleged acts listed at paragraph A(3)(c)-(t) as detriments, in so far as they post-date each protected act.

3. Did the Claimant suffer the detriments as a result of doing a protected act(s)?

C. HARASSMENT (S27 EA 2010)

1. The Claimant relies upon the acts stated at paragraph A(3)(e)-(m) and (p)-(t) as unwanted conduct.

2. If the Claimant was subjected to unwanted conduct, was it related to her race?

3. Did the conduct complained of have the prohibited purpose or effect?

~~D. DISCRIMINATION ARISING FROM DISABILITY (S15 EA 2010)~~

1. Is the Claimant disabled in accordance with s6 EA 2010?

2. If so, did the Respondent know/should it have reasonably expected to know that the Claimant was disabled?

3. If so, did the Respondent in so knowing treat the Claimant unfavourably as a result of something arising in consequence of her disabilities?

4. With respect to paragraph 3 above, the following arose in consequence of the Claimant's disabilities:

    a. The Claimant requires assistive technology to perform her tasks and therefore required the desk usually occupied by Ms Jarrett.

5. With respect to paragraph 2 above, the unfavourable treatment relied upon by the Claimant is as follows:

    a. Ms Jarrett reacted angrily to the fact that the Claimant required her desk to use assistive technology and was rude to the Claimant in front of other.

6. Was the Respondent's treatment of the Claimant a proportionate means of achieving a legitimate aim? The Respondent relies on the following aim(s):

    ~~a. [RESPONDENT TO COMPLETE IN AMENDED RESPONSE]~~

~~E. WHISTLEBLOWING (DETRIMENTS) (S47B ERA 1996)~~

1. Did the following amount to protected disclosures in accordance with ss43A and 43B ERA 1996:
    a. 21 October 2013 informal grievance;
    b. 27 March 2014 formal grievance;
    c. The Claimant's email to Ms Davies and Ms Ambrose on 10 September 2015; and
    d. 9 December 2015 formal grievance.
2. The Claimant relies on the alleged detriments listed at paragraph A(3)(c)-(t).
3. If the Claimant was subjected to detriments, was the reason for the detriments the fact that ~~she made protected disclosures?~~

LIMITATION

1. Are all, or some, of the Claimant's claims out of time?
2. Do the acts alleged amount to conduct extending over a period within the meaning of s123(3)(a) EA 2010?
3. If not, is it just and equitable to extend time
4. Do the alleged acts amount to a series of similar failures within the meaning of s48(3)(a) ERA 1996?
5. If not, was it reasonably practicable to submit the complaint on time (as appropriate)?

STATUTORY DEFENCE

1. If it is found that the Claimant was subject to race discrimination did the Respondent take such steps as were reasonably practicable to prevent such discrimination?

REMEDY

1. The Claimant seeks the following:
    a. An award to injury to feelings including aggravated and/or exemplary damages;

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b. An award for personal injury in so far as the Respondent's conduct has caused the Claimant to suffer from anxiety;

c. Declaration;

d. An uplift of up to 25% to any compensation awarded due to the Respondent's unreasonable failure to comply with the ACAS Code;

e. Recommendation;

f. Financial penalty to the secretary of state;

g. Interest.

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21.07.2016

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