EMPLOYMENT TRIBUNALS

Claimant:		**Respondent:**
Miss D Kosek	**v**	Aldermore Bank Plc

Heard at: Reading **On:** 11, 12, 13, 14 and 15 March 2019

Before: Employment Judge George
Members: Mr JF Cameron and Mr J Appleton

Appearances
For the Claimant: In person
For the Respondent: Mr S Wyeth of Counsel

RESERVED JUDGMENT

1. The claims of direct race discrimination contrary to sections 13 and 39(2) of the Equality Act 2010 are not well founded and are dismissed.

2. The claims of race related harassment, contrary to sections 26 and 40 of the Equality Act 2010 are not well founded and are dismissed.

3. The claims of victimisation contrary to sections 27 and 39(4) of the Equality Act 2010 are not well founded and are dismissed.

REASONS

1. The Claimant was employed as a Financial Analyst with the Respondent bank between 3 December 2015 and 22 June 2017. After a period of early conciliation that lasted between 15 September 2017 and 15 October 2017 the claimant presented her ET 1 on 14 November 2017, she complained of direct race discrimination on grounds of her Polish nationality, harassment related to race and victimisation. The respondent defended the claims by an ET3 presented on 29 December 2017. The case was case managed at a preliminary hearing on 2 May 2018. Following that, amended particulars of claim were lodged on 13 June 2018 and an amended grounds of response were lodged on 26 June 2018.

2. At the full merits hearing the tribunal had the benefit of an agreed bundle of documents. Both parties had submitted chronologies. The respondent put forward a cast list which was agreed on day one of the hearing. Where it has been necessary in these reasons to refer to individuals who have not given evidence before us, we do so using the initials of their full name as that appears in this agreed cast list.

3. The parties had prepared witness statements which were adopted by the witnesses in their evidence and upon which they were cross-examined. The Claimant gave evidence in support of her case. The Respondent called the following witnesses: David Jenkins, Divisional Finance Director; Priyesh Shah, Finance Director-asset Finance; Christine Madin, HR Business Partner; Beth Roe, then HR Business Partner; Louise Rogerson, Senior HR Business Partner and Leo Mburu, then Finance Business Partner. Ms Mburu was working for the respondent as a contractor rather than an employee and her contract has now come to an end. She gave evidence to the tribunal at a prearranged time by video link from Australia where she is now working. There was no suggestion by the Respondent that they were not responsible for the actions of Ms Mburu when she was acting as their Finance Business Partner and line manager of Ms Kosek.

Issues and preliminary matters

4. Counsel for the Respondent proposed a list of issues at the start of the first day the hearing. It was the subject of some discussion and the Claimant had the opportunity to comment upon it. She applied for some additional factual matters to be included in the claims which the Tribunal had to decide upon and, following our ruling on that, an updated version was agreed on the second day of the hearing. Reasons for our decision on which factual allegations should be included among those which the Claimant could argue to be unlawful under the Equality Act 2010 were given orally at the time and are not repeated here.

5. The issues have been reworded slightly for consistency of syntax and the alleged acts of victimization and harassment have been reordered in order to mirror that of the alleged acts of direct discrimination, for ease of reference. Subject to that, these are the issues which it was agreed by both parties fell to be determined by the Tribunal

   Section 13 Equality Act 2010 (hereafter the EQA)-direct discrimination because of the Claimant's Polish nationality

6. Has the Respondent subjected the Claimant to any of the following treatment:

   6.1. On 19 July 2016, did David Jenkins laugh at the Claimant during a meeting?

6.2. Was the Claimant deprived of the choice/excluded from the opportunity of applying for the Finance Business Partner Role by David Jenkins on 1 August 2016?

6.3. In October 2016, during a Conversation between Priyesh Shah and David Jenkins, did Mr Shah say "*I worked with people from that country. I know what they are like*?"

6.4. Did David Jenkins laugh about DD's departure from the business in January 2017?

6.5. Was the Claimant threatened with disciplinary action by David Jenkins and Leo Mburu during her performance review meeting on 17 January 2017?

6.6. Was any entitlement to a bonus withheld from the Claimant in March 2017?

6.7. Were the minutes of the grievance meeting of 6 March 2018 (prepared by GN, HR Business Partner) and grievance appeal meeting and outcome of 22 and 24 March 2018 respectively (prepared by Christine Madin) inaccurate?

6.8. Did the Respondent failed to investigate allegations of harassment by Leo Mburu made by the Claimant at the meetings of 6 March, 22 and 24 March 2018?

6.9. Was Christine Madin and DF's failure to speak to AF about the Claimant's grievance inappropriate?

6.10. Did Christine Madin disconnected herself from the grievance appeal outcome called of 24 March 2017 because the Claimant said she was being harassed?

6.11. Did Christine Madin pretend she didn't hear the Claimant saying "harassment" during this call?

6.12. Giving the Claimant notice on 22 March 2017 to terminate her employment by reason of redundancy on 22 June 2017?

6.13. Rejecting the Claimant's appeal against redundancy (by Louise Rogerson) of 7 April 2017? The Respondent accepts that it terminated the Claimant's employment because of redundancy and rejected the Claimant's appeal against dismissal.

6.14. Not being informed by the Respondent of a potential role identified in a text message exchange between the Claimant and a former manager on 26 May 2017 (said to be a Cost Analyst Role in London)?

7. Insofar as any of the above is proven, has the Respondent treated the Claimant less favourably than it treated or would treat a comparator? The Claimant relies on a hypothetical comparator and/or Leo Mburu.

8. If so, has the Claimant proved primary facts from which the Tribunal could properly and fairly conclude, in the absence of any other explanation, that the difference in treatment was because of the Claimant's nationality?

9. If so, what is the Respondent's explanation, and does it prove a non-discriminatory reason for any proven treatment?

<u>Section 27 EQA-Victimisation</u>

10. Do any of the following acts alleged and relied on by the Claimant amount to a protected act for the purposes of s.27 EQA:

10.1. the Claimant making a complaint to DD on 18 November 2016 about allegedly being bullied by Leo Mburu: In particular, the Claimant alleges she said the following to DD,

"I have been bullied and put down by Leo Mburu for the last 4 months. It has become a daily occurrence now. I have complained to HR and David Jenkins already, but Leo's attitude towards me has become worse recently… I can provide you with many examples when I was bullied/intimidated by Leo Mburu…";

10.2. the Claimant making complaints about Leo Mburu during the meeting with Beth Roe and Leo Mburu on 30 November 2016;

10.3. the Claimant's grievance of 6 February 2017;

10.4. the Claimant raising concerns during the grievance appeal meeting on 22 March 2017;

10.5. the Claimant mentioning that she was being harassed by Leo Mburu during the grievance appeal outcome call of 24 March 2017;

10.6. the Claimant's letter of appeal against selection for redundancy on 29 March 2017.

11. If there was a protected act, in so far as any of the alleged treatment set out below is proven to have occurred and is a detriment, did the Respondent carry it out because the Claimant has done a protected act?

11.1. Leo Mburu preparing the Performance Improvement Plan ("PIP") for the Claimant dated 21 November 2016;

11.2. Leo Mburu allegedly intimidating and provoking the Claimant in front of the whole office on 22 November 2016;

11.3. Beth Roe allegedly bullying, acting aggressively or acting in an intimidating manner towards the Claimant during the meeting of 30 November 2016?

11.4. Was the Claimant threatened with disciplinary action by David Jenkins and Leo Mburu during her performance review meeting on 17 January 2017?

11.5. Was any entitlement to a bonus withheld from the Claimant in March 2017?

11.6. Where the minutes of the grievance meeting of 6 March 2018 (prepared by GN, HR Business Partner) and grievance appeal meeting and outcome of 22 and 24 March 2018 respectively (prepared by Christine Madin) inaccurate?

11.7. Did the Respondent failed to investigate allegations of harassment by Leo Mburu made by the Claimant at the meetings of 6 March, 22 and 24 March 2018?

11.8. Did Christine Madin disconnected herself from the grievance appeal outcome called of 24 March 2017 because the Claimant said she was being harassed?

11.9. Giving the Claimant notice on 22 March 2017 to terminate her employment by reason of redundancy on 22 June 2017?

11.10. Rejecting the Claimant’s appeal against redundancy (by Louise Rogerson) of 7 April 2017?

<u>Section 26 EQA-Harassment related to nationality</u>

12. Did the Respondent engage in unwanted conduct as follows:

12.1. on 19 July 2016, did David Jenkins laugh at the Claimant during a meeting?

12.2. Leo Mburu allegedly bullying the Claimant from 10 August 2016?

12.3. Leo Mburu allegedly calling the Claimant within 30 minutes of the Claimant apparently complaining to David Jenkins on 9 and 21 September 2016 about Leo Mburu, to “have a go” at the Claimant;

12.4. In October 2016, during a Conversation between Priyesh Shah and David Jenkins, did Mr Shah say “*I worked with people from that country. I know what they are like*?” And did Mr Jenkins and Mr Shah laugh afterwards;

12.5. Beth Roe allegedly bullying the Claimant during the meeting of 30 November 2016 by asking the Claimant: a) how long she had worked

for the Respondent; b) not to make notes during the meeting; and c) not to make secret recordings of her colleagues;

12.6. Did David Jenkins laugh about DD's departure from the business in January 2017?

12.7. Allegedly failing to investigate allegations of harassment by Leo Mburu made by the Claimant at the meetings of 6 March, 22 and 24 March 2018?

13. Insofar as any of the above is proven, was the conduct related to the Claimant's Polish nationality?

14. Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

15. If not, did the conduct have that effect? In considering whether the conduct had that effect, the Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect.

Time limits

16. the claim form was presented on 14 November 2017 following a period of early conciliation between 15 September 2017 and 15 October 2017. Accordingly, and bearing in mind the effects on time limits of ACAS early conciliation, any claim based on an act or omission which took place before 16 June 2017 is potentially out of time, so that the tribunal may not have jurisdiction to hear the complaint.

17. Has the Claimant proven that there was conduct extending over a period which is to be treated as having been done at the end of the period, such that a claim based on the said conduct is in time?

18. In respect of any claim that on the face of it was not presented within the primary limitation period, was it presented within such other period as the Employment Tribunal considers just and equitable?

19. The Claimant had made an application for recordings of a number of meetings which she had made covertly to be played to the Employment Tribunal. She argued in relation to one particular recording (that of a meeting in early September 2016 which we find was probably on 9 September) that the tone of Mr Jenkins's voice in one recording was relevant to the impression which his words caused in her and therefore to our judgment about what was said. We refused her application, but she then applied for a reconsideration on the basis that she had understood Tribunal correspondence (to which she then referred us) to mean that she was permitted to play the recordings but needed to bring the relevant

equipment. Having considered that correspondence, we understood her misconception and reconsidered our decision. We therefore allowed her application, but she was limited to the precise sections of the specific recordings which she intended to refer to in her submissions and which it was necessary to for us to hear in addition to reading in the agreed transcripts of the recordings in question. Full reasons for our initial rejection of the application and the reconsideration were given at the time and are not repeated now.

Findings of fact

20. We make our findings of fact on the balance of probabilities taking into account all of the evidence, both documentary and oral, which was admitted at the hearing. We do not set out in this judgement all of the evidence which we heard but only our principle findings of fact, those necessary to enable us to reach conclusions on the issues set out above. Where it was necessary to resolve conflicting factual accounts, we have done so by making a judgment about the credibility or otherwise of the witnesses we have heard based upon their overall consistency and the consistency of accounts given on different occasions when set against contemporaneous documents where they exist.

21. It is important to make findings about the nature of the Finance Business Partner role because the Claimant's perception about her own suitability for the role and the extent to which she had been fulfilling it underpin her conclusions about the reasons for her treatment.

22. At the start of the Claimant's employment David Jenkins was Finance Director. The Finance Business Partner (initially SC and later Ms Mburu) reported to him and the Finance Analyst (the Claimant) reported to the Business Partner. They all sat in the Invoice Finance Department. Mortgage Finance and Invoice Finance sit within the same division.

23. The first Finance Business Partner to whom the Claimant reported was SC, who left the business on 16 June 2016. It was by all accounts a sudden departure; he did not work his notice period and we heard unchallenged evidence from the Respondent that there were performance concerns about him. Mr Jenkins' evidence was that SC was not doing the trusted adviser aspect of the Business Partner role. By that he meant that part of the function of any Business Partner is to act as a trusted adviser to the senior management team about their particular area of expertise.

24. In this respect his evidence to us was consistent with the information he gave to the Claimant in the meeting which probably took place on 9 September 2016; that which she covertly recorded. We say that the recorded meeting was probably that of 9 September because the Claimant dates it from early September and has only given a detailed account of two September meetings with Mr Jenkins: 9 September and 21 September. The Claimant's transcript of this meeting is at page 254; see in particular at page 257 where it is recorded that Mr Jenkins said that what was needed

in the post holder was a business partnering perspective. Having listened to the recording at the application of the Claimant we find that she omitted details of the conversation in her transcript which are recorded in the Respondent's version of the transcript at page 534e and following. What Mr Jenkins said (as is clear both from the Respondent's transcript and the recording) about the function of a business partner was:

"It is interesting to define what a business partner is – you are essentially their adviser right so it is not just about numbers on the page".

25. This is a contemporaneous explanation of the distinction which Mr Jenkins explained to us, namely that a Finance Business Partner was not simply producing accurate numbers in the accounts to report to the senior management team (hereafter the SLT). Their role was to advise the SLT on trends and on the consequences of decisions in order to help their decision making. We observe that if the Claimant saw SC as a model of how a business partner should be, then it appears that he was not a good model of what the Respondent expected from their finance business partner.

26. Leo Mburu and David Jenkins said that the role needed to be occupied by a fully qualified accountant: Mr Jenkins said that he has never known anyone to occupy the role who was not a fully qualified accountant. It is a Band 3 role within the Respondent's pay structure and we heard evidence, that we accept, that the post-holder would be paid a starting salary of between £70,000 to £80,000. The job description for the role was at page 581. At page 582, it shows that there is a requirement that it be CIMA or ACCA or ACA qualified and, for that reason, we accept the Respondent's evidence about the necessary qualifications. The first bullet point shows that

> *"The business partner is expected to have the key accountabilities of working with the senior management team within Business Finance. He will provide financial information and support on all aspects of the business, including but not limited to, budgetary management, monthly forecasting, business performance analysis, accounting and treasury management, capital utilisation monitoring and weekly, monthly and quarterly reporting."*

27. This is distinguished by the words *"working with the senior management team"* from the equivalent in the job description for the FP&A Analyst for Business Finance which says:

> *"Working within the finance team and with the business you will provide financial information and support in all aspects of the business, including but not limited to, budgetary management, monthly forecasting, business performance analysis, accounting and treasury management, capital utilisation monitoring and weekly, monthly and quarterly reporting."*

28. It is said that the analyst role will develop into business partnering with managers and teams across the division. This distinction was reinforced by Ms Mburu and Mr Jenkins where they said that the Business Partner had responsibility for supporting the senior management and making recommendations in their decision making. The Business Partner's analysis is supported by the preparation of the raw data which was the least important part of the Business Partner role. We accept that distinction and conclude that that was what was meant when Mr Jenkins said that a Business Partner is expected to be a trusted adviser to senior management and that that is what distinguishes them from the Financial Analyst.

29. Following the departure of SC, there was a hiatus of about six weeks before Leo Mburu filled the role of Finance Business Partner. The Claimant said that that happened on 1 August; the Respondent agreed that it was August 2016 and the first meeting between the Claimant and Ms Mburu as her new line manager took place on about 8 August.

30. In that hiatus it is accepted by the Respondent that the Claimant carried out some aspects of activities which sit within the Finance Business Partner's role. She clearly had less supervision during that period. Mr Jenkins' evidence was that he, himself, carried out the trusted adviser aspect of the business partner role. The Claimant did not give evidence of advising senior management beyond attendance at the meeting in July 2016 when she responded to challenges on the figures that had been produced. We accept that the Claimant populated the forecast for Q3F that is at page 286. However, this does not lead us to conclude that overall during this period she was doing significantly more than would have been expected of a Financial Analyst, albeit with less supervision. The judgement and responsibility that distinguishes a business partner from a financial analyst was not hers. She may have gone to a quarterly team meeting on 19 July 2016 that she would not ordinarily have gone to but that does not change our view.

31. One of the accusations against Mr Jenkins is of having laughed during the Claimant's presentation to the 19 July 2016 (issue at paragraph 6.1 and 12.1. above). He says he has no recollection of it. Our view on this incident is that he may have laughed at some point during the meeting, but the Claimant's evidence taken at its height does not amount to more than seeing him laughing. There is nothing in the incident as she describes it to lead to an inference that he was laughing at her, let alone at her Polish accent.

32. The post of Finance Business Partner was not advertised prior to Ms Mburu starting in it from 1 August 2016. The Claimant complains about that lack of open advertisement and about the fact that it was a contractor who was appointed; the post did not go a member of staff and went to someone who was not experienced in invoice finance.

33. Mr Jenkins' explanation for appointing someone, in the person of Ms Mburu, who lacked experience in invoice finance is that what he needed

was somebody with the capacity to question and challenge senior management. Accepting as we do that that is a key element of the business partner's role, we accept that Mr Jenkins wanted to bring someone into the division who had the raw intelligence and the transferable skills that were necessary and trusted that they would be able to pick up details of the business of invoice finance.

34. The Claimant challenged Ms Mburu's appointment with Mr Jenkins in the 9 September 2016 meeting. Mr Jenkins' evidence to us is consistent with the explanation he gave to the Claimant at that covertly recorded meeting. The Claimant makes much of the fact that Mr Jenkins accepted at that meeting that Ms Mburu had no invoice finance experience. However, the reasons he gave to the Claimant then for appointing her were entirely consistent with his evidence before us. Our view is that it was reasonable that he should focus on transferable skills given the importance of the trusted adviser aspect of the role.

35. Conversely, the reasons why Mr Jenkins did not consider the Claimant for the role were also explained to her at that meeting, as we see from the transcript. They were first, that Mr Jenkins did not have the impression that she had capabilities to do the role. He had worked with her directly for six weeks and seems to us to have been well placed to make that judgement. The Claimant was not a fully qualified accountant even at the point that she left the business let alone in July 2016. We find that his judgment was a reasonable one.

36. Secondly, Mr Jenkins had had feedback from the managing director about what was needed in the role and said that Ms Mburu was a better fit. That explanation is consistent with the evidence from Ms Mburu herself to the effect that she had been instructed to introduce more rigour after the departure of a business partner who had been underperforming.

37. There was also the question of practicalities. Leo Mburu was already contracted to the business and was coming out of the end of an assignment so she was available; indeed the business needed to redeploy her to make use of her skills for the remainder of her contract period. The restructuring of the finance department was in development by mid-2016. In those circumstances, the decision not to recruit openly and formally is entirely understandable – there was an urgent need to fill a post which was important in a department which was in flux.

38. Why was the Claimant not considered? Our assessment is that appointing someone with experience at a senior level and a proven track record quickly was entirely reasonable in those circumstances. The Claimant was not fully qualified; she had no senior experience to speak of. Had the Respondent actively considered the Claimant as a candidate (and there is no evidence that they did) we can understand why they might have concluded that it was inadvisable to promote someone unqualified and inexperienced to a position vacated by someone who had been underperforming at a time when a restructuring was in motion. However, Mr Jenkins asked the Claimant to share her product experience with the

incoming business partner. We see nothing wrong with that. The Claimant has a very narrow view of what the business partner role is and she complains that if she was good enough to train Leo, she was good enough for the role. She completely misunderstands what the Finance Business Partner role was. What the Claimant was being asked to provide to Ms Mburu was details of the department's processes and their products. She was not being asked to train her.

39. A specific complaint about Mr Jenkins' conduct in the 9 September meeting is that he implied, or suggested, that if the Claimant did not help Leo Mburu she would be adversely affected in the restructuring. The Claimant argued that the tone of Mr Jenkins' voice in the recording led to the implication of a threat. The relevant passage is:

> *"If I can see you assisting me and helping me in making sure we support [the MD] through this period when he is reappraising the whole business finance […], that is the best thing you can do in terms of a job application for the future roles in that respect. Not participating in that is clearly the opposite."*

40. We have listened to the recording and considered the transcript and the Claimant's submissions. Our view is that Mr Jenkins is essentially saying is that if you show good and useful qualities, that will reflect well on you and stand you in good stead. Not showing those qualities will not help you. In our view, there is nothing wrong with that advice and no implied threat.

41. This conversation between Mr Jenkins and the Claimant took place, probably on 9 September 2016, after about four weeks of a difficult relationship between the Claimant and Ms Mburu. The latter had a different management style to SC and that flowed from her function and from what she had been asked to bring to the department. It led Ms Mburu to want to know details of the processes (see her email to that effect at page 243). This was unwelcome to the Claimant.

42. Furthermore, the Claimant was clearly of the view that Leo Mburu was incompetent. See, for example, the Claimant's response to Ms Mburu's email of 9 August 2016 (page 246). The email includes the following request:

> *"Provisions – what does this actually mean and who told us this – [she names two individuals]? Please can you provide me with back up."*

The Claimant quite unreasonably concluded that that means that Leo as a qualified accountant does not know what provisions are. She cross-examined Ms Mburu to that effect in the hearing before us. That is not what Ms Mburu said in the email and it is apparent that that is not what she said. The Claimant formed the mindset that Ms Mburu was incompetent and complained to Mr Jenkins about her. That led to the meeting that she recorded covertly. His response to the complaint was that the Claimant and Ms Mburu needed to sort it out between them.

43. Another specific complaint of the Claimant is that within minutes of complaining to Mr Jenkins on two occasions about Ms Mburu (on 9 and 21 September 2016), the latter was on the phone to her.

44. We have considered what was the nature of the Claimant's complaint to Mr Jenkins about Ms Mburu? To judge by the transcript of the 9 September meeting, her complaint was that Ms Mburu called for something (for example, some information) and then when that was provided called for something else. At its height, the Claimant is complaining that she is being repeatedly asked for information by her line manager. According to the transcript of the 9 September 2016 meeting, she did not complain of harassment or bullying by Ms Mburu. Indeed, in advancing her case before us, the Claimant did not say that she complained to Mr Jenkins of harassment or bullying by Ms Mburu on 9 September or on 21 September: her statements on neither of those two dates are alleged to be protected facts.

45. On the other hand, Ms Mburu's account is that, during this period, the Claimant was difficult to get hold of and was trying to cut her out. She puts forward, as an example, emails (pages 247 and 247A) in which the Claimant had reported an error direct to the Managing Director and had bypassed all of Ms Mburu, Priyesh Shah and Mr Jenkins. The Claimant's explanation for her omission was that it was an accident.

46. It does look to us as though, by this email, the Claimant was cutting Leo Mburu out, but not only her because she bypassed not merely her immediate line manager but the level above that and Mr Shah who was a senior manager within the department and went straight to the Managing Director of Business Finance.

47. On page 259 is an email where Ms Mburu asked the Claimant to follow a different approach for the 2017 budget to that for the year previously. The Claimant forwarded this email to Mr Jenkins saying that she did not need Leo's help as she had done the budget before but that Leo herself was struggling with her project. This email leads us to conclude that the Claimant was refusing to work in the way that Ms Mburu wanted her to. The latter's evidence was that page 259 was not an isolated example and she pointed to a spreadsheet that she had compiled contemporaneously (page 362) which contains details of incidents where she was struggling with the Claimant's behaviour. Conversely, the Claimant sought to rely on her work on the 2016/17 budget as evidence of her expertise and how she brought continuity during the hiatus. In fact, the contemporaneous email shows that she apparently refused to comply with Ms Mburu's request to follow a different approach. That was not, in our view, a judgement that the Claimant should have made. Mr Jenkins replied to the Claimant's complaint (page 263A) to make clear that the Claimant's is only the lowest of three levels of budget review. Despite that, the Claimant continued to argue before us that her she had prepared the budget on her own.

48. According to the Claimant (see her paragraph 58), in October 2016, she overheard a conversation between Mr Jenkins and Mr Shah when the latter said that he worked with people from that country and he knows what they are like, following a remark made by Mr Jenkins about something that the Claimant had said. The first complaint about this by the Claimant was on 1 June 2017 and it was investigated by Louise Rogerson in October 2017. Her findings (at page 551) are much more proximate in time to the incident than the evidence given before the Tribunal.

49. In their evidence before us neither Mr Shah nor Mr Jenkins could remember having made any such comment. Even on her own account of the comment, our view is that the Claimant has not provided sufficient evidence from which we think it right to infer that it was about Polish people or, what is more important, that it was pejorative. She gave further details about the incident in oral evidence, saying that she had overheard it as Mr Shah and Mr Jenkins came out of a room near where she was working. Were we to accept her account, we have little in the way of context to the remark and cannot judge the reason for it.

50. The Claimant did not complain about it at the time of the incident nor at the time of her grievance about Ms Mburu on 18 November 2016. She did not complain about it in February 2017 when she alleged that bullying by Ms Mburu was a reason for the imposition of the PIP. That is relevant to whether we accept her evidence about the incident because the Claimant did not say at the time of her grievance against Ms Mburu or when complaining about the PIP that there was an anti-Polish sentiment in the department or that Mr Jenkins - her manager's manager, her so-called "grandfather" manager - who had countersigned the PIP had sympathised with anti-Polish comments that were being made by a co-worker. That is the gist of complaint against him in relation to this incident and it would have been relevant to the challenge to the PIP. The first complaint was on 1 June 2017, in the letter from the Claimant's solicitor (page 508).

51. The burden is on the Claimant to prove that this incident happened, and we are not satisfied on the balance of probabilities that it did happen or that it happened in the way that she said. We reach that conclusion based on the lateness of the complaint, and lack of clear evidence about what Mr Jenkins said which allegedly provoked the response of Mr Shah. The context of comments is particularly important when considering an allegation of discrimination and harassment. There is little to suggest that the reference was to the Claimant or to Polish people and nothing to suggest that any comment was meant to be derogatory. The Claimant did not seem to be upset at the time despite now effectively saying that it was a deliberate comment. Our finding is that this incident did not happen.

52. On 7 November 2016, there was a meeting between Ms Mburu and the Claimant. The former told us that her intention going into the meeting had been to try to manage the Claimant more formally and to introduce a PIP. The Claimant's account contradicts that: she gave evidence that she arranged the meeting and that her intention had been to enable them to clear the air and have a fresh start. Our view is that, even if the Claimant

did arrange the meeting as a fresh start, that would involve Ms Mburu making it clear what her expectations of the Claimant were going forward. We do not need to resolve the conflict about who arranged the meeting. The more material question is whether Ms Mburu's concerns about the Claimant were reasonable and justifiable.

53. We accept that there are genuine examples from prior to 7 November 2017 of the Claimant not performing as her line manager reasonably expected her to and the Claimant was not amendable to persuasion or discussion about these issues so they needed to be tackled on a more formal basis. To judge by the spreadsheet of events, many of the issues involved the Claimant being resistant to being managed by Ms Mburu.

54. The Claimant's perspective is that she was raising her own concerns and refutes the suggestion that Ms Mburu tried to introduce a PIP in that meeting. By all accounts, the Claimant left the meeting very upset. Following the 7 November meeting, she covertly recorded a meeting with Ms Mburu on about 8 November (rather than 10 November as in the Claimant's chronology). At the second meeting, the Claimant said that she wanted HR to be involved in that meeting. Her criticism of Ms Mburu's behaviour before us is, firstly that she wanted HR to be introduced but Ms Mburu did not, and secondly that this difference of approach points to a discrepancy. The Claimant argues effectively that we should not believe that Ms Mburu intended at that early stage to introduce a PIP (a step which would have required her to seek HR advice) because had she done so she would not have said that she did not want HR involved.

55. That argument relies upon a misreading of what Ms Mburu said to the Claimant during this meeting according to the Claimant's transcript of her own recording. No point is taken by the Respondent on the accuracy of this transcript. What Ms Mburu apparently said was that she did not need HR at that meeting because she had nothing in particular to say and that that was because it was an informal meeting to catch up with the Claimant to see if she was feeling better after the upset of the previous day. Ms Mburu did not say that she did not need HR advice about any aspect of managing the Claimant, merely that they did not need to be present at that meeting. There is no discrepancy in Ms Mburu's evidence in this respect and we see no reasonable basis for criticism of her handling of 8 November meeting. The conversation on 8 November is consistent with the Claimant having been upset during the conversation on 7 November and we accept that the reason for her upset was that Ms Mburu raised with her that she intended to draw up a performance improvement plan.

56. The Claimant says that in that 8 November meeting she also said that she disliked being micro-managed by Ms Mburu and, based upon the transcript evidence, it appears that she did say that. The Claimant's essential complaint about this is that having said that she did not like to be micro-managed, Ms Mburu then starting calling her every day: for her to do so when she knew that the Claimant said she did not like being micro-managed amounted to bullying, according to the Claimant.

57. Our conclusion on this is that Ms Mburu had been trying to do her own job by finding out from the Claimant in detail what the latter's job involved. She had been unsuccessful in that because the Claimant had not always responded positively. Ms Mburu was getting advice from DD, see page 304 where she wrote to him and attached (see pages 304A-C) details of issues that she had experienced. In the email at page 303 there is a proposed timetable for introducing a PIP to the Claimant. Ms Mburu was evidently having difficulty overseeing the Claimant's work. There is evidence that the Claimant resented Leo's enquiries. In our view, it was not reasonable of the Claimant to do so. We accept that the reason for the daily calls was Ms Mburu's need to try to introduce more structure to the management relationship and to continue to try to ensure that the Claimant was carrying out the tasks that she had reasonably been asked to do by her manager. We accept that that was the whole reason for the calls.

58. Similarly, although this is to jump back in time slightly, if Ms Mburu did call the Claimant on 9 and 21 September 2016 as she alleges, this was part of the same picture. Ms Mburu needed oversight of the Claimant's work. Given that Mr Jenkins' reaction to the Claimant's complaints to him was that the two women needed to go and sort it out, it is probable that that was the message he conveyed to the Ms Mburu. The Claimant complains that Ms Mburu called her following her complaints to Mr Jenkins to "have a go" at her. We are not able to make findings about the detail of what Ms Mburu said beyond that. However, we are quite satisfied from what we have found to be the overall picture that Ms Mburu's actions stemmed from a desire to find out the detail of the processes in the department and were not related to the Claimant's nationality.

59. The Claimant made the point that in her email to DD at page 304, Leo Mburu said:

> *"If performance is not satisfactory and process is to repeat is a written warning given at this point?"*.

The Claimant put to Ms Mburu that this indicated that she had predetermined that a written warning would be given. We reject that argument; the statement does not put forward Ms Mburu's conclusion that a written warning is going to happen. We read that sentence as a whole to mean that Ms Mburu is asking what would happen if performance did not improve and there is nothing wrong with her asking what the right procedure is.

60. Furthermore, that email makes it quite clear that Ms Mburu was getting advice on how to devise a performance improvement plan and set up a schedule for it as early as 10 November. Therefore, we find that the PIP could not have been drawn up in response to or because of the Claimant's complaint (made on 18 November – page 314) that Ms Mburu was bullying her.

61. In that complaint the Claimant says:

> *"I have been bullied and put down by Leo Mburu for the last four months. It has become a daily occurrence now. I have complained to HR/and David Jenkins already, but Leo's attitude towards me has become worse recently. I suggested three weeks ago that we need to start afresh and learn how to work better together. I told Leo how it makes me feel when she puts me down, her response was that she could have done it more. I really enjoy my job and working with my colleagues but work shouldn't be a place where employees are being bullied and intimidated by their line manager."*

62. One specific complaint of the Claimant is that on 22 November 2016 Ms Mburu intimidated and provoked her in front of the whole office. Our view about the state of the relationship between the two women by this point is that it was quite dysfunctional. Ms Mburu had been finding the Claimant uncooperative. The Claimant resented Ms Mburu. It is not possible to make specific findings about precisely what was said in the office on this occasion but the Claimant was, we find, bound to find everything Ms Mburu did provoking: this was two weeks after she had been warned that a PIP was to be imposed which she thought unjustified. Any confrontation between them has to be seen in the context of what had gone before and we are quite satisfied that Ms Mburu would have been motivated by her desire to establish authority over the Claimant whom she was finding difficult to manage and not by the Claimant's complaint – of which she did not have notice at that point.

63. On 22 November, the Claimant asked for a chat with DD. The PIP was drawn up by Ms Mburu in the evening of 21 November 2016 (see page 320) but she had, to judge by the email of 10 November, clearly been planning it and in discussions with HR for days before.

64. When DD had spoken to the Claimant during the morning of 22 November, he asked Ms Mburu to hold off presenting it by an email in the following terms:

> *"Looks OK to me Leo… However…. Can you hold off presenting this to her for now. I'm in BFC at the minute but will explain later on"*.

65. The Claimant's grievance had been submitted by email and it appears that he intended to find out how the Claimant wished to proceed with it: formally or informally. In fact, she agreed to deal with it informally. It was not, as the Claimant seeks to infer because he thought the PIP was wrong: that much is clear from the words "*Looks OK to me Leo"* in the first line.

66. Despite that, the Claimant has clearly interpreted DD's intervention as support of her and criticism of the PIP process which was not raised formally with her again until 17 January 2017. She alleges that in the following January when Mr Jenkins heard that DD had left the business, he laughed in response and she expressed guilt for what she regards as her responsibility for DD's departure. She appears to have deduced from DD's

intervention by email on 22 November and the fact that the PIP was written on 21 November but not shown to her until January not only that DD had caused the PIP to be put on pause pending a possible grievance against the line manager but also that he knew the PIP to be suspect and was removed because he was standing in the way of Ms Mburu starting the PIP process.

67. This is an example of the Claimant drawing deductions that are not supported by evidence and logic. There is no evidence before us of the reasons for DD's departure even if Mr Jenkins did laugh about it and no evidence that it or Mr Jenkins' laughter was anything to do with the Claimant or the fact that she was Polish. On the contrary, it shows an unusual degree of self-absorption. Her evidence has to be evaluated taking that into account. This presents to us as a tendency to assume that she is connected to events without evidence for that connection.

68. A mediation meeting was arranged for 30 November 2016. The Claimant and Ms Mburu attended and the meeting was conducted by Ms Roe.

69. The Claimant's evidence of the meeting includes the allegation that she made a protected act during that meeting. She says that Ms Roe acted intimidatingly (paragraphs 10.2, 11.3 and 12.5 above) and that there was a difference of treatment of her (compared with Ms Mburu) in being permitted to take notes. In relation to the allegation of intimidation, she says that when she told Beth Roe that she had covertly recorded meetings, Beth Roe got angry and checked whether she had two years' service.

70. Beth Roe did not produce an outcome letter for the mediation meeting of 30 November 2016, despite agreeing to do so.

71. Our view of Beth Roe's evidence to the Tribunal is that she did not overstate her account. However, neither did she dispute that she spoke forcefully – in our view that was justified by the circumstances. The Claimant does not seem to understand why the Ms Roe would have been concerned, indeed shocked, to hear that she had covertly recorded meetings with Ms Mburu and Mr Jenkins. We accept her explanation that it was that concern and shock that caused her to speak as she did.

72. We have also concluded that there was no difference in treatment of the Claimant and Ms Mburu in relation to the taking of notes: the Claimant was asked not to take verbatim notes because Ms Roe considered that doing so was getting in the way of the conciliation which she wanted to promote. By contrast, Ms Mburu was taking bullet point notes. This was the reason given by Ms Roe for asking the Claimant not to take verbatim notes and we accept it. In any event, there is nothing in the Claimant's account of Ms Roe's alleged conduct that is related to race. The Claimant does not challenge that she was asked not to take verbatim notes; it was meant to be an attempt to mediate and improve relations and that seems to us to have be a reasonable request.

73. As to the Claimant's allegation that she made a protected act on 30 November 2016 within the meaning of s.27(2) of the EQA, we think that the Claimant contends that she did so because she was complaining of bullying (see her account of the meeting at her paragraphs 84 to 90). Additionally, at paragraph 87 of her statement, she says that she complained of victimisation because she recounted her experience of complaining to David Jenkins and, on her account, being punished by Ms Mburu. However, this is not a description of an act of victimisation by Ms Mburu within the meaning of the EQA because her complaint to Mr Jenkins could not itself amount to a protected act.

74. In the end, the PIP was introduced at the annual performance review meeting that took place on 17 January 2017 and was sent to the Claimant by email from Ms Mburu that is at page 352A. The last bullet point of that email says:

> *"Please also note that if there has been unsatisfactory performance at the end of this time, you will be subject to disciplinary action and/or have the plan extended for the further period."*

75. This is a standard wording; it is desirable and indeed necessary that it should be in there. The Claimant sees it as personal attack. It was not. The ACAS Code of Practice on Disciplinary & Grievance Procedures (2015) which covers situations of poor performance either directly or because the basic principles of fairness are the same makes plain that the employee should be informed of the consequences of a failure to improve performance. Paragraph 21 of the ACAS reads as follows:

> "*A first or final written warning should set out the nature of the misconduct of poor performance and the change in behaviour or improvement in performance required (with timescale). The employee should be told how long the warning will remain current. The employee should be informed of the consequences of further misconduct, or failure to improve performance, within the set period following a final warning. For instance, that it may result in dismissal or some other contractual penalty such as demotion of loss of seniority."*

76. At the APR meeting, Ms Mburu and Mr Jenkins rated the Claimant as unsatisfactory. The Claimant said that Ms Mburu lied where she completed the PIP. In particular, the entry that is at page 368 where it says:

> *"In relation to corality actuals – update. Process note completed in Dec 16 is at minimum level expected. However, no other documents have been submitted".*

The Claimant took us to page 338 and this is the basis of her allegation that her line manager lied in the PIP document. She says that there were five documents attached to this email dated 15 December 2016, rather than the one implied from the PIP. We do see that there appeared to have

been five attachments. With the consent of the Respondent, the Claimant added supplemental documents at page 351C and following which appear to be emails (dated 13 and 16 January) and documents attached by staples which the Claimant said were the attachments in question. These were not available at the time that Leo Mburu gave her evidence and they were not put to her. We therefore do have Ms Mburu's evidence about whether she accepts that those were attachments which she saw and, if she does, an explanation for her statement that there was only one document submitted. On their face, the 13 and 16 January state that they were an update, presumably to documents previously submitted in December.

77. However, in cross examination Ms Mburu was asked about the email of 15 December 2016 and was asked what the attachments to it had been. Her evidence was that the Claimant had attached page 336A to it. She did not regard it as being the Process Note she had asked for because it was merely three lines long and did not have the content of a process note.

78. Having heard Ms Mburu's evidence, we find that she seems to have been struggling to understand the Claimant's processes and had found the Claimant to be secretive. The Claimant attached some files in her emails to her line manager: some she had initiated but others she had had ownership of for some time. The content of them is not detailed. The Claimant's riposte to Ms Mburu's criticism of her is that her line manager made intrusive requests and she did not want her to change things. In our view, that was an unreasonable position for the Claimant to take, given that Ms Mburu had been tasked with improving processes. We take on board that, in the first meeting, Ms Mburu apparently said that the Claimant had to earn her trust, which perhaps did not set a conciliatory tone to the start of the relationship, however Ms Mburu was entitled to expect the Claimant's co-operation, nonetheless.

79. We accept that there may be an inaccuracy in the PIP about this one point (namely whether the Claimant had provided a single document or multiple documents). However, that does not mean that Leo Mburu lied in the PIP. There were issues about the quality of the documentation provided by the Claimant, and it was reasonable for Ms Mburu to be concerned about that lack of quality. We could understand why her comment on what we were shown was that it did not have the content of a process note. Furthermore, any inaccuracy does not undermine the totality of the concerns expressed in the PIP.

80. There were also concerns about the Claimant's behaviour. This was not, we find, a case in which the Claimant was simply complaining about her manager. Had we concluded that this was a case in which the Respondent had sought to performance manage an employee simply because they had justifiable concerns about the behaviour of their manager, we would have been very concerned. This was a case where the Claimant was resisting being managed. That element of the justifiable concerns about the Claimant's behaviour is covered by the third section of

the PIP entitled "Professional Working Manner". In essence, the allegations set out there were of substance.

81. It is not clear to us whether the Claimant's documents lacked sufficient content because the Claimant was defensive or because she lacked capability. However, Ms Mburu was not the only person who drew attention to the Claimant's lack of attention to detail (see email at page 262A). We are satisfied that Ms Mburu had genuine concerns about technical matters. Since she found that the Claimant rebuffed her attempts to manage her and to get information about the role and the processes, there was an inter-relation between concerns about performance and behaviour. The Claimant's lack of co-operation meant she was unable to get to the bottom of the degree to which there were technical issues and the degree to which there were behavioural issues.

82. The PIP was put in place on the same day as the Claimant had her annual performance review. The policy for the annual performance review says that if an individual is to be rated as unsatisfactory, then there should be a PIP already in place (see page 174). In this case, there was not already a PIP in place and the Claimant was rated as unsatisfactory at her annual performance review. We accept that this may be a technical failure in policy. However, Ms Mburu had clearly intended to put a PIP in place before the annual performance review. Had she been able to implement it at the time she had originally intended, then it would have been operational for a couple of months and been able to be reviewed at the APR. There is certainly nothing from which we could infer that this failure strictly to adhere to policy had anything to do with the Claimant's race.

83. The failure to award the Claimant a bonus follows from the decision on the performance review. The manager's comments are set out at page 190 and the so-called grandfather's comments at page 191. In the latter, Mr Jenkins said that his comments were based on the evidence contained in the document.

84. We accept that the bonus is discretionary rather than contractual and the Claimant accepted that the individual would not get a bonus unless they were rated satisfactory. This was the oral evidence before us. In fact, the policy (at page 150A of the bundle) says that the employee does not get the bonus if they have been rated as unsatisfactory, rather than they do not get the bonus unless they are rated satisfactory. Notwithstanding that discrepancy, it seems clear to us that the reason why the Claimant did not get the bonus was that that was in accordance with the policy itself. It is not argued by the Claimant and we have certainly seen no evidence to suggest that the policy itself is racially discriminatory.

85. The Claimant appealed her PIP on 18 January 2017 (see page 357) including on grounds that Ms Mburu had been bullying her. (See also pages 355 – 356.) It was reviewed by Mr Jenkins and when he did not increase the rating, it led to the Claimant raising a grievance about her performance rating, among other things on 6 February 2017.

86. At the same time, the restructuring of the Finance Department was coming to a head. The restructuring was referred to in the Claimant's evidence of the meeting with Mr Jenkins in September 2016 and therefore we conclude that the restructuring of the division as a whole was not something that was done as a result of anything the Claimant did.

87. The detail of the effect of the restructure in the finance department was being fleshed out in the early part of 2017. This lead to Ms Roe writing to Mr Jenkins on 13 February 2017 (page 372PPP-QQQ) with a request for the rationale for the changes, among other things, so that she could put it into some of the formal documentation. On the same day, she also drafted another email (page 373C) to Mr Jenkins requesting documents that were necessary for the investigation into the Claimant's grievance. The wording of Beth Roe's emailed request for information does not contain any suggestion that she was the decision maker in the restructuring or redundancy. She is concerned about setting up a timetable for all the affected staff. The timeline in the email at page 372PPP-QQQ suggests that by the 13 February 2017 Beth Roe knew that the Claimant's role was not going to be mapped over to a role in the new structure. The decision was made before this email by which Ms Roe is setting the implementation process in place.

88. Despite the coincidence of dates, there is nothing from which we can infer that Beth Roe wrote the email about restructuring because she knew about the grievance. We have considered this point carefully and our finding is that Beth Roe was acting on two separate pieces of work at the same time.

89. The structure that was intended to be put in place under the reorganisation at about the time Ms Roe wrote those emails is at page 402E. We accept Louise Rogerson's evidence that, in the end, the restructuring in the mortgage department did not happen in the way that was planned at that stage; it did not happen in accordance with the organisational chart at page 402E. That plan was to remove one finance analyst role from the IF department and two mortgage analyst roles.

90. At the time of the 14 March 2017 redundancy consultation meeting the Claimant was the only Polish national, all the others were British. On the mortgage side of the business the Business Partner had recently changed to RS. Although there were two Mortgage Analysts roles, only one was vacant; the other was occupied by BT. He resigned and his post was not recruited to. The vacancy was not filled. Therefore, those two posts went from the structure as well as the financial analyst post (held by the Claimant). However, only one individual, the Claimant, was made redundant. All the analyst positions were intended to go, under the plan. As things turned out, although the analyst positions did go the planned structure as a whole was not implemented.

91. After March 2017 and prior to the page 402E structure being put in place, a new Finance Director for the whole of Finance came in and further changes were agreed on. She was appointed in April or May 2017. Amongst other things, she created a new role of finance analyst in

Birmingham. LS applied for and was appointed to that role with effect from March 2018. We accept that this was a subsequent change, decided on after the Claimant left by the new Finance Director and implemented a year after she was told of her redundancy.

92. The Claimant's grievance was investigated by Lesley Rolfe in a meeting on 6 March 2017. The Respondent's version of the minutes of that meeting are at page 378 of the bundle. Those are disputed by the Claimant who says they are inaccurate. Her version is at page 385.

93. At page 387 of the Claimant's version of the minutes of 6 March 2017 she sets out in capital letters statements which, according to her, were said by her at the grievance meeting and not recorded in the Respondent minutes. They include the following:

> *"It almost felt like I was being punished for complaining about her"*;
>
> *"[It feels like she] is putting me down. Leo's response was that she could have done it more";*
>
> *"I want to be treated equally"*.

and then at page 388:

> *"It felt like I was being punished for complaining to HR"*;
>
> *"She was very intimidating towards me. I asked her twice to stop bullying me*".

This last in relation to the visit by Leo to the Reading office on 22 November.

94. We start by presuming that the Claimant's oral evidence is reliable and that the matters recorded above were said at the grievance hearing on 6 March 2017 and were omitted from the minutes. Nevertheless, our view is that nothing said on that occasion amounts to a protected act within the meaning of section 27 of the EQA.

95. The statement *"I want to be treated equally"* is not a complaint of discrimination. There is no reference to a protected characteristic. It comes after a passage where the Claimant complains that she has been told by Leo Mburu that if she is too unwell to come to the office, she needs to take it as a sick day, but that Leo herself does not follow the same rules and had been allowed to work from home when she had a cough. Setting aside the question about whether it can be detrimental to an employee to be told they have to take a day's sickness absence rather than work from home if they are too unwell to work, there is no suggestion that the Claimant is complaining about being treated differently to Ms Mburu because of her race or any other protected characteristic.

96. Furthermore, if we look at the complaint that the grievance minutes are inaccurate because the phrase *"Leo lied on the document that could be used to start disciplinary actions against me"* (see page 388) had been omitted, the gist of the Claimant's information to the grievance investigation is clearly included in the Respondent's version of the minutes. We therefore do not think that there is such a stark difference between the Respondent's version of the minutes and the Claimant's version of the minutes that it could be inferred from any omissions made that the Respondent was failing to take the grievance seriously or deliberately suppressing the Claimant's complaints. We also note that the word 'harassment' is not used in even the Claimant's version of the grievance minutes.

97. In conclusion, so far as the grievance meeting of 6 March is concerned, taking into account that GN did not set out to produce verbatim notes, the inaccuracies alleged by the Claimant in relation to the minutes are not sufficiently significant to mean that they do not fairly reflect the conversation and the main points made by the Claimant.

98. The grievance appeal hearing took place on 22 March 2017 and the outcome was delivered on 24 March 2017. The particular aspects that the Claimant complains about in relation to the grievance appeal meeting are

98.1. that the minutes were inaccurate,

98.2. that there was a failure to investigate allegations of harassment,

98.3. that there was an inappropriate failure to speak to AF about the Claimant's grievance,

98.4. that Christine Madin had disconnected herself from the grievance appeal outcome call because the Claimant said she was being harassed,

98.5. and that Christine Madin had pretended she did not hear the Claimant saying harassment during this call.

99. The Claimant recorded the grievance appeal meeting and her transcript is at page 410. She played part of the recording in the tribunal hearing. The Respondent's minutes (prepared by Ms Madin) are at page 424. The Claimant complains in paragraph 125 of her statement that there are particular inaccuracies in the Respondent's minutes that she has numbered at (a) to (i). She put these to Ms Madin during the course of cross-examination and we considered the differences between the Claimant's account and the minutes that start at page 424.

100. At para.125(a), the Claimant says that the allegation that Leo Mburu had punished her straight away for raising complaints about her on two occasions was completely removed or changed. However, this part of her complaint is reflected at page 424 where it says:

> "*DK outlined that she complained to DJ about LM on 9/9 and within 30 minutes LM was on the phone to her. This happened again on 21/9 – LM had a go at her for complaining to DJ within 30 minutes of DJ making the call.*"

101. In relation to para.125(b), it is said that her complaint that Leo Mburu did not have the requisite skills to perform the duties had been removed from the minutes. In fact, there is a question by Ms Madin towards the bottom of page 424 where it is recorded that she:

> *"Asked DK what she had complained about."*

and the Claimant is recorded as having said

> *"About LM's performance"*.

102. The Claimant complained that the minutes removed reference to her allegations that Ms Mburu lied on the PIP documents and threatened her with disciplinary action. However, at the bottom of the top box on page 425, she is recorded as saying:

> *"LM had said to DK that her unsatisfactory rating meant that she had to start attending PIP meeting. DK stated that LM had lied on the document so had emailed [DD]."*

103. In para.125(d), the Claimant complained that her statement that she wanted to be treated equally was removed. This is specifically said to have been missing from 5 lines down on page 425 between the end of the sentence ending *"was working from home herself"* and *"LM would also pick up on small things"*. We listened to a section of the recording that had been made covertly of this meeting by the Claimant and we can see that that statement was missing.

104. However, although the Claimant says in her witness statement that she compared herself to Leo Mburu, a British contractor, she is not heard in the meeting itself mentioning that she compares herself with someone because of their British nationality. The statement simply is that she wanted to be treated equally and as in relation to the grievance meeting, it comes in relation to the discussion about being able to work from home. There is therefore the record in the notes that she is complaining that she has not been treated the same in relation to working from home, but the statement she wanted to be treated equally is omitted. We do not think that in the circumstances that is a particularly significant omission. There is no reference to a particular protected characteristic. An employer cannot presume that an employee is alleging that they have suffered discrimination simply because they complain that they have not been treated the same as a colleague and it is insufficient to amount to a protected act for the Claimant to have simply used the word "equally".

105. She complained at para.125(e) that there was an omission about her raising a complaint and the PIP being created the following day. However,

at page 425, 2nd line down in the second box of the Claimant's speech, there is the following statement:

> *"She had emailed [DD] about LM and the next working day (21 Nov) a PIP document had been completed."*

We therefore find that the minutes in substance are accurate in the way they record this complaint.

106. At para.125(f), the Claimant complained that there has been an excision of the complaint that Leo was being very intimidating towards her on 22 November. However, immediately after the above quote, there is the following:

> *"Another point is that on 22/11 LM was in the office and DK had complained to DD as LM had been very intimidating being aggressive with her."*

107. At para.125(g), the Claimant says that a particular section had been removed where she had complained about Mr Jenkins criticising her and giving her an unsatisfactory rating at her APR for complaining about her manager and stating that that was an example of unprofessional behaviour. The Claimant's particular complaint is that Ms Madin's reaction to being told had been removed from the minutes. However, we can see the following exchange:

> *"DK - Stated she needed to finish the points she wanted to raise about the minute. DK stated that DJ had tried to persuade her/manipulate her into dealing with LM grievance informally. She had been quiet in a meeting and then DJ said she was unprofessional.*
>
> *CM - Asked what DK was referring to when she said DJ told her she was unprofessional.*
>
> *DK - Confirmed that DJ meant it was unprofessional to complain about LM."*

108. We do not regard this as being a particularly significant difference to the words that we heard on the recording.

109. The Claimant complained about the omission of her allegation that Mr Jenkins had misrepresented who had produced the Q3F budget. However, this is reflected on page 425 (4th box of speech by the Claimant) where she said:

> *"DK produced forecasts for Q3 all by herself. The long balances etc were the main things. However, DJ undermined the work she had done, saying DK had based this work on Q2 figures – she had proof about this."*

110. She also at para.125(i) complained about the omission of reference to daily calls designed to criticise her. However, at the top of page 425, her criticism of the grievance meeting minutes for omitting this allegation is stated in the following terms:

> *"LM would also pick up on small things and start criticising DK – for example the list of deliverables was formatted wrong. She did this to portray her in a negative way."*

111. Overall, we are quite satisfied that. taking into account they are not verbatim, the minutes of the Respondent of 22 March are not inaccurate in any major or significant respect

112. We have also accepted the evidence of Ms Madin from her witness statement in paragraph 9 that on 24 March in a call recorded by the Respondent's internal system, that we heard on the Claimant's request, she heard the Claimant that Leo Mburu would harass her and she referred to the alleged behaviour as harassment.

113. We listened to the call and have read the transcript that starts at page 430 and in particular the section where the word "harassment" is used at page 437 in the second entry down for the Claimant, she is recorded as saying:

> *"Leo would send me an email, can you call me? If I did not call her within five minutes, she would send me another email, can you call me again? Can you call me again? And I would call her and even if I was away from the desk and she would do that a lot, if I did not call her in 5 to 10 minutes she would harass me. Call me, call me. I would get emails, I don't know it's called harassment I think sometimes."*

114. Then over the page, at page 438, the Claimant said in the first entry attributed to her:

> *"Because we have decided that later the deadline at 10 o'clock is unrealistic and during the meeting with HR I brought it up that sometimes I am being chased by Leo and harassed when she knows I am unable to finish something lets say by 10 o'clock."*

115. We listened carefully to the recording and, so far as we can tell, the word "harassment" or "harassed" is used by the Claimant in the colloquial sense. It is certainly reasonable that Ms Madin should have understood it to have been used in the colloquial sense rather than as a protected act meaning harassment related to a protected characteristic. There was no reason to think that the Respondent should have investigated further or should have asked what the Claimant meant by the use of that word; it was quite clear in context.

116. So far as the failure by LR to ask AF what his experience of working with the Claimant was, the Claimant had argued that AF had worked closely with her and his feedback about the performance was necessary when

considering whether the decision to rate her as unsatisfactory was too low. LR raised the Claimant's rating to "requires development" (see page 393) and the Claimant's own case on the degree to which she had worked alongside AF was that she worked with him on month end duties which took up in total about 10-15% of her workload. A satisfactory relationship with AF would not have outweighed the relationship she had with her direct line manager if, as we find that she did, she had justifiable complaints about the Claimant's performance. It seems to us to be understandable that LR took the view that when considering the Claimant's performance, her line manager's opinion, provided that it was objectively justifiable, was more important than someone such as AF who had such limited involvement with the Claimant on a day to day basis. This was a reasonable course of action given that LR had reached the justifiable conclusion that the Claimant had shown unprofessional behaviour. We accept that explanation for the failure to interview AF.

117. In any event, there is no reason to infer that the Claimant's race had anything to do with the decision not to approach AF. Ms Madin and DF decided not to speak to AF because they similarly took the view that his input was not going to be sufficient to outweigh the reasonable concerns of Ms Mburu and that was a stance that they were entitled to reach on the evidence available to them.

118. Having listened to the audio recording of the grievance appeal outcome on 24 March 2017, we were able to hear the point at which Ms Madin was disconnected from the call. Her evidence was that she was dialling into the call on her mobile phone from home on what was normally her day off. That is plausible and reinforced by the fact that we could hear a child in the background at approximately the point in the conversation that appears at the top of page 438.

119. The point at which Ms Madin drop out of the conversation is denoted in the audio recording by an electronic beep. This comes immediately after the Claimant has said the paragraph that is on page 437 that starts: *"I've had a situation if I can interrupt…."* and ends: *"she would completely ignore me and ignore the problems"*.

120. Contrary to what the Claimant says, this is not immediately after she uses the word "harassment" which was in the section quoted in paragraph 114 above. It was in the part of the Claimant's speech that was a little earlier. It is clear that Ms Madin very quickly came back in because the same electronic beep is heard between the words: *"I'll call for 11 o'clock"* and *"Oh hi Christine, you're back"*.

121. Our findings are that the point when Ms Madin dropped out of the meeting was not immediately after the word "harassment" had been used. Furthermore, she accepts that she heard the word "harassment". The Claimant's allegation that Ms Madin dropped out because the word had been used and in order to avoid having to deal with an allegation of harassment is not made out.

122. Furthermore, as we have already said, we accept that Ms Madin not only accepted that the word "harassment" had been used but reasonably concluded that it had been used in the sense of bullying or micro-management in a colloquial sense. She did not pretend that she did not hear the work and she has never said that the Claimant had not said it.

123. The redundancy consultation with the Claimant was initiated with an email at page 402A. She had a meeting on 14 March 2017, the notes for which are at page 402B. It appears that the Claimant was arguing that she and Ms Mburu should both have been considered for redundancy or that she should have been able to apply for the role of Finance Business Partner. She was told clearly by Beth Roe that there was no vacancy in the business partner role. That was as at 14 March 2017 objectively true.

124. We also remind ourselves of everything that we have found earlier in these findings to the effect that the business partner role is a significantly different one to the Band 4 financial analyst role occupied by the Claimant which was the role being made redundant.

125. The Claimant was notified about a different Band 4 role: the Commercial Analytics Manager role. The Claimant argues that the fact that this was suggested to her was inconsistent with it being said that she could not apply for the Finance Business Partner role because both are managerial status. However, the evidence before us was that the Commercial Analytics Manager role was a band 4 role and Mr Jenkins therefore thought that it was suitable for the Claimant, as a Band 4 employee, to be told about that vacancy. We accept that explanation which is consistent with our findings about the different stature of the two roles.

126. The redundancy consultation outcome meeting took place one week later on 22 March 2017 (see page 396) in a meeting where Mr Jenkins told the Claimant that she was being made redundant. He was supported by HR in the person of Beth Roe. We are satisfied that it was just a coincidence that both that meeting and the grievance appeal meeting took place on 22 March 2017. In our experience, that is not uncommon, particularly when, as here, the HR function is not on site.

127. The Claimant appealed against her redundancy (see page 495) and it is notable that in that letter of appeal, she still did not allege that there had been unlawful treatment under the EQA. It is true that in the redundancy appeal, she raised the allegation of bullying and harassment by Leo Mburu. However, given that she did not say that it was unlawful discrimination nor victimisation, Ms Rogerson reasonably concluded that the complaint was the same one as that that had been looked into during the grievance procedure by LR.

128. Although the grievance had on the face of it been about the performance rating, LR had had to consider the allegation that bullying and harassment was behind the rating and to that extent the allegations had been considered already. We accept that the same allegations against Ms Mburu that were said to have led to the rating of unsatisfactory, were said

to have led to her selection for redundancy. That seems to us to be a satisfactory explanation for Ms Rogerson's decision not to look into those allegations.

129. In relation to her investigation into the redundancy appeal, Ms Rogerson reasonably concluded that the post had been deleted from the structure and that it had not been a question of selecting that individual in which case the view of the manager would have been particularly relevant. This was a situation where the post was deleted as were all finance analysts posts at that time.

130. It was not until 1 June 2017 (see page 507) that solicitors instructed by the Claimant first articulated nationality discrimination. That led to a further formal grievance (see page 515) that was investigated by Ms Rogerson and determined on 6 October 2017 when she concluded that there was no evidence of discrimination. The letter from the solicitors, the formal grievance and Ms Rogerson's decision on it, all postdate all of the matters complained of in these proceedings and therefore we do not need to make any more specific findings about them.

The law applicable to the issues

131. The Claimant complains of a number of breaches of the EQA. Section 136 of the Act reads (so far as material):

> *"(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.*"

132. That section applies to all claims brought before the Employment Tribunal under the EQA. By s.39(2) and (4) EqA an employer must not discriminate against an employee or victimise them by dismissing them or subjecting them to any other detriment. By s.40 an employer must not harass an employee of theirs in relation to their employment.

133. Direct discrimination is defined in section 13 (1) of the EqA which reads:

> *"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."*

The Claimant complains that she has suffered direct discrimination on grounds of race which is a protected characteristic: she is non-British, being of Polish national origin. She compares her treatment with that

which she argues was or would have been meted out to a comparable British employee.

134. The application of s.136 of the EQA has been explained in a number of cases, most notably in the guidelines annexed to the judgment of the CA in Igen Ltd v Wong [2005] ICR 931 CA. In that case, the Court was considering the previously applicable provisions of the Race Relations Act 1976 but the guidance is still applicable to the equivalent provision of the EQA: Efobi v Royal Mail Group Ltd [2019] IRLR 352 CA.

135. When deciding whether or not the Claimant has been the victim of direct race discrimination, the employment tribunal must consider whether she has satisfied us, on the balance of probabilities, of facts from which we could decide, in the absence of any other explanation, that the incidents occurred as alleged, that they amounted to less favourable treatment than an actual or hypothetical comparator did or would have received and that the reason for the treatment was race. Here the initial burden is on the Claimant. That burden will not be satisfied simply by showing that the Claimant has suffered a detriment and that she has a protected characteristic: Madarassy v Nomura International plc [2007] ICR 867 CA.

136. If the Claimant does satisfy us of those primary facts, then we must find that discrimination has occurred unless the Respondent proves that the reason for their action was not that of race. In order to identify the reason for the act complained there should be intense focus on the mental processes of the decision maker; it is the reasons for their actions, rather than the actions of another upon whose information they innocently act with which we should be concerned: CLFIS (UK) Ltd v Reynolds [2015] EWCA Civ 439 CA.

137. We bear in mind that there is rarely evidence of overt or deliberate discrimination. We may need to look at the context to the events to see whether there are appropriate inferences that can be made from the primary facts. We also bear in mind that discrimination can be unconscious but that for us to be able to infer that the alleged discriminator’s actions were subconsciously motivated by race we must have a sound evidential basis for that inference.

138. The provisions of s.136 were considered by the Supreme Court in Hewage v Grampian Health Board [2012] ICR 1054 UKSC. Where the employment tribunal is in a position to make positive findings on the evidence one way or the other, the burden of proof provisions are unlikely to have a bearing upon the outcome. Furthermore, although the law anticipates a two-stage test, it is not necessary artificially to separate the evidence adduced by the two parties when making findings of fact (Madarassy v Nomura International plc [2007] ICR 867 CA). We should consider the whole of the evidence when making our findings of fact and if the reason for the treatment is unclear following those findings then we will need to apply the provisions of s.136 in order to reach a conclusion on that issue.

139. Although the structure of the Equality Act 2010 invites us to consider whether there was less favourable treatment of the Claimant compared with another employee in materially identical circumstances (within the meaning of s.23(1) of the EqA), and also whether that treatment was because of the protected characteristic concerned, those two issues are often factually and evidentially linked (Shamoon v Chief Constable of the RUC [2003] IRLR 285 HL). This is particularly the case where the Claimant relies upon a hypothetical comparator. If we find that the reason for the treatment complained of was not that of race, but some other reason, then that is likely to be a strong indicator as to whether or not that treatment was less favourable than an appropriate comparator would have been subjected to.

140. Further guidance was given comparatively recently by Singh LJ in Ayodele v Citilink Ltd [2018] I.C.R 748 CA where he said in paragraphs 62 and 63,

> "*62….., there may be cases in which there are at least the following three issues which arise in respect of any specific complaint of discrimination: (1) Did the alleged act occur at all? (2) If it did occur, did it amount to less favourable treatment of the Claimant when compared with others? (3) If there was less favourable treatment, what was the reason for it? In particular, was that reason discriminatory?*
>
> *63. Accordingly, there may be cases in which the tribunal never has to address question (3), because it is not satisfied that it has been proved on the evidence that the alleged act took place at all; or it may not be satisfied that there was less favourable treatment.*"

141. Victimisation is defined in section 27 of the EqA which provides, so far as material, that

> *" (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."*

142. There is no need for the Claimant in a victimization claim to compare her treatment with that of a comparator. The question is whether the protected act was an effective cause of the detrimental treatment. This is a subjective test: Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48 HL. As with direct discrimination, it is the reasons for the actions of the decision maker which should be considered and therefore the extent of knowledge of the decision maker of the protected act can be an important consideration.

143. The test for what amounts to a detriment, both in relation to direct discrimination and victimisation, is whether a reasonable employee would take the view that they had suffered a detriment; this objective element means that an unjustified sense of grievance cannot amount to a detriment within s.39 EQA: Shamoon.

144. Neither in the case of direct race discrimination nor in the case of victimisation is it necessary for race (or the protected act as the case may be) to be the only or even principle reason for the act complained of. It is enough if race or the protected act contributed significantly to the alleged discriminator's thought processes: in this context, significant means more than trivial. The statutory burden of proof set out in s.136 EQA applies equally in victimization cases as it does in direct discrimination cases.

145. The definition of harassment is contained in section 26 of the Act and, so far as relevant, provides as follows:

"(1) A person (A) harasses another (B) if—

(a)A engages in unwanted conduct related to a relevant protected characteristic, and

(b)the conduct has the purpose or effect of—

(i)violating B's dignity, or

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

(2) A also harasses B if –

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

…

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a)the perception of B;

(b)the other circumstances of the case;

(c)whether it is reasonable for the conduct to have that effect."

146. What is and what is not harassment is extremely fact sensitive. So, in Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336 EAT at paragraph 22, Underhill P (as he then was) said,

> *"We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (…), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."*

147. The importance of giving full weight to the words of the section when deciding whether the claimant's dignity was violated or whether a hostile, degrading, humiliating or offensive environment was created for him or her was reinforced in Grant v HM Land Registry & EHRC [2011] IRLR 748 CA. Elias LJ said, at paragraph 47:

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

148. Furthermore, in Weeks v Newham College of Further Education UKEAT/0630/11, Langstaff P, as he then was, said:

> *"17....Thus, although we would entirely accept that a single act or a single passage of actions may be so significant that its effect is to create the proscribed environment, we also must recognise that it does not follow that in every case that a single act is in itself necessarily sufficient and requires such a finding.*
>
> *...*
>
> *21. However, it must be remembered that the word is 'environment'. An environment is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the office or staff-room concerned."*

149. The tribunal may not consider a complaint under s.39 or 40 of the EqA which was presented more than 3 months after the act complained of unless it considers that it is just and equitable to do so, subject to the effect of early conciliation. Conduct extending over a period is to be treated as done at the end of the period. A failure to act is to be treated as occurring when the person in question decided upon the inaction and that date is assumed to occur, unless the contrary is proved, when the alleged discriminator does an act inconsistent with the action which it is argued

should have been taken or when time has passed within which the act might reasonably have been done.

150. The tribunal may extend time for presentation of complaints if it considers it just and equitable to do so. The discretion in s.123 to extend time is a broad one but it should be remembered that time limits are strict and are meant to be adhered to. There is no restriction on the matters which may be taken into account by the tribunal in the exercise of that discretion and relevant considerations can include the reason why proceedings may not have been brought in time and whether a fair trial is still possible. The tribunal should also consider the balance of hardship, in other words, what prejudice would be suffered by the parties respectively should the extension be granted or refused?

Conclusions on the findings

151. We now set out our conclusions on the issues, applying the law as set out above to the facts which we have found. We do not repeat all of the facts here since that would add unnecessarily to the length of the judgment, but we have them all in mind in reaching those conclusions.

152. The Claimant read out submissions that she had typed and which she handed in to the Tribunal and Mr Wyeth made oral submissions on behalf of the Respondent.

153. It is alleged that some of the matters are out of time. However, our view is that the appropriate course of action is for us to make findings on the issues and then if we find that any of the acts were unlawful acts of discrimination, we will go on to consider whether the Employment Tribunal has jurisdiction to hear them or not.

154. Para.6.1 above: Our finding is that, although it is possible that Mr Jenkins laughed during the meeting of 19 July 2016, there is insufficient evidence from which to infer either that he laughed at the Claimant or that he was laughing at her Polish accent. Therefore, either this allegation is not made out on the facts or the Claimant has not discharged the burden of showing facts from which we could, in the absence of any other explanation, conclude that the act amounted to less favourable treatment on grounds of nationality.

155. Para.6.2. above: Our conclusion is that the Claimant was not considered for the Finance Business Partner role by Mr Jenkins. We have considered the explanation put forward by the Respondent for this and found that the reason for that was that he reasonably did not consider the Claimant to have the capability for the role: she did not appreciate the full scope of the role and was not aware of the Managing Director's instructions for what was needed. By contrast, in the circumstances that a restructuring of the department was in the offing, we accept that the proven track record and transferable skills of Ms Mburu were a better fit for what was needed in the

role at that time. We are satisfied that the reason was in no way that of nationality.

156. Para.6.3. above: We were not satisfied on the balance of probabilities that this comment was made. Even assuming in the Claimant's favour that it was, there is insufficient evidence from which to infer that it was pejorative or about Polish people. Therefore either this allegation is not made out on the facts or the Claimant has not discharged the burden of showing facts from which we could, in the absence of any other explanation, conclude that the act amounted to less favourable treatment on grounds of nationality.

157. Para.6.4. above: We are not satisfied that Mr Jenkins laughed about DD's departure. That departure was not connected with his receipt of the Claimant's grievance. We do not see how this was or could have been an act of less favourably treatment of the Claimant on grounds of her nationality.

158. Para.6.5.above: The Claimant was warned that if, at the end of the period covered by the PIP, there was unsatisfactory performance she would be subject to disciplinary action or have the plan extended (see paragraph 73 above). This was not less favourable treatment of the Claimant, it is standard good HR practice to warn an employee of the potential consequences.

159. Para.6.6.above: The Claimant was told that she would receive no bonus. However, this was because of the policy that bonuses would not be paid to those who had not received a sufficiently high performance rating. It is therefore not capable of being a discriminatory act or an act of victimisation itself: it is a consequence of the poor performance rating. The unsatisfactory (and then requires improvement) rating was not alleged by the Claimant to have been a discriminatory act. However, we have considered the PIP within the context of the allegations which we needed to decide. We can therefore say that our findings of fact are only consistent with the Claimant's behaviour being the reason for the decision that she only merited a poor performance rating (or requires improvement) and do not lead to an inference that the reason was that of nationality.

160. Para.6.7. above: The minutes of the grievance meeting of 6 March and the grievance appeal meetings of 22 and 24 March 2018 were not inaccurate in any material way. This allegation is not made out on the facts. Nor can it be argued that any differences in the minutes lead to the inference that the reason why there are differences of expression and omissions is that of nationality or the EQA based complaints brought by the Claimant.

161. Para.6.8. above: The failure of Ms Madin and DF to speak to AF about the Claimant's grievance was understandable and reasonable in the circumstances. There is nothing to suggest that it could be inferred that the reason why they did not speak to AF was anything other than a

genuine belief that he did not have sufficient relevant experience of the Claimant's work and capabilities to provide relevant experience.

162. Para.6.9.above: Our finding is that the decision not to speak to AF was not inappropriate. This allegation is not made out on the facts.

163. Para.6.10. above: Our finding is that Ms Madin did not disconnect herself from the grievance appeal outcome call because the Claimant said she was being harassed. This allegation is not made out on the facts.

164. Para.6.11. above: Our finding is that Ms Madin did not pretend that she didn't hear the Claimant saying the word "harassment" during the call. This allegation is not made out on the facts.

165. Para.6.12.: The Respondent did give the Claimant notice of redundancy on 22 March 2017. Although the Claimant was the only individual who was made redundant, we have found that there were two other analyst posts which were deleted from the structure at the same time. In our view, the appropriate hypothetical comparator is a British person in an analyst's position in the Finance Department at the time of the March 2017 redundancy consultation. We are satisfied on the basis of our findings that had there been such a person, they would also have been made redundant. The Claimant seeks to compare herself with Ms Mburu. However, the role occupied by Ms Mburu was a different role at a higher band which was still needed in the future structure. She is not a suitable comparator. The Claimant sought to argue that the Respondent should have kept her and made Ms Mburu redundant. Had this been an unfair dismissal case we might have thought that an employer should consider whether to let a contractor go and redeploy an employee into their post. However, this is not an unfair dismissal claim. More to the point, the Claimant has misunderstood the demands of the Finance Business Partner's role. It was reasonable for the Respondent to conclude that that role was not vacant and therefore that there was no vacancy for which the Claimant might have applied. She was informed about a suitable vacancy at the same level as her then role. We are therefore of the view that there was no less favourable treatment of the Claimant than a hypothetical comparator and there is nothing from which we could infer that the reason for the decision to make the Claimant redundant was her nationality.

166. Para.6.13. above: It is true that the Respondent rejected the Claimant's appeal against redundancy. However, there is no evidence that in doing so they treated her less favourably than they would have treated a hypothetical comparator or that the reason for rejecting the appeal was in any way that of nationality. It was rejected because Ms Rogerson genuinely and reasonably concluded that it was not well-founded.

167. Para.6.14. above: Our conclusion is that the role referred to in this paragraph was decided upon by the new Finance Director who was appointed in April or May 2017. The creation of the role was decided upon after the Claimant left and was in Birmingham. We are not persuaded that there was in existence prior to termination of the Claimant's employment

an analyst's role for which she should have been considered or about which she ought to have been told. This allegation is not made out on the facts.

168. It can be seen from the above that in respect of all of the specific allegations of direct discrimination on grounds of nationality, either the facts alleged by the Claimant have not been made out, or there was no less favourable treatment of the Claimant than a suitable comparator, or the grounds for the treatment in question was not nationality. The direct discrimination claim is not well founded.

Section 27 – EQA Victimisation

169. None of the acts relied upon by the Claimant amount to a protected act within the meaning of s.27 of the EQA. In her complaint of 18 November 2016, the Claimant complains of bullying and intimidation. This does not, in our view, amount to a protected act because the lack of reference to a protected characteristic means that, in the present case, the complaint is not of something which would, if found proven, be unlawful under the EQA. We remind ourselves that s.27(2)(d) EQA states that an allegation may be a protected act whether or not it is express. However, in the present case there is nothing about the complaint which has the quality of an allegation of unlawful discrimination, harassment or victimisation.

170. Similarly, the complaints made by the Claimant during the mediation meeting of 30 November 2016, or her grievance of 6 February 2017, the grievance appeal meetings of 22 and 24 March 2017 and the letter of appeal of 29 March 2017 did not make any reference to a protected characteristic. They did not amount to an allegation of a contravention of the EQA. The first allegation of a contravention of the EQA was in the solicitor's letter of 1 June 2017 which postdates all of the alleged acts of victimisation.

171. That is sufficient to cause us to conclude that the victimisation claim is not well founded because the Claimant did not make a protected act until after the last alleged act of victimisation. None of those acts can therefore have been done on grounds of a protected act.

172. In the alternative, it can be seen from our findings above that we have accepted that there are valid, non-discriminatory reasons for the actions of the Respondents. Paragraphs 11.4 to 11.10 are alleged acts of discrimination as well as victimisation and our findings in paragraphs 158 to 166 are repeated.

173. So far as paragraph 11.1. above is concerned, Ms Mburu prepared the PIP before she was aware of the Claimant's grievance against her. She had been planning to introduce a PIP for some time and had discussed it with the Claimant on 7 November 2016. Her reasons for doing so were the justifiable criticisms which she had of the Claimant's performance and professionalism and not any complaint about her.

174. So far as Paragraph 11.2. above is concerned, we are quite satisfied that in any interaction between them in the office on 22 November 2016, Ms Mburu was motivated by her desire to establish authority over the Claimant, whom she was finding difficult to manage and not by the Claimant's complaint.

175. So far as Paragraph 11.3. above is concerned, Beth Roe's behaviour on 30 November 2016 was entirely a reaction to learning that the Claimant had covertly recorded meetings between her and Mr Jenkins and between her and the Claimant. Her reaction was not disproportionate and there is nothing from which to infer that the reason for it was any of the complaints made to the Respondent.

176. Therefore, the victimisation claim is not well founded: the Claimant did not make a protected act before any of the acts of which they claimed and we are satisfied that the reasons for the Respondent's actions was not unlawful.

177. The alleged acts of harassment (set out in paragraph 12 above) overlap considerably with the alleged acts of discrimination and victimisation.

178. Para.12.1 above: see paragraph 154 above. Either this allegation is not made out on the facts or there is insufficient evidence from which to conclude that Mr Jenkins' laughter was related to the Claimant's Polish nationality.

179. Para.12.2. and 12.3. above: We do not think that the actions of Ms Mburu can fairly be characterised as bullying (see, for example, paragraph 57 & 58 above). We accept that the actions of Ms Mburu were unwelcome to the Claimant but it was not reasonable for them to have the harassing effect and, viewed objectively in context, they did not do so. Furthermore, the actions of Ms Mburu in managing the Claimant were not related to her Polish nationality.

180. Para.12.4. above: See paragraph 156 above. Either this allegation is not made out on the facts or we are not satisfied that the conduct amounts to harassment within the statutory definition or that it was related to the Claimant's Polish nationality.

181. Para.12.5. above: See paragraph 175 above. In context, it was not reasonable for Beth Roe's reaction to have the harassing effect and there is nothing from which to infer that her conduct was related to the Claimant's Polish nationality. We have found as a fact that the conduct at (c) was related to the Claimant's actions in covertly recording her managers' conversations. The conduct at (a) and (b) was incidental to the purpose of the mediation meeting.

182. Para.12.6. above: See paragraph 157 above. We are not satisfied that this act occurred as alleged. If Mr Jenkins did laugh at hearing of the departure of DD, his conduct was not directed to the Claimant and it was not reasonable for it to have had the harassing effect in relation to her

working environment. There is nothing from which it could be inferred that his conduct was related to her Polish nationality.

183. Para.12.7. above: We have already explained that merely alleging harassment against Ms Mburu was insufficient to cause the Respondent to understand that what was being alleged was unlawful harassment related to nationality contrary to the EQA. That being the case, there is nothing from which to infer that any failure to investigate was itself related to the Claimant's Polish nationality. That is sufficient to dispose of this allegation. However, the principle criticism of the grievance investigation was that the minutes were inaccurate. That we have found not to be the case. We have found that the decision not to interview AF was reasonable in the circumstances. Overall the grievance investigation looked at the points raised by the Claimant and answered them: she does not agree with the answers but there was no culpable failure to investigate.

184. For the reasons set out in paragraphs 178 to 183 above, the complaint of harassment is not made out.

185. It is not necessary for us to go on to consider whether the acts complained of amounted to an act extending over a period, whether the complaint was presented within the primary limitation period or whether it is just and equitable to extend time.

Employment Judge George

Date: …30 May 2019…………………..

Sent to the parties on: ...04.06.19........

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For the Tribunals Office

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