Case Number: 2201915/2019

THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON CENTRAL
BEFORE: EMPLOYMENT JUDGE ELLIOTT
MEMBERS: MS G BRADFIELD
MR F BENSON

BETWEEN:

Ms S Chambers

Claimant

AND

London Underground Ltd

Respondent

ON: 12, 13 and 14 February 2020
Appearances:
For the Claimant: Ms R Tuck, counsel
For the Respondent: Ms S Chan, counsel

JUDGMENT

The unanimous Judgment of the Tribunal is that the victimisation claim succeeds and the respondent shall pay to the claimant the sum of **£10,800** for injury to feelings.

REASONS

1. This decision was delivered orally on 14 February 2019. The respondent requested written reasons.

2. By a claim form presented on 15 May 2019 the claimant Ms Savannah Chambers brings a claim for victimisation for doing the protected act of raising a grievance in relation to alleged sex discrimination.

3. The claimant remains in the respondent's employment which commenced on 12 October 2015. She is employed as a Customer Services Adviser and was recently based at Colliers Wood Underground station.

The issues

4. The issues for this hearing were identified at a case management hearing on 6 December 2019 before Employment Judge Stout and confirmed with the parties at the outset of this hearing as follows:

Victimisation

5. Did the claimant do a protected act? The claimant relies upon emails of 30 October 2018, 2 November 2018 and 19 December 2018 concerning an incident on 25 October 2018 with Mr Osiade.

6. It was conceded by the respondent that the 19 December 2018 email was a protected act.

7. Did the respondent subject the claimant to any of the detriments as follows:

    a. The manner of Ms Oderinde on 6 February 2019, including that: (i) she became agitated; (ii) she accused the claimant of not displaying TfL behaviours by failing to be direct and ignoring emails and (iii) made comments that were derogatory to the claimant's union. The comments relied upon were at paragraphs 7 and 8 of the claimant's Further Particulars of 12 December 2019. These were that Ms Oderinde said that the claimant should not be listening to union reps as they only gave advice and not instructions, that she did not hide from reps, doesn't take kindly to being judged and doesn't like her work beliefs to be questioned. It was also alleged that Ms Oderinde raised her voice and asked aggressively: who is your rep? (bundle pages 40-41).
    b. Ms Oderinde's refusal to let her sit an assessment for promotion on 6 February 2019.

8. If so, was this because the claimant did any proven protected act and/or because the respondent believed the claimant had done, or might do a protected act?

9. If the claimant succeeds the tribunal will consider the issue of remedy.

10. After we gave oral judgment on liability the claimant's counsel took instructions and said that the claimant only pursued an award of injury to feelings and not financial loss so we said we would deal with this without the need for a separate remedy hearing.

Witnesses and documents

11. The tribunal heard from the claimant and Mr Glen Hart, a Customer Service Manager former trade union representative.

12. For the respondent the tribunal heard from Mr Toks Oderinde, Area Manager for High Barnet and grievance officer, Ms Naomi Smith, Head of Customer Service for the Metropolitan Line, grievance officer in relation to the events of 6 February 2019 and Mr Angus Draper, Area Manager at Angel station.

13. There was a bundle of documents of around 300 pages. We had 21 pages of additional disclosure from the respondent at the start of day 2 of the hearing. At about midday on day 2 we had additional disclosure from the claimant of the respondent's Grievance Procedure.

14. We had written submissions from both parties to which they spoke. They are not replicated here.

Findings of fact

15. The claimant commenced work for the respondent on 12 October 2015. She works as a Customer Service Assistant (CSA) and is currently based at the Colliers Wood Underground station.

<u>The 25 October 2018 incident and grievance</u>

16. On 25 October 2018 an incident took place when the claimant was on duty at Tooting Broadway station. The claimant said that she was bullied by her male manager Mr Tunde Osiade in front of a customer. The claimant said that Mr Osiade was aggressive and verbally abusive towards her. She considered this to be related to her gender and discriminatory. As a result of the incident she went off sick and was prescribed antidepressants. A witness was present at the incident, Ms LS, who was a part time CSA.

17. On 26 October 2018 the claimant went off sick with stress.

18. On 30 October 2018 the claimant sent an email to the Area Manager at Colliers Wood, Mr Vijay Senathirajah, complaining about this incident (page 43). She was asked by Ms Marcia Williams Head of Northern Line Customer Service, by email on 30 October 2018 if she wanted her complaint investigated under the respondent's Harassment and Bullying procedure (page 45). Mr Senathirajah asked her to come into the office on Friday 2 November to discuss the matter. He told her it was an informal meeting but she could be accompanied if she wishes (page 49).

19. On 2 November 2018 the claimant confirmed that she wanted her complaint investigated under the Harassment and Bullying procedure but she would like someone other than Mr Senathirajah investigating the matter (page 51). The claimant did not attend the informal meeting that day. She thought he had shown bias by telling the witness Ms LS not to get involved. We saw the statement of LS at page 268-269 where she alleged that the Area Manager had told her not to get involved or say anything.

20. On 6 November 2018 the claimant confirmed by email the reason she objected to Mr Senathirajah investigating the matter was because she thought he had shown bias (page 56).

21. Shortly after providing her initial statement LS sent a follow-up email (page 270) titled "*Additional info*" saying that Mr Osiade asked her if she could say that she heard him say only the word "*rubbish*" and that the Area Manager also advised her not to get involved or say anything. These were serious allegations on the part of LS to the effect that her immediate managers had asked her to keep silent about the incident and what she saw or heard.

22. On 22 November 2018 Ms Yvonne Osedumme was appointed as the PMA or HR officer for the grievance. She contacted the claimant by email (page 59) and also told her that mediation was an option.

23. On 7 December 2018 Ms Osedumme emailed the claimant to say that "an accredited manager" Mr Bob Hardy, had decided that this was not a case of bullying but it was inappropriate language and it should follow the grievance procedure and not the Bullying and Harassment procedure (page 86). An accredited manager is a manager who makes the decision as to whether a complaint falls under the Harassment policy.

24. The claimant strongly disputed Mr Hardy's view and explained her reasons in an email of 19 December 2018 at 07:36 to Ms Osedumme, copied to Mr Hardy (page 94-96). The respondent accepts that this email was a protected act.

<u>The claimant's CSM application</u>

25. Also on 19 December 2018 the claimant was notified that she had been successful in proceeding to the next round in her application for the position of Customer Service Manager (CSM) (page 93A). She was invited to an assessment at an Assessment Centre in West Kensington on Wednesday 6 February 2019. The information for the assessment said that candidates would be informed within 2 weeks of the final assessment as to whether they had been successful (page 93E). The information about the assessment said nothing about not attending if you were off sick. It did not say anything at all about sickness absence.

<u>The OH report</u>

26. The claimant attended an Occupational Health (OH) appointment on 9 January 2019. The OH report produced by OH Adviser Mr Bowles (page 107-108) said that a main barrier to a return to work was her work place stresses and the resolution of these was likely to be a main factor in her return to work. The report also said: "*currently [the claimant] is suffering with symptoms of depression and anxiety which are exacerbated by thoughts of work, she explained that she is not able to undertake SATs*

[platform] duties but aside this there are no other work tasks having a negative impact upon her health".

27. Although the claimant later told those managing her sickness absence that OH had said she was not to return to work "*or the work environment*" the words "*or the work environment*" were not actually said in the OH report (see the claimant's email at page 169).

Ms Oderinde – grievance officer

28. The claimant received an outcome to her complaint that the matter was not being dealt with under the Harassment policy. This was dated 14 January 2019 from Ms Osedumme (page 112). She was told there was no right of appeal and that the complaint would proceed as a grievance. Area Manager Ms Toks Oderinde was appointed to deal with it.

29. Ms Oderinde is an experienced manager with the respondent. She is the Area Manager of High Barnet station and has 25 years service. She has been an Area Manager on the Northern line for about 10 years.

30. Grievances are normally dealt with by the Area Manager for that particular employee. In this case that would have been Mr Senathirajah. A different Area Manager might be appointed for example if there is a conflict or for timing reasons if that Area Manager is it unable to deal with it in a timely fashion. Ms Oderinde has carried out about 10 grievance investigations about four of which were outside her own area and six within it. She said she did not enquire as to the reason why she had been asked to do this investigation and hear this grievance in place of Mr Senathirajah. She said she had "*no idea*" why it had come to her.

31. Ms Oderinde initially told the tribunal that she first became involved in the matter on 14 January 2019 when she was emailed by Ms Osudumme (page 117) asking her to contact the claimant to complete the grievance investigation. The title of the email was "*FW: response to your email titled: Fwd: Bullying (TfL Restricted – private and confidential)".* It was clearly part of a chain of emails that had been forwarded on.

32. At the start of her evidence Ms Oderinde agreed that when tasked with investigating a grievance, a key document was the grievance itself and that before she met anyone about a grievance, it was important to see the grievance document. She was asked how it had been sent to her and she said that this was by email by Ms Osudumme, but she could not remember when. There had been no disclosure of any such email.

33. When Ms Osudumme emailed Ms Oderinde on 14 January 2019 she said "*please see the e-mail below –.."* thus inviting her to read at least the email below of the 14 January sent three minutes earlier. We have then considered whether it invited her to read the chain of emails with the further email of 19 December 2018. Ms Oderinde agreed that she had received the 14 January email. She was asked whether she read the

chain of emails which included the claimant's email of 19 December 2018, which is admitted as being a protected act. Ms Oderinde denied reading the chain of emails because, she said she "*concentrated on the grievance".* She said she wanted to meet the claimant and get her side of the story. Ms Oderinde was also asked if she had read Mr Hardy's report which did not accept that the complaint was one of bullying. She said she had been told about it but did not see it.

34. Ms Oderinde first contacted the claimant on 16 January 2019 (page 129-130). In reply the claimant asked Ms Oderinde whether she had ever worked with Mr Osiade. Ms Oderinde replied that she thought this bore no relevance to the investigation. She said her fundamental role was to listen to parties and make a balanced decision. The claimant understood that Ms Oderinde had worked with both Mr Osiade and Mr Senathirajah as they are all managers on the Northern line.

35. Effectively Ms Oderinde refused to answer the claimant's question as to whether she had ever worked with either of these managers. The claimant understandably wanted to know, particularly in the light of LS's allegations, whether Ms Oderinde might have any conflict of interest.

36. Ms Oderinde's evidence was that by 16 January 2019 she had still not seen the grievance, yet we find that it was a contradiction to say that the reason she did not read the email chain of 14 January was because she was "*concentrating on the grievance*" because on her own evidence she had never seen it.

37. Ms Oderinde said that the reason she did not look at the grievance was because she wanted to hear it from the claimant herself so that she was not "*biased"*. We do not understand how reading a grievance complaint creates bias in the mind of the reader. If upon reading it, they find a conflict of interest, something can be done about it.

Complaint about Ms Oderinde

38. Ms Oderinde's refusal to answer this question gave the claimant concerns such that she complained on 21 January 2019 to Mr Darren Clare, PMA Manager (effectively a senior HR officer) (page 136) about the handling of her grievance. She complained that Ms Oderinde had, to her knowledge, worked with Mr Osiade and Mr Senathirajah and therefore had a conflict of interest. This was two days before the initial investigation meeting had been set with Ms Oderinde for 23 January 2019.

39. It is not in dispute that the claimant did not attend that investigation meeting on 23 January because of her concerns about Ms Oderinde's impartiality. Ms Oderinde accepted in cross-examination that the claimant's request that she no longer be involved in the grievance was reasonable but she denied any knowledge of the claimant's letter to Mr Clare. Ms Oderinde said that Mr Clare did not tell her that the claimant was not going to attend.

40. The claimant had made this clear in her letter to Mr Clare by saying "*also, under no circumstances will my complaint to be heard by AM Oderinde of High Barnet due to a conflict of interest and her failure to answer a simple yes or no question".* Ms Oderinde said that neither Mr Clare nor anyone else ever asked her the question as to whether she had worked with Mr Osaide or Mr Senathirajah.

41. Mr Clare replied to the claimant on 28 January 2019 (page 124-125). He did not uphold the complaint. He said that the appointment of Ms Oderinde was a business decision. He could not see why Ms Oderinde would not undertake an impartial assessment. We find that it would have been an easy solution to this issue if Ms Oderinde had simply answered the straightforward question as to whether she had ever worked with either of these individuals.

<u>The rescheduled grievance meeting 5 February 2019</u>

42. Ms Oderinde invited the claimant to a rescheduled grievance meeting on 5 February 2019. The claimant told Mr Clare she was not happy with his response but he declined to appoint another grievance officer.

43. The investigation meeting was set for 5 February 2019 at 13:30 hours. Ms Oderinde said that she contacted Mr Senathirajah to find out the claimant's availability so that "*nothing would clash*". The claimant was due to attend a sickness review meeting at 12:00 on 5 February so the grievance meeting was arranged to follow this. We find on a balance of probabilities that Ms Oderinde discussed this with Mr Senathirajah and they decided that scheduling the grievance meeting to follow the sickness review meeting was the best way of securing the claimant's attendance.

44. The invitation to the grievance investigation meeting was sent by Ms Oderinde on 29 January 2019 (page 128). Her evidence was that when she sent this email she could not recall whether she had seen the claimant's original grievance of 30 October 2018. She also said that she did not know the reason why the claimant was off sick.

45. On 31 January 2019 the claimant was asked by CSM Ms Kemi Olubusi about her current health situation (page 138). The claimant replied on 5 February at 11:07 (page 168) saying that OH had said that she was not to return to work the work environment until such time as her grievance was resolved.

<u>5 February 2019</u>

46. Ms Oderinde travelled from High Barnet to Oval on 5 February for the grievance meeting. The claimant did not attend and accepts that she did not tell Ms Oderinde in advance that she would not be attending; the claimant accepts that with hindsight she should have done. The claimant did not attend because she objected to Ms Oderinde conducting the

meeting and not because she was unwell.

47. When the claimant did not turn up, Ms Oderinde telephoned Ms Osedumme and Area Manager Mr Senathirajah to find out whether the claimant had attended the sickness review meeting. It was at this point she says that Mr Senathirajah told her that the claimant was off sick with work-related stress. Ms Oderinde did not make any note of this conversation.

The lead up to the assessment on 6 February 2019

48. The claimant was due to attend an assessment as part of the CSM application on 6 February 2019. The assessment is a demanding process and the claimant had been sent the paperwork for this on 19 December 2018 (page 93A onwards). She was asked to attend the assessment centre in West Kensington at 10:30am.

49. Prior to attending she had checked with HR (by telephoning a male member of HR staff, whose name she did not note) and another experienced CSM, Ms Beverley Johnson, that she could take the assessment whilst off sick and she was told that she could. In evidence she said that she did this at around the time she received the invitation for the assessment, so this was around 19 December 2018. The respondent had no policy saying that those off sick cannot attend promotion assessments. The rule was that those on disciplinary warnings or those who had failed their probation, could not attend.

50. At 09:40am on 6 February 2019 Ms Oderinde sent an email to the claimant (page 140) stating:

> *"I arranged 2 meetings of which you did not show up for both meetings to discuss your grievance complaint in a view to finding a resolution to resolve your complaint as soon as practicable possible, however you have not responded nor attended the meetings.*
>
> *I would like to give you a final opportunity to meet with me to discuss your complaint on Monday 11th February at 11am at the AM's Office Oval. I must stress that your failure to attend the 3rd meeting on Monday 11th will leave me no choice than to use the information that has been passed to me by the PMA to make a balance decision on your grievance complaint and this will be brought to a close."*

51. The content of this email raised the question for us of what information had been passed to Ms Oderinde by the PMA (HR) and upon which she proposed to make her decision. Ms Oderinde continued to deny ever having seen the grievance. She said it was to make sure she was not "*biased*". The Judge asked Ms Oderinde if she knew what the grievance was about. She said she knew that there had been an altercation between the claimant and Mr Osiade but said "*so you are not biased you are not shown it*".

52. There had been a lack of disclosure by the respondent of the email by which Ms Osedumme sent Ms Oderinde a copy of the grievance. We ordered disclosure to take place overnight between days one and two of this hearing.

53. When we saw the additional disclosure on day two, it became clear that Ms Osudumme had sent the grievance paperwork to Ms Oderinde on 27 December 2018. This contradicted Ms Oderinde's evidence paragraph 8 of her witness statement and her oral evidence, that she first became involved on or around 14 January 2019. The additional disclosure involved a covering email of 27 December 2018 with five attachments. The covering email said: "*As discussed, please find attached – the relevant paperwork regarding Savannah Chambers. It has been assessed as being a grievance (relevant assessment by Bob Hardy is included)".*

54. Ms Oderinde's evidence was that although there were five attachments and she was told that it was "*relevant paperwork"* she only read the two sentence email quoted above and she did not read any of the attachments. Her evidence was that it was her practice not to read a grievance before a grievance meeting but to get the information from the complainant. In the combined experience of this tribunal, we find this highly unusual. We have never encountered this practice before and it did not accord with the respondent's grievance procedure.

The grievance procedure

55. The grievance procedure at clause 5.1 says: "*Any employee who wishes to raise a personal grievance should submit the matter in writing to his or her immediate manager*" (our underlining). Paragraph 5.4 says: *"Employees should set out the details of the grievance, attaching any relevant documentation and state what outcome is sought, identifying anything that may help resolve their concerns*."

56. We find that there is a purpose in requiring an employee to set out their grievance in writing and that is so that it can be read and considered by the investigating manager who goes on to conduct a meeting with some knowledge of what it is about. It allows that manager to raise any questions in the meeting if there are points in the written grievance that need to be covered. It enables the manager to know what the issues are that they need to investigate. The grievance procedure says nothing about the risk of the manager being biased by reading the written complaint. We see no good reason why Ms Osedumme would send Ms Oderinde a set of documents describing it as "*relevant paperwork*" if Ms Oderinde was not expected to read it. We find she was expected to read it.

57. We find it implausible that Ms Oderinde did not at least skim read the documents sent to her on 27 December 2018 and 14 January 2019 even if she did not go into it in detail. We find on a balance of probabilities that

Ms Oderinde read the email chains at least in a sufficient manner to pick up the gist of what the documents said. In total we were taken to three occasions on which the 19 December 2018 email had been sent in a chain to Ms Oderinde's email account. We find that she had knowledge of the protected act before 6 February 2019.

The events of 6 February 2019

58. As Ms Oderinde's email of 6 February 2019 giving the claimant a final opportunity to attend a grievance meeting was sent at 09:40am on 6 February, we find that the claimant did not see it before she left to attend the assessment centre.

59. The claimant accepted that the assessment was likely to be demanding. It included a face to face meeting, a written test and some role play. There was background reading to be done in order to prepare and the claimant said she had done a significant amount of preparation for the assessment. We found her evidence convincing as to what she had done by way of preparation.

60. The assessment process was organised by an outside provider, Capita. Ms Oderinde was one of the managers involved in the assessment process. She saw the list of attendees and noticed that the claimant was on the list. She told Capita that she thought it was unlikely that the claimant would attend because she was off sick and had not attended the grievance meeting the previous day. She asked whether the claimant had phoned in to cancel and Capita said she had not. She asked Capita to let her know if the claimant arrived because she wanted to see her.

61. The claimant signed in at reception and went to the fourth floor for the assessment. Ms Oderinde was told about the claimant's arrival and waited for her in a small "pod" section on the fourth floor. The claimant was shown into the room and although they had never met before, the claimant immediately saw Ms Oderinde's name badge and knew who she was.

62. The claimant and Ms Oderinde sat at a small circular table about three feet apart. It is not in dispute that Ms Oderinde told the claimant that she would not be allowed to take part in the assessment process because she was off sick. It was the first thing that was said and no enquiry was made as to how the claimant was. Ms Oderinde said that this was because she owed a duty of care towards the claimant and the assessment day was demanding. The claimant's position was that she attended the assessment because she wanted to better herself and she had been told by HR and Ms Johnson that she could attend. This was not a work environment in the sense of attending work coming across the managers against whom she had made complaints.

63. We find that had Ms Oderinde not recognised the claimant's name on the list, as the person who had not turned up to the grievance meeting the

previous day, the claimant would have been able to sit the assessment.

64. We find unanimously that Ms Oderinde had made the decision to send the claimant home before the claimant arrived. She had flagged up with Capita that she wanted to be told if the claimant arrived and wanted to see her if she did attend.

65. Ms Oderinde's evidence was that the claimant was relieved to be told that she could not undertake the assessment because she had not prepared very well. Ms Oderinde accepted that the claimant told her that she had been advised that she could undergo the assessment, even though she was off sick. Ms Oderinde was aware that the claimant had spoken to Ms Beverley Johnson about this.

66. We saw Ms Oderinde's email of 8 February 2019 at page 161, sent to Ms Osedumme, saying that the claimant replied: "*I am not prepared anyway and she was relived (sic) and her stress level has gone back down".*

67. Ms Naomi Smith, the Head of Customer Service for the Metropolitan line, investigated the claimant's grievance about the events of the 6 February 2019. She said that when she held her investigatory meeting with Ms Oderinde, she said the claimant was "*not very happy*" about being sent away on 6 February 2019 (notes page 286). Ms Smith said that if she had been told the claimant was relieved, that is something she would have noted.

68. If the claimant was relieved as Ms Oderinde suggested, this is also inconsistent with her evidence that the claimant was shouting and raising her voice. This is not the behaviour of a person who is said to be relieved and happy at the turn of events. If the claimant was unprepared and did not want to do the assessment, she had the perfect excuse of being unwell. She had made the effort to go and had specifically asked HR and Ms Beverley Johnson as to whether she could still attend whilst off sick. We find that the claimant was not happy or relieved at being sent away. She wanted to do the assessment. It was a detriment to her to be sent away.

69. The claimant said that Ms Oderinde firstly pointed at herself saying that she was a direct manager and then pointed at the claimant saying she was not direct. Ms Oderinde agreed that she did say that the claimant had "*not been direct*" with her by failing to reply to the emails about the grievance meetings. The allegation was that that she drummed her finger nails on the table and that she raised her voice and shouted at the claimant. In evidence the claimant gave us demonstrations of how Ms Oderinde acted, including the pointing gestures, the drumming of the nails and a dismissive hand flicking gesture. Ms Oderinde strenuously denied this and said it was the claimant who raised her voice.

70. We find unanimously that Ms Oderinde acted as the claimant said – with pointing and drumming her nails. Overall we found the claimant to be a

more credible witness than Ms Oderinde. The claimant's oral evidence and physical demonstrations were convincing. We have found above that we did not accept Ms Oderinde's evidence that she had not at least skim-read the 19 December 2018 email to gain the gist of what it said.

Mr Draper's evidence

71. Mr Angus Draper was also an assessor at the assessment centre on 6 February. He did not give an account of this event until almost a year afterwards when he was asked in early 2020 if he could give a statement for the purposes of these proceedings. He was not interviewed by Ms Naomi Smith when she carried out her investigation. He agreed that the pod is soundproofed. He said it is not so soundproofed that raised voices could not be heard.

72. During the 20 minutes or so when the claimant and Ms Oderinde were having their discussion, Mr Draper had his back to the pod as he was working on his computer dealing with emails. He did not see the claimant and Ms Oderinde either arrive or leave. He also spent time meeting and greeting candidates and was away from the pod from time to time. He had known Ms Oderinde for about two years and have never met the claimant. About a year after the event he was able to say that he believed it was the claimant who raised her voice and not Ms Oderinde. He accepted that he could not hear what was being said.

73. We find that given that Mr Draper accepts that he could not hear any of the words said, that the pod is soundproofed (although not completely so) and that he was not asked for his recollection until about a year after the event, his view that the it was just the claimant who raised her voice, cannot be relied upon. Our finding is that the claimant was not at all happy about being sent away when she had been advised that she could do the assessment and that on a balance of probabilities she raised her voice but that so did Ms Oderinde.

Findings as to reasons for the actions on 6 February 2019

74. It was put to Ms Oderinde that she was cross because the claimant had turned up to the assessment when she had not turned up to the grievance meeting. The claimant says that Ms Oderinde told her that she was not displaying "*TfL behaviours*". Ms Oderinde admitted that she told the claimant she had not been direct with her. She had made a decision before seeing or hearing from the claimant that she was going to send her away. We find that both parties raised their voices at each other. The claimant did so because she was upset about being turned away. We went on to consider why Ms Oderinde did so.

75. Ms Oderinde's evidence was that sent the claimant away because of a duty of care towards her in the light of her ill health. She understood that the claimant was not supposed to attend any workplace environment. Yet at 09:40 on 6 February she had invited the claimant to a grievance meeting

at the Area Manager's office at Oval station. This is clearly a workplace environment.

76. Ms Oderinde said that attending a grievance meeting was "*more relaxing"* than doing the assessment. We simply could not accept this evidence. This was a grievance which on our finding Ms Oderinde knew was about workplace bullying that had led the claimant to go off sick. Discussing this in an Area Manager's office at Oval station would not in any way be "*relaxing"* compared to carrying out a neutral competency based assessment for which the claimant had prepared and had been advised she could attend. We did not accept her evidence that she was acting out of a duty of care.

77. On her own admission she had not seen the OH report although she had been given some information about the claimant's health. In answer to tribunal questions, Ms Oderinde said that she did not take any HR advice on the health situation before sending the claimant away. She said she did not take such advice because she did not expect the claimant to attend, but even once the claimant attended she did not seek HR guidance.

78. Ms Oderinde had spotted the claimant's name on the list and wanted her to be brought straight to the pod, so that she could send her away. If she was genuinely concerned about this duty of care, we find that a little more enquiry was necessary, both of the claimant and from HR or OH. We find that she was not genuinely concerned about a duty of care. She was cross and irritated that the claimant had failed to turn up to two grievance meetings, had not replied to her emails and had challenged her impartiality in terms of whether she had worked with either of the managers. We find that she acted in a cross and agitated manner with the claimant and this was significantly influenced by the grievance.

Union comments

79. The claimant's case was that in the 6 February meeting Ms Oderinde said that she should not be listening to union reps as they only gave advice and not instructions, that she did not hide from reps, she doesn't take kindly to being judged and doesn't like her work beliefs to be questioned. It was also alleged that Ms Oderinde raised her voice and asked aggressively: "*who is your rep?"*

80. Ms Oderinde admitted at paragraph 27 of her statement that she asked who the union representative was. We have already found that she was cross and agitated with the claimant and we find that the comments were made. As we have found above, we found the claimant to be a more credible witness than Ms Oderinde. Whilst it is right to say for example that union representatives give advice and not instructions and some of what was said was accurate, it was the manner and tone which we find was a detriment to the claimant. It was part of an agitated expression towards the claimant.

Attending another CSM assessment

81. When the claimant left the assessment centre she called Mr Ronjon Chawduryon in HR who told her that she should have been allowed to take the assessment (her statement paragraph 34). The claimant was contacted on 8 February 2019 by Ms Garima Doubey in HR who told her that she would need to obtain OH approval before the claimant could be allowed to carry out the CSM assessment.

82. We were taken to an email to the claimant of 12 February 2019 from Ms Rose Horton a recruitment consultant in HR, who invited the claimant back to an assessment for the CSM role to take place by 22nd February. This email said that Ms Horton had discussed the matter with her line manager and they had decided that it was not necessary to speak to OH to find out whether she was fit to attend the assessment (page 177).

83. The subsequent grievance officer Ms Naomi Smith took the view that Ms Oderinde and Ms Doubey were right to require OH input before allowing the claimant to attend a CSM assessment. We find that this is set against the view of Ms Horton, her line manager and Mr Chawduryon who were of the view that the that further OH advice was not necessary.

84. The claimant declined Ms Horton's offer to allow her to sit the assessment (claimant's email 13 February 2019 at page 182).

85. The respondent submitted that the claimant was a serial complainer and that this should cast doubt on her perception of how she was treated. Whilst is it is right to say that the claimant raised a number of complaints, we cannot say that they were all without justification. Whilst we make no fact finding on matters that were not in issue before us, we considered for example, the allegations made by LS sufficient to give rise to very serious concern and the refusal to answer the simple question as to whether Ms Oderinde had worked with the 2 managers, could justify her doubts as to impartiality. It would have been a very simple matter to answer that question.

The relevant law

86. Section 27 of the Equality Act 2010 on victimisation, provides as follows:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

87. Section 136 of the Equality Act deals with the burden of proof and provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

88. One of the leading authorities on the burden of proof in discrimination cases is ***Igen v Wong 2005 IRLR 258***. That case makes clear that at the first stage the Tribunal is to assume that there is no explanation for the facts proved by the claimant. Where such facts are proved, the burden passes to the respondent to prove that it did not discriminate.

89. Lord Nicholls in ***Shamoon v Chief Constable of the RUC 2003 IRLR 285*** said that sometimes the less favourable treatment issues cannot be resolved without at the same time deciding the reason-why issue. He suggested that tribunals might avoid arid and confusing disputes about identification of the appropriate comparator by concentrating on why the claimant was treated as he was, and postponing the less favourable treatment question until after they have decided why the treatment was afforded.

90. In ***Madarassy v Nomura International plc 2007 IRLR 246*** it was held that the burden does not shift to the respondent simply on the claimant establishing a different in status or a difference in treatment. Such acts only indicate the possibility of discrimination. The phrase "could conclude" means that "a reasonable tribunal could properly conclude from all the evidence before it that there may have been discrimination".

91. In ***Hewage v Grampian Health Board 2012 IRLR 870*** the Supreme Court endorsed the approach of the Court of Appeal in ***Igen Ltd v Wong*** and ***Madarassy v Nomura International plc****.* The judgment of Lord Hope in ***Hewage*** *shows that* it is important not to make too much of the role of the burden of proof provisions. They require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other

92. The courts have given guidance on the drawing of inferences in discrimination cases. The Court of Appeal in ***Igen v Wong*** approved the principles set out by the EAT in ***Barton v Investec Securities Ltd 2003 IRLR 332*** and that approach was further endorsed by the Supreme Court in ***Hewage.*** The guidance includes the principle that it is important to bear in mind in deciding whether the claimant has proved facts necessary to establish a prima facie case of discrimination, that it is unusual to find

direct evidence of discrimination.

93. It was recently reconfirmed by Underhill LJ in ***Greater Manchester Police v Bailey 2017 EWCA Civ 425*** that the causation test requires examination of "the reason why" the detrimental treatment was carried out. Care must be taken not to simply ask whether the impugned treatment would have taken place but for the protected act. At paragraph 12 Underhill LJ referring to both sections 13 and 27 EqA held:

> *"Both sections use the term "because"/"because of". This replaces the terminology of the predecessor legislation, which referred to the "grounds" or "reason" for the act complained of. It is well-established that there is no change in the meaning, and it remains common to refer to the underlying issue as the "reason why" issue. It requires an examination of what Lord Nicholls referred to in* **Nagarajan v London Regional Transport** ***2000 1 AC 501,*** *referred to as "the mental processes" of the putative discriminator (see page 511 A-B). An act will be done "because of" a protected characteristic, or "because" the claimant has done a protected act, as long as it had a significant influence on the outcome."*

94. On the question of detriment under section 27, the respondent took us to the decision of the EAT in ***Jesuadson v Alder Hey Children's NHS Foundation Trust EAT/0248/16*** at paragraph 75, to the effect that the question is whether "*no reasonable worker/employee would consider the comments…as detriments".* We were also taken to ***Shamoon*** (above) which makes the observation that "*an unjustified sense of grievance cannot amount to 'detriment'"*.

95. The test as to what amounts to a detriment is to be construed broadly; there is no need to demonstrate physical or economic consequences and a detriment will be found to exist if a reasonable person would or might take the view that the treatment was in all the circumstances to their disadvantage – see again ***Shamoon.***

96. Section 124 of the Equality Act 2010 provides that where a tribunal finds that there has been a contravention of a relevant provision the tribunal may make a declaration as to the rights of the parties; an order requiring the payment of compensation and an appropriate recommendation.

97. Awards for injury to feelings are compensatory. They should be just to both parties, fully compensating the claimant (without punishing the respondent) only for proven, unlawful discrimination for which the respondent is liable. Tribunals must remind themselves of the value in everyday life of the award by reference purchasing power or earnings - the principles set out by the EAT in ***HM Prison Service v Johnson 1997 IRLR 162***.

98. There are three bands for award for injury to feelings following ***Vento Chief Constable of West Yorkshire Police 2003 IRLR 102 CA*** and uprated in ***Da'Bell v NSPCC 2010 IRLR 19 EAT*****.**

99. The ***Vento*** bands in respect of claims presented on or after 6 April 2019 are lower band (less serious cases): £900 to £8,800; middle band: £8,800

to £26,300 and upper band (the most serious cases): £26,300 to £44,000.

100. We are obliged to consider whether to award interest on awards for discrimination. The basis of calculation is set out in the ***Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996 SI 2803*** (as amended). For injury to feelings interest is for the period beginning on the date of the act of discrimination and ending on the day the amount of interest is calculated.

Conclusions on liability

101. We had no submission from the claimant that the first two emails relied upon, 30 October 2018 (the original grievance) and 2 November 2018 were protected acts. We find from the face of those documents that they were not and what was in contention for us as the protected act, was the email of 19 December 2018 (page 94). The respondent conceded that this was a protected act. The respondent's case was that Ms Oderinde had no knowledge of it.

102. Our finding above is that Ms Oderinde read the email chains sent to her on both 27 December 2018 and 14 January 2019 at the very least in a sufficient manner so as to get the gist of what the documents said. We did not accept her evidence that she had not read them as we found this implausible. We have found that she had knowledge of the admitted protected act prior to 6 February 2019.

103. On our finding Ms Oderine had knowledge of the protected act by at least 14 January 2019.

104. The respondent conceded in submissions paragraph 15, that not allowing the claimant to undertake the assessment was a detriment that was not applied to the other candidates. The respondent accepted under section 136 EqA that *"there were facts from which the court could decide, in the absence of any other explanation, that a person contravened the provision concerned"* so that the burden of proof shifted to them to provide an explanation for the unfavourable treatment of not allowing her to sit the assessment.

105. Once the burden of proof has passed to the respondent, if they cannot give a satisfactory explanation for sending the claimant away and not allowing her to sit the assessment, the claimant submits that the claim must succeed. We have found above that Ms Oderinde acted in a cross and agitated manner with the claimant and this was significantly influenced by the grievance. We did not accept the explanation that Ms Oderinde was acting out of a duty of care. She did not therefore satisfy us with a non-discriminatory explanation for sending the claimant away and we agree that in those circumstance the claim must succeed.

106. In relation to the other issues we have found as a question of fact that they happened as the claimant alleged and that they were detriments. We find

that they were all part and parcel of the same event, culminating in sending the claimant away from the assessment centre and on a balance of probabilities we did not accept Ms Oderinde's evidence. We find that the burden of proof passed to the respondent to explain why these actions took place and we were not given an explanation that satisfied us that it was not because of the protected act of which Ms Oderinde had knowledge.

107. The claim therefore succeeds.

Remedy

108. Both parties agreed that this was an exacerbation case and the claimant sought only an award for injury to feelings. She did not seek financial losses.

Findings on remedy

109. As we have found above, based on the OH report of 9 January 2019 at page 107, the claimant was unwell prior to the incident upon which she has succeeded in this claim. We have made findings on this above. She was on antidepressants, sleeping tablets and receiving counselling. She told the tribunal that she was also accessing CBT online every day. She had also had some contact with the Samaritans prior to 6 February 2019.

110. We had two further OH reports, one dated 13 May 2019 (210) and one date 17 December 2019 (page 245). The May report was from the same OH advisor as the January report, the December 2019 report was from an OH Physician. The 13 May report said that the claimant's symptoms had significantly increased and the December report said she had moderate to severe signs of depression and anxiety.

111. The claimant returned to work at Vauxhall station on about 8 June 2019. She works on restricted hours and duties. She works four hours per day 5 days per week and doing customer service and gate line duties only. She had been removed from SAT's prior to 6 February 2019 incident.

112. The 6 February 2019 incident had a profound effect upon the claimant. She was tearful during her remedy evidence. Her doctor advised that her son should move back in with her, which the son and his wife did in late February 2019. This was because the claimant had expressed some very negative thoughts towards herself.

113. The claimant has not taken up the offer to do an assessment for CSM. She said that the thought of the assessment centre was very upsetting for her. She said she did not think she could handle going back there because it was not a good place.

114. The respondent pointed out that this was a one off incident by one single manager over a period of about 15 to 20 minutes. It was not a course of

conduct. They offered a second chance to allow the claimant to sit the assessment.

Conclusions on remedy

115. The claimant puts this as a middle band ***Vento*** case, the respondent puts it as a mid to lower end of the lower band. In terms of figures the claimant submitted we should award around £25,000; the respndent submitted we should award £7,000.

116. We find that the award falls in the lower part of the middle band. The effect of the events of the 6 February were profound upon the claimant to the extent that her son and daughter-in-law moved in with her shortly afterwards. Whereas prior to 6 February 2019 she was keen to "better herself" by seeking a promotion, she no longer feels able to pursue this.

117. We accept that this was a one off incident and not a course of conduct.

118. For these reasons we place the award at the lower end of the middle band and we award the claimant the sum of **£10,000.**

119. The parties agreed that the award of interested could be conveniently rounded to 1 year so we award with interest the sum of **£10,800.**

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Employment Judge Elliott
Date: 14 February 2020

Judgment sent to the parties and entered in the Register on: 17 Feb. 20.
________________________________ for the Tribunals