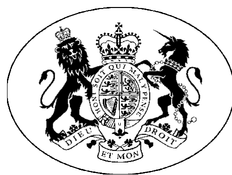

THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms N Staph	**v**	**Notting Hill Genesis**

Heard at: London Central **On**: 11-15 January 2021
In Chambers 18 & 19 January 2021

Before: **Employment Judge Glennie**
Ms G Carpenter
Ms C James

Representation:
Claimant: Mr Staph (Claimant's husband)
Respondent: Mr A Allen QC

JUDGMENT

The unanimous judgment of the Tribunal is that the complaints under the Equality Act 2010 are all dismissed.

REASONS

1. By her claim to the Tribunal the Claimant, Ms Staph, made complaints of direct discrimination because of race, harassment related to race, victimisation and failure to consult (this last complaint having been dismissed on withdrawal). By its response the Respondent, Notting Hill Genesis, resisted those complaints.

2. With the agreement of the parties, the hearing was held wholly remotely by video (CVP). The Claimant was represented by her husband, and the Respondent by Mr A Allen QC.

3. The Tribunal is unanimous in the reasons that follow.

The issues

4. The issues were originally defined by Employment Judge Tayler at a preliminary hearing on 7 July 2020. On 14 August 2020 Employment Judge Nicolle gave permission for the claim to be amended in three respects. The amendment was discussed at the commencement of the present hearing, and it was agreed that paragraph 1 of the amendment added a new allegation of direct discrimination and victimisation; paragraph 2 gave further detail about an existing issue in paragraph 11.4 of EJ Tayler's list; and that paragraph 3 provided background information relied on by the Claimant in support of her allegations.

5. The Claimant had produced for this hearing a skeleton argument and a Scott schedule, both of which in some respects went beyond the issues as previously defined. Mr Staph raised the prospect of applying to amend the claim. The Employment Judge stated that, although the Tribunal could not pre-judge the issue, a possible consequence of a successful application to amend was a postponement of the hearing, and that this consideration was in itself something that the Tribunal might take into account against allowing an amendment. After further consideration, Mr Staph stated that the Claimant had decided against applying to amend, although it might be that a further claim would be presented, raising additional matters.

6. The Tribunal decided to determine the issues on liability in the first instance.

7. For ease of reference the Tribunal will set out here the full list of issues to be determined. The letters D, H and V will be used as shorthand indications of whether the factual allegations are relied on as acts of direct discrimination, harassment, or victimisation.

8. The Claimant describes her race as black, Caribbean origin.

9. Did the Respondent treat the Claimant as follows:

   9.1 Deciding that the appointment to the role of Legal Caseworker required competitive assessment. The Claimant believes that this was a decision taken by Ms Sargeant. (D)

   9.2 Not appointing the Claimant to the role of Legal Caseworker. The Claimant compares her treatment to that of Ms Allen. (D)

   9.3 In a meeting in early October 2019, Ms Sargeant falsely accusing the Claimant of "getting angry" which the Claimant contends was a racial stereotype. The Claimant compares her treatment with that of Ms Allen, who raised her voice in a meeting with Ms Sargeant on 31 July 2020 but was not accused of getting angry. (D, H)

   9.4 Ms Sargeant not informing the Claimant of the possible availability of a Floating Housing Officer role. The Claimant compares her

treatment with that of a white woman (subsequently identified as Ms Martin) who was informed. (D)

9.5 Providing the Claimant's personal telephone number to residents on 2 December 2020. (H)

9.6 Failing to assimilate the Claimant into the role of Legal Caseworker prior to that role being advertised in November 2019. (D)

9.7 After the role of Legal Caseworker had been advertised, not shortlisting the Claimant for the role. (D)

9.8 Failing to properly investigate the Claimant's grievance, including not interviewing key witnesses. (D, V)

9.9 Mr Coils stating when interviewed in the grievance process that the Claimant was "confused", which involved a racial stereotype of the Claimant as being unable to understand complicated matters. (D, H, V)

9.10 Dismissing the Claimant's grievance. (D, V)

9.11 On 6 February 2020 sending the Claimant a letter backdated to 23 January 2020 transferring her to the role of Housing Officer, which is a demotion (described by EJ Tayler, seemingly in error, as a "dismissal") to a role in which there is overrepresentation of black employees. (D, V)

9.12 During the grievance appeal, stereotyping the Claimant as a black employee by stating that she had misunderstood elements of the Integration Policy. (D, H, V)

9.13 In the grievance appeal outcome, Ms Cook writing "You mentioned at our meeting that you hoped not to have to take your issues to a tribunal. I sincerely hope that this will not be necessary and that you will remain an NHG employee and move into a Housing Officer role", thereby suggesting that bringing a complaint of race discrimination to the Employment Tribunal would result in the Claimant leaving the Respondent's employment, and expressing a wish that the Claimant accept the demoted role of Housing Officer. (V)

9.14 At a meeting on 30 June 2020, Ms Sargeant indirectly threatening the Claimant with termination of her employment, by saying that the Claimant was on probation. This was followed by a letter dated 14 July 2020, claiming that the Claimant was on a trial period until 12 June, which had been extended to 31 July. The Claimant considers that this was an express threat that the Claimant's employment could be terminated at the end of July, because she brought a claim to the Tribunal. (D, V)

10. In the case of detriments relied on as acts of direct discrimination, was the act less favourable treatment of the Claimant in comparison with the person named, or in comparison with how the Claimant would have been treated if she were not black of Caribbean origin.

11. If so, was the treatment because of the Claimant's race, in that race was a material factor in the treatment.

12. In the case of the detriments relied on as acts of harassment, was the conduct unwanted.

13. If so, was the conduct related to race.

14. If so, did the conduct have the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

15. If the treatment did not have that purpose, did it have that effect, taking into account the perception of the Claimant, the other circumstances of the case, and whether it was reasonable for the conduct to have that effect.

16. The Claimant contends that during her grievance hearing on 29 November 2019 she was recorded in the notes as referring to the effects that the situation would have on her "as a black woman" when she did not make such a comment. The Claimant contends that this shows that the Respondent saw her in terms of her race and believed that she was going to make a complaint of race discrimination and therefore believed that she might do a protected act.

17. In the case of the detriments relied on as acts of victimisation, was the treatment done because the Respondent believed that the Claimant might do a protected act.

18. Are the complaints about incidents that occurred prior to 5 December 2019 out of time, including whether they form part of conduct extending over a period, the end of which is in time, and/or whether it is just and equitable to apply a time limit in excess of 3 months.

Evidence and findings of fact

19. The Tribunal heard evidence from the following witnesses:

    19.1 The Claimant.

    19.2 Ms Sue Sargeant (Director of Housing Management).

    19.3 Mr Christopher Ashplant (In-house Solicitor). Mr Ashplant was the subject of a witness order obtained by the Claimant. Following discussion of how Mr Ashplant's evidence could be a given in a way that would allow Mr Staph to ask him questions, it was agreed that his

evidence would be treated as if he had been called by the Respondent.

19.4 Mr Neil Coils (Regional Head of Housing).

19.5 Mr David Morrissey (Operations Lead – Assets).

19.6 Ms Jill Cook (HR Director).

20. There was agreed bundle of documents, and page numbers that follow in these reasons refer to that bundle.

21. The Claimant began work for the Genesis Housing Association ("Genesis") as an Anti-Social Behaviour Officer ("ASBO") in August 2014. This was a role at level 5 in the Genesis structure. There was no suggestion that she performed other than well in that role.

22. In April 2018 a merger took place between Genesis and the Notting Hill Housing Association ("Notting Hill"), giving rise to the Respondent organisation. There was a TUPE transfer of staff, including the Claimant. There followed consultation about a restructure consequent upon the merger

23. The role of ASBO, which had not existed in the Notting Hill organisation, was to cease to exist under the restructure. An Integration and Change Policy (pages 1072-1081, plus appendices), was produced. The policy stated that there might be different levels of change required in different teams, and that there were 3 main options for dealing with new versus current roles. These were identified as follows on page 1073:

23.1 Being matched into a role. This meant that the new role was regarded as sufficiently similar to the old one for the employee to be moved straight into it. Matching could be direct or competitive, the latter applying when there were more matched candidates than available roles.

23.2 Being offered suitable alternative employment. On page 1074 it was explained that suitable alternative roles would be offered taking into account the employee's current role, personal skills, experience and performance. The policy continued on page 1075:

"Even if a role looks like a suitable alternative for you, you may still need to compete against others in the same situation, and we may need to assess you for the role to ensure that it is a correct fit for you and NHG, and to evaluate any training needs."

23.3 Being given redeployee status, meaning that there was no obvious role in the new structure, and that the employee was therefore at risk of redundancy.

24. On pages 1076-7 the policy referred to trial periods if employees were redeployed to a suitable alternative post. It stated that there would be a minimum statutory trial period of 4 weeks if an employee were redeployed. Where a trial period was successful, the employee would transfer to the new role and retain their continuous service. Where the trial period was unsuccessful, the employee would return to redeployee status and would be made redundant if no other role could be found.

25. There was produced with the policy a flow chart at page 190. The part of this that showed the process for suitable alternative employment included a box that read: "Discuss SAE role profiles and identify and assess gaps. Agree support, training and trial." There was then an asterisk, which led to a footnote reading:

    "There may be occasions when an assessment is required. For example, when one or more people are interested or the skills / knowledge required is deemed significantly different, therefore assessment is needed."

26. When cross-examined about these documents, the Claimant agreed that the reference to assessment for roles was separate from the reference to competition, although she maintained that the reference to training and support was not entirely separate. She also agreed that the policy stated that any trial period in a role would arise after the employee concerned had been offered a particular role. The Tribunal found that the documents in fact said these things. Where a role ceased to exist, the possible routes to a new role were (a) a direct match, where the new role was sufficiently similar to the old one for the employee to move straight to it, or (b) suitable alternative employment where, according to the policy, an assessment might or might not be needed before the employee took the new role. "Competition" meant a situation where there were more candidates than places for a particular role.

27. The Respondents produced a consultation pack at pages 88 onwards. The Claimant agreed that she had received this. The proposed overall structure was regional. On page 94 the consultation document stated that Housing Teams would be responsible for delivering a complete housing management service to tenants, including (among other things) managing and letting homes, collecting rent, managing repairs, and dealing with any tenancy and behavioural issues. There were to be Housing Officers, supported by a legal casework officer ("LCW"), a Floating Housing Officer ("FHO") and a co-ordinator.

28. The role of LCW is of central importance to the present case. Page 94 contained the following information about this role:

    "Legal Casework Officers will manage all legal work; this may involve possession hearings, Disrepair and Environmental Health hearings as well as anti-social behaviour and general tenancy matters. Importantly these officers sit within teams and will offer advice and support to officers on the

options and solutions to local problems. They will work across more than one team."

29. Then, on pages 94-5, the following appeared under the heading "Competition for roles":

    "In some instances there is competition for roles or assessments are required because roles are more specialised, like legal caseworkers. We are not holding assessment centres for these roles but we will use sensible exercises that we have used previously……"

30. The Claimant's evidence was that she did not, at the time, see these references to the possible need for assessments. The Tribunal did not understand the Claimant to mean by this that she did not receive the documents, but rather that she did not notice these references in them. In cross-examination, the Claimant said: "We were continuously told that assessment was for training or support. That was the main message being given by managers. Within the meetings managers were not putting any emphasis on assessment."

31. The Claimant repeated statements to this effect throughout her evidence, and this was clearly an important factor for her. The Tribunal considered that the Claimant's perception of what was being said about assessment helped to explain why she did not take on board what was contained in the documents on this subject.

32. On 11 July 2019 Ms Sargeant sent a letter to the Claimant at pages 153-155 indicating the start of formal consultation about the restructure. The letter stated that the position of ASBO would not be part of the new structure, and that there was not a direct match to a role. The roles of Housing Officer Level 3 and LCW were identified as "very strong comparable suitable alternative roles as you are currently working at this level, carrying out at least one of the functions in one [sic] the above roles."

33. The letter continued that there was not, at this point, competition for the suitable alternative roles, but that the Claimant would be informed should this change. It stated, "If you are successful in obtaining a suitable alternative role within the proposed new structure, you will be given a trial period to assess that the new role is suitable for you. During this period you will be offered further training / retraining and induction where appropriate."

34. The Tribunal noted that this letter did not contain any reference to a potential need to pass an assessment in order to obtain one of the alternative roles.

35. Following the date of this letter, there was a period when it appeared that there would be competition for the LCW roles (in that there were more potential candidates than roles), but by the time the Claimant came to be

considered, this was no longer the case, and there was the same number of candidates as available roles.

36. There was a "start of consultation" meeting on 12 July 2019, led by Ms Sargeant. In paragraph 7 of her witness statement Ms Sargeant said that she explained various matters, including that the ASBO role had not been matched with any role in the new structure. She said that it was made clear that that there should be sufficient roles for all employees, even if not in their first choices, and that assessments would be required in three scenarios. Ms Sargeant continued that she said that one of these would be where there was a specific requirement for a role, and that she specifically referred to the LCW role in this context. (At this point, it appeared that there would also be competition for these roles as there were 5 posts and 7 potential candidates).

37. Another meeting took place on 31 July 2019. Ms Sargeant presented slides that are at pages 119 to 152. These included at page 137 a slide which referred to the need for "a straightforward assessment" if (a) there was competition for a role, (b) the individual's current role was less complex than the role for which they were an SAE, or (c) there was a specific requirement for a role. This was very similar to what Ms Sargeant stated was said at the meeting on 12 July.

38. There is a dispute about what was said at the 31 July meeting. The Claimant's evidence is that Ms Sargeant did not say anything about there being a need to pass the assessment in order to take up the LCW role, and gave no benchmark for passing it. She also stated that Ms Sargeant said that she did not know whether assessment would be written or by way of interview. Ms Sargeant maintained that she said that there was now no competition for the LCW role (i.e. the number of candidates and the number of roles were the same) but that there would still be an assessment and that candidates needed to be successful.

39. Ms Sargeant's account of this meeting in paragraph 10 of her witness statement did not include an assertion that she said that the assessment would be a pass / fail exercise. In paragraph 7 of his statement Mr Coils said that Ms Sargeant stated that there was a need to pass the assessment in order to obtain the LCW role.

40. The Tribunal concluded that all three of the Claimant, Ms Sargeant and Mr Coils were giving honest accounts of their recollection of what was said. We found as a matter of probability that Ms Sargeant mentioned a need to be "successful" in the assessment, without giving this a great deal of prominence; but that the statement that there was now no competition for the role led the Claimant to believe that it would not be necessary to "pass" the assessment. The Tribunal also noted that it was not suggested that it was explicitly said that "failing" the assessment would mean that the candidate could not go forward to the role. The Tribunal also concluded that Ms Sargeant gave similar information at the earlier meeting on 12 July, again without emphasising it.

41. There was also an issue about whether Ms Allen raised her voice at this meeting, without being rebuked. The Tribunal found, again as a matter of probability, that Ms Allen spoke angrily, and that the Claimant reasonably interpreted this as her raising her voice, although we also considered that this was not likely to have been a particularly memorable aspect of the meeting, and that it was not surprising that Ms Sargeant and Mr Coils did not recall this.

42. On 20 August 2019 an email (page 167) was sent to the ASBOs by a Mr O'Neill stating that there were two LCW positions available in the Hammersmith and South teams. The email referred to the need to complete a short assessment of the applicant's legal knowledge and experience, and said that "following a successful assessment" there would be a competency based interview. The Claimant stated that she did not recall receiving this, pointing out that it had been sent to an old email address of hers. She would not, in any event, have been interested in moving to either of those teams, as they would not be geographically convenient for her.

43. Mr Coils sent an email at page 169 on 22 August 2019 to the ASBOs, including the Claimant, attaching answers to some questions that had been asked about the process for being deployed into the LCW role. On page 173, a question was recorded as to why candidates were being asked to attend a competency based interview, when Ms Sargeant had said that there would not be one. The answer included this: "…given we are so close to ending consultation will we [sic] revert to what has been agreed for post consultation, i.e. just technical assessment." The answer to another question, on page 174, read as follows: "Until everyone has completed their preference forms and these have been analysed we cannot eliminate the competition element as we may still have more people preferring the Legal Caseworker role. The role requires a technical assessment that will look at legal knowledge this must be passed before we can offer anybody roles." The Claimant accepted that she had received this document.

44. When asked about these answers, and repeatedly in her evidence, the Claimant said that, while the documents indisputably said what they said, she relied on what was said by "trusted people", meaning the Respondent's managers. She maintained that the managers did not say that there would be a need to pass the assessment in order to be deployed to the LCW role, or that the assessment would be something that could be failed.

45. There was a group meeting on 27 August 2019. The Claimant stated that Mr Coils said at this meeting that there were enough jobs for everyone: she took this to mean enough LCW jobs, as she had only ever discussed that role and not that of Housing Officer. Mr Coils agreed that he had said something to this effect, but maintained that he meant that there would be a job for everyone, whether as an LCW or as a Housing Officer.

46. There was another meeting on about 29 August 2019 when Ms Sargeant presented some slides. The slide at page 197 referred to assessment for the LCW role. The Claimant was not sure whether she was present at this meeting, and said that she did not remember a presentation by Ms Sargeant.

47. As the Tribunal has already observed, the Claimant relied heavily on what she understood from the meetings, as opposed to what was in the documents. It is beyond dispute that the documents produced at the time made reference to assessment for the LCW role. As to what was said at the meetings, the Tribunal found as follows:

    47.1 There was no suggestion that any of the Respondent's managers had positively asserted that an assessment would not take place, or that there would be no need to pass it: the Claimant's case was that they did not say that there would be such a need.

    47.2 As will be explained below, several of the Claimant's colleagues who were also unsuccessful in relation to the LCW role, made similar points to hers about what was said.

    47.3 The Tribunal found it probable that the managers would not want to emphasise the assessment or the prospect of failing it, while not going as far as to ignore it altogether.

    47.4 Equally, if the Claimant and her colleagues were convinced that they should go automatically into the LCW role, it was plausible that they might overlook or not remember the unwelcome prospect of an assessment that could be passed or failed.

    47.5 As a matter of probability, therefore, the Tribunal found that the assessment was mentioned at times in the meetings, but not given any great prominence.

48. An important point in the context of the present case is that the Claimant agreed that, whatever was said or not said about the assessment, it was the same for all the ASBOs. She was not told anything different from what her colleagues were told.

49. The Claimant was invited to the assessment for the LCW role on 29 August 2019 (page 483). The purpose of the assessment was stated to be to "test how you interpret and apply legal knowledge presented to you". A sample or specimen assessment was attached, with a suggestion that candidates might wish to practice the format of the test. (This involved being provided with the legislation relevant to the questions asked, with the stated intention of testing the candidate's ability to understand and apply the law, rather than their knowledge of it). Support sessions were available on 2 September, which the Claimant did not attend. When asked about this in cross-examination, the Claimant said that she did not attend because she

was still working, and her manager had consistently told her that she had a job.

50. The Claimant sat the assessment with 4 out of 6 others on Friday 6 September. Her evidence was that, before the assessment, Mr Coils reassured everyone that there were enough jobs for all. He agreed that he said this, although meaning jobs including that of Housing Officer. The Claimant also said that Mr Coils described the purpose of the assessment as being to identify training and support needs. Mr Coils' evidence was that he said that part of the reason for the assessment was to identify training needs, and he accepted that he did not say that there was a pass mark. (He commented that there came a point where he realised he did not know what the pass mark was.)

51. Two ASBOs, including Ms Allen, sat the same assessment on Monday 9 September. Mr Coils stated that Ms Allen had an unmovable professional appointment on 6 September, while the other individual had been on leave on that date.

52. The pass mark for the assessment was set at 60%, being a score of 18 out of 30. Mr Ashplant marked the assessments and Ms Majkowski of HR moderated them. The Claimant scored 8.5, which was the lowest of the eight candidates. The two who took the assessment on 9 September (Ms Allen, who is white, and another colleague, who is Asian) both passed. Another candidate (a black man), who took the assessment at the same time as the Claimant, scored 17, and in the event this was found to be sufficiently close to the pass mark for him to be appointed. The remaining three who took the assessment on 6 September also failed.

53. The Claimant contended that her assessment was not scored fairly. This was not, in itself, identified as an issue in the case, although it could perhaps be seen as part of the complaint that the Claimant was not appointed to the LCW role. A fair amount of time was spent in the hearing considering the merits of the answers that the Claimant gave in the assessment. The Tribunal reached the following findings on this aspect:

    53.1 The exercise of going through C's arguments as to why she should have been given a higher score showed the inadequacies of her answers. It would be disproportionate to set out the whole of this exercise in these reasons, and the Tribunal will give a single example only. Question 1 carried two marks, and asked what the Respondent had to prove to persuade a judge to make a possession order on discretionary grounds. The Claimant scored zero, and maintained that she should have received at least 1 mark, because she identified rent arrears of 8 weeks, and compliance with the pre-action protocol. The requirement for 8 weeks' arrears arises under the mandatory grounds for possession, not the discretionary ones; and compliance with the protocol is not something that needs to be proved. The Claimant also referred to a debt outstanding at the date of the hearing, which is also not a requirement under the discretionary

grounds. The Claimant's answer was wholly wrong, yet she continued to assert that she should have been given some credit for it. Further analysis of others of the answers where the Claimant complained that she had been marked unfairly gave rise to similar conclusions.

53.2 Even if the Claimant's contentions were accepted in full (the Tribunal did not accept them) the result would be a score of 16, which was still not a pass.

53.3 The Claimant raised the alterative argument that, had she known that the test involved passing or failing, she would have approached it differently (meaning that she would have prepared more carefully). This was, if anything, an explanation for why her answers were poor, which did not sit comfortably with her primary argument that they were better than she was given credit for.

53.4 It may be a coincidence that the two candidates who took the assessment a few days later than the others both passed; but it may also be that they had some indication from one or more colleagues of what the assessment involved, and in particular that about half of the questions were ones that had appeared in the sample assessment sent on 29 August.

54. On 20 September 2019 the Claimant was informed that she had not been successful in the assessment. She sent an email to Mr Coils and Ms Sargeant at page 291 in which she stated that, throughout the consultation process, the team had been told that the assessment was not relevant to appointment to the role, but was merely to identify training needs. She said that, had she been properly informed, she would have prepared differently, and that some people evidently knew that the questions were going to be the same as in the sample assessment. Ms Sargeant replied on the same day stating that it had been explained that it would be necessary to pass the assessment, and that no appeal was available, but that the grievance procedure would provide a mechanism for challenging the outcome.

55. The Tribunal found that the reason why the Claimant was not deployed into the LCW role as a result of this exercise was that she did not pass the assessment. It was impossible to discern any connection between this and the Claimant's race. Whatever the merits, or otherwise, of the assessment, it was the same for everyone. The papers were anonymised when marked. Whatever criticisms there might be of what was said about the assessment, the same was said to everyone. Allowing two candidates to take the assessment a few days after the others gave rise to a risk that information would "leak" to those two that would enable them to do better in the assessment than they might otherwise have done. The Tribunal accepted the Respondent's evidence about the reasons why these two candidates were allowed to take the assessment later, and these had no connection with matters of race. The candidate in whose favour an element of

discretion was exercised when he fell just short of the required mark was black.

56. On 25 September 2019 a collective complaint (page 293) was presented by all four unsuccessful candidates, including the Claimant. This stated that there were 7 positions; that they had not been told that they might not get a position; that they had been told that the assessment was mainly to assess training needs; and that they had now been told that there was a pass mark.

57. A meeting about the collective complaint took place on 1 October 2019, minutes of which are at pages 247-250. All four candidates attended, together with Ms Sargeant and Mr Coils, and there was discussion of the assessment. There was a dispute as to whether in this meeting Ms Sargeant accused the Claimant of getting angry. The Tribunal found as a matter of probability that Ms Sargeant said something to that effect, and that, in the absence of any record of it in the minutes, she has not remembered it: this would not be, in itself, a particularly memorable incident. As to the reason why this was said, the Tribunal found that the most obvious explanation, and as a matter of probability what in fact occurred, was that Ms Sargeant thought that the Claimant was becoming angry: she was indeed angry about what had happened regarding the assessment.

58. A further role became available at this time, being that of a Floating Housing Officer (FHO). On 2 October 2019 at pages 251 - 253 Ms Sargeant instructed that an email should be sent out to "a defined group of people" about the FHO role. Her evidence was that this should have included the ASBOs but that they were all inadvertently omitted. The Tribunal accepted that this was an error. There was no reason why Ms Sargeant should have intentionally excluded the ASBOs from this communication. The Tribunal also found that there was no reason to link this error to any question of race: the Claimant accepted that, of the 58 individuals to whom it was addressed, 31 are black.

59. On 4 October 2019 at pages 500-501, Ms Sargeant sent an email responding to the issues raised at the meeting on 1 October. She maintained that it had been stated that it would be necessary to pass the assessment, while recognising that the candidates had not been told what the benchmark or the scoring system would be. Ms Sargent also addressed other complaints as to, for example, the fairness of the marking, and the fact that many of the questions had already appeared in the specimen paper.

60. On 10 October 2019 at pages 269-275 the Claimant raised a grievance against Ms Sargeant and Mr Coils covering many of the contentions about the process for selection of LCWs that arise in the present case. Mr Morrissey wrote to the Claimant on 25 November 2019 at page 404 inviting her to a grievance meeting. The letter stated, among other matters, that

the Claimant could identify witnesses, who would usually be interviewed on another occasion.

61. The issues for determination by the Tribunal that arose from the grievance process were:

    61.1 Mr Morrissey's failure to interview witnesses identified by the Claimant.

    61.2 Mr Coils, when interviewed, saying that the Claimant was confused.

    61.3 Mr Morrissey's rejection of the grievance.

62. The grievance meeting took place on 29 November 2019. Draft minutes were produced which included at page 509 a record of the Claimant making an observation "culturally as a black woman". The Claimant denied saying "as a black woman", and when she raised the point, the minutes were amended.

63. The Claimant asked Mr Morrissey to interview the witnesses she named, being Ms Allen and two others who had been present at the meeting on 27 August. He did not do so. In his witness statement (paragraph 42) Mr Morrisey's explanation for this was that "ultimately nothing they would be able to tell me would alter the fact that an assessment was required". In cross-examination he said something different, i.e. that he did not need to speak to the others because he believed what the Claimant said about her perception. The two points are not inconsistent with each other, and the Tribunal did not consider that any adverse inference should be drawn from the difference. We found that both points were probably relevant to Mr Morrissey, and on that basis accepted his evidence about this aspect.

64. The second issue arising from the grievance hearing concerns Mr Coils saying in the course of his interview that the Claimant was confused. In paragraph 41 of his witness statement Mr Coils said that he was not aware of this involving any racial stereotype: he said what he did because he thought the Claimant was confused. The Tribunal found no reason to believe that Mr Coils had any conscious reason for saying this other than that he genuinely thought that the Claimant was confused, and accepted his evidence on the point.

65. Towards the end of his cross-examination of Ms Cook, Mr Staph put to her that the amalgamation was very confusing for the Claimant and for management. The Tribunal found the fact that Mr Staph put this question of some support in finding, as we did, that suggesting that someone was confused did not involve any racial stereotyping or connotation.

66. The third allegation concerning the grievance was that the outcome was an act of discrimination and/or victimisation. Mr Morrissey gave the outcome in a letter dated 23 December 2019 at pages 642-645. The letter stated that Mr Coils and Ms Sargeant had been interviewed after the meeting with

the Claimant. The central finding was that Mr Morrissey found no evidence that clearly demonstrated that the Claimant had been misled or set up to fail in the assessment process for the LCW role. Mr Morrissey further stated that, although the policy provided for on the job assessment after training, this did not arise as the Claimant had not passed the assessment and had not been appointed. He therefore concluded that the grievance was not upheld. The letter referred to the right to appeal against the outcome.

67. In paragraph 62 of his witness statement Mr Morrissey set out in full the conclusions expressed in the outcome letter. In paragraph 64 he stated (as in the letter) that he found that a more effective communication strategy should have been implemented, with a view to ensuring that any disputes or challenges could be resolved in a more effective and professional way. Mr Morrissey continued that it was clear from the documents that an individual would need to pass the assessment in order to obtain the LCW role, and that it should be obvious to anyone undertaking an assessment that they should try their best.

68. The Claimant relied on the (ultimately deleted) reference to "as a black woman" in the grievance meeting minutes as indicating that Mr Morrissey believed that she might do a protected act, such as make a complaint referring to the Equality Act. The minutes were not taken by Mr Morrissey, so if there was an error in recording what the Claimant said, the error was not his. In paragraph 58 of his witness statement Mr Morrissey said about this point: "I do not recall whether Noresa referred to herself as a black woman in the meeting, though I do recall her referring to being a single mother….." The Claimant is not, and was not at the time, a single mother. When asked about this in supplementary questions in chief, Mr Morrissey said something different, i.e. that the Claimant had spoken about the impact of events on her and her child without mentioning anyone else being around, which led him to conclude that she was a single mother.

69. Although this point was not directly in issue, the Tribunal asked itself whether this evidence indicated stereotyping on Mr Morrissey's part, and if so, what significance it had. Ultimately, the Tribunal found that he had made an assumption about the Claimant which we found troubling, to a degree. There was not, however, any reason to link this with his decision, nor any reason to find that it showed any belief or suspicion on Mr Morrissey's part that the Claimant might do a protected act. We found that he did not have that belief. The Tribunal concluded that Mr Morrissey reached the decision that he did on the merits of the grievance as he saw them.

70. On 2 December 2019 the Claimant's personal telephone number was obtained by some customers. It is clear that, somehow, the number had found its way onto the Respondent's system. It is not, however, clear how it got there. Ms Sargeant said that she believed that the Claimant had lost her work mobile, and had provided her personal number for this reason. The Claimant denied losing her mobile, and maintained that someone must have put her personal number on the system as an act of harassment.

71. The Tribunal considered it likely that this had arisen from some form of mistake on someone's part. It seemed unlikely that anyone would have done this with the intention of harassing the Claimant, as she would find out that it had happened as soon as a customer used her personal number, and she would have it removed from the system. The Tribunal found, on balance of probabilities, that there had been a mistake. There was no reason to find that this event was related to the Claimant's race, not least because there was no firm evidence as to how or why it happened, or who was involved.

72. Meanwhile, in November 2019 an LCW role became available and advertised internally within the Respondent and externally. The role was not offered to the Claimant before being advertised. The Respondent's case was that it could not be, as she had not been successful in the assessment for the role. The Tribunal considered that this followed logically from the Respondent's stance about the significance of the assessment.

73. The Claimant was nonetheless entitled to apply for the role and did so, being one of 25 internal and external applicants. Ms McKinlay and Mr Arthur carried out the first sift for shortlisting and produced a list of 8, including the Claimant. Mr Ashplant then reviewed all 25 applications and provided comments which were set out in a document at pages 715-716. Mr Ashplant agreed with the decision not to shortlist 17 out of the 25. He did not agree with 4 of the 8 shortlisted, including the Claimant. His evidence was that at a subsequent meeting on 11 December 2019, Mr Arthur, Ms McKinlay and he agreed on shortlisting just the 4 that he had identified, thus not including the Claimant.

74. Mr Staph put a number of points to Mr Ashplant about his role in this shortlisting exercise. The applications were not anonymised, and the Tribunal comments that it would have been better practice if they had been, especially given the mixture of external and internal candidates. Mr Ashplant denied being "in charge" of the shortlisting. The Tribunal noted that his opinion had evidently prevailed in respect of the 4 whom he thought should not be shortlisted, so that if he was not technically in charge of the process, his opinion carried a great deal of weight.

75. It was put to Mr Ashplant that Mr Arthur (who managed the Claimant) was better placed than he was to judge her suitability for the role. Mr Ashplant said that the selection had to be based on the contents of the applications, and not on anyone's other knowledge of the candidates, otherwise it would not be fair. The Tribunal accepted Mr Ashplant's evidence on this point as being a view that could plausibly be taken in the circumstances. The Tribunal also accepted Mr Ashplant's evidence that he did not at this time know that the Claimant had made complaints against him in her grievance: there was no evidence that Mr Morrissey had contacted him, and no reason to disbelieve Mr Ashplant on the point.

76. On 11 December 2019 Ms McKinlay sent an email at page 726 to Ms Bose of the Respondent's HR team, attaching the list of 4 candidates to be interviewed. Ms Bose replied on 18 December saying that there were inconsistencies in the list, and asking for the shortlisting criteria used before the candidates could be updated. Ms McKinlay sent an email, also on 18 December, which prompted a reply from Ms Bose on 19 December asking what each candidate had scored under each criterion. The interviews of the 4 candidates were scheduled for 9 January 2020. Ms Crawford also sent an email on 19 December asking for further details of the scoring of the candidates. This was provided by Mr Arthur on 10 January 2020 at page 273, with the same 4 candidates shortlisted.

77. The Claimant had meanwhile raised an appeal against the grievance outcome, which was referred to Ms Cook. On 8 January 2020 the Claimant wrote to Ms Cook at page 702 about the time being taken to arrange an appeal hearing. She also referred to her application for the advertised LCW role, asking for an update on this. Ms Cook replied on the latter point, again on 8 January, saying that there had been a delay in shortlisting and that the candidates should be updated soon. On 10 January at page 718 Ms Bose sent an email, apparently to all the applicants for the LCW post, saying that the shortlisting panel were still reviewing the applications and that they should receive an outcome soon.

78. All of the above led Mr Staph to cross-examine Ms Cook on the basis that her email of 8 January and Ms Bose's of 10 January were untrue, in that the shortlisting had been completed by 19 December and the 4 interviews conducted on 9 January. This point was not directly in issue in the case and was not addressed in the Respondent's witness statements. However, the Tribunal concluded that the most likely explanation was that, although the interviews had originally been scheduled for 9 January, they did not take place then, because of the queries about the shortlisting, which were not resolved until 10 January. What was said on 8 and 10 January was not, therefore, untrue.

79. The appeal meeting took place on 27 January 2020, conducted by Ms Cook. The particular issue that arises from the meeting concerned Ms Cook's stated view that the Claimant had misunderstood elements of the policy, which Ms Cook referred to in paragraph 40 of her witness statement. This was not taken up with Ms Cook in cross-examination, and it seemed to the Tribunal to involve a similar point to that raised in relation to Mr Coils stating that he believed that the Claimant was confused. For essentially the same reasons as expressed in relation to the latter issue, the Tribunal concluded that there was no reason to find that Ms Cook had any reason for saying what she did other than that she felt that the Claimant had misunderstood the policy, and that this did not involve any racial stereotyping or connotation.

80. Another point that arose in Ms Cook's evidence concerned a note made by a colleague, Ms Glynn, at page 1020, of a conversation with Mr Arthur. This contained questions put to Mr Arthur arising from the collective

grievance, and his answers. There was a dispute about whether a particular line in the note recorded a question or answer. The words were: "Were told outcome of tests wouldn't determine if they would get a role or not – they were led to believe that and they all believed it". In the absence of direct evidence from Ms Glynn and/or Mr Arthur, it was impossible for the Tribunal to be certain about this (although Ms Cook stated that she had spoken to Ms Glynn, who had told her that this was one of the questions). The more important point, in the Tribunal's judgement, was that (as noted previously) all of the ASBOs were told the same thing.

81. Ms Cook sent the appeal outcome to the Claimant in a letter of 3 February 2020 at pages 828-836. The primary conclusion reached by Ms Cook was that the policy had been followed correctly and that the Claimant had misunderstood elements of it. As with the similar observation made by Mr Coils, the Tribunal found that this statement should be taken at face value: Ms Cook said that she had concluded that the Claimant had misunderstood elements of the policy because that was what she believed had happened.

82. The letter concluded with the words "You mentioned at your meeting that you hoped not to have to take your issues to a tribunal. I sincerely hope that this will not be necessary and that you will remain an NHG employee and move into a Housing Officer role."

83. The Claimant's case was that the reference to remaining an employee of the Respondent meant that she would not, or might not remain an employee if she brought a Tribunal claim, and was therefore a form of threat that she would be dismissed if she did so. The Tribunal did not consider that this was a reasonable interpretation of what Ms Cook wrote, and that the passage should be taken at face value: Ms Cook hoped that the Claimant would not go to a Tribunal, and hoped that she would remain with the organisation and take up the Housing Officer role.

84. On 6 February 2020 the Claimant was sent a letter dated 23 January at pages 845-846 stating that she was being transferred to the role of Housing Officer (Level 3), involving a reduction in salary of around £4,000, but with salary protection. The Claimant asserted that this was a demotion from the role of ASBO, while the Respondent maintained that it was not. The Tribunal concluded that this was not technically a demotion, as the ASBO role had ceased to exist, but also that an employee in the Claimant's position might reasonably regard it as such, given in particular the reduction in salary.

85. In the course of her oral evidence, in answer to a question from the Employment Judge, the Claimant agreed that the transfer to the role of Housing Officer was a consequence of her not being appointed to the LCW role. The Tribunal considered that this was inevitably so, as these were the two roles open to an ASBO under the restructure.

86. Mr Staph also took up with Ms Cook paragraph 64 of her witness statement, in which she stated that, although it was correct that the Housing

Officer role attracted a lower salary, there would be the opportunity for the Claimant to apply to progress to level 4, which would have given her a salary closer to her previous ASBO salary. Mr Staph suggested that it was discriminatory to demote someone and say that they could regain their status and pay after 12 months. The Tribunal considered that this might be regarded as somewhat insensitive in the circumstances, but could not reasonably be seen as discriminatory.

87. There was then a period during which the Claimant was absent sick, following which she returned to work. This period was not canvassed in the course of the hearing. One further matter was covered, which arose from a telephone conversation between Ms Sargeant and the Claimant on 30 June 2020. There was discussion of the Claimant's feelings about her ability to carry out the Housing Officer role, which included reference to a traumatic incident earlier in her career when she was a Housing Officer. Among other things, Ms Sargeant asked whether the Claimant was aware that she could be at risk of redundancy if she were to consider the Housing Officer role unsuitable because of her personal circumstances.

88. The Claimant's case was that this amounted to a threat, which was followed up by a letter of 14 July 2020 extending the trial period as a Housing Officer from 12 June to 31 July 2021. The Tribunal considered that what Ms Sargeant said could not reasonably be interpreted as a threat. It was a statement of fact which reflected the circumstances that the Claimant had not been appointed to the LCW role and was speaking of not being able to continue in the role that was available to her. The Tribunal also considered that the extension of the trial period was, if anything, a benefit to the Claimant in that it gave her further time to adjust to the requirements of the role.

89. Finally, the Claimant relied on a YouTube video posted by the Respondent's Chief Executive, Ms Davies, in response to the Black Lives Matter movement. In the course of this, Ms Davies made observations such as "….at Notting Hill Genesis despite a strong and genuine will to address these issues we are clearly not getting it right….." (page 883) and "….we want to challenge current ways of working and we need to get into the depth of the organisation, institutional racism means that maybe some of our policies are not doing what they should be doing."

90. The Tribunal did not consider that this material was, ultimately, of any real assistance in determining the issues in the case. The Tribunal's task was to examine the evidence concerning the matters about which the Claimant complained. The Chief Executive's comments served to remind the Tribunal that it should do so with care, but did not mean that any assumptions should be made that were not otherwise warranted.

<u>The applicable law and conclusions</u>

91. Section 13 of the Equality Act 2010 makes the following provision about direct discrimination:

(1) 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.

92. The "because of" test does not mean that the protected characteristic must be the sole or principal reason for the treatment. It is sufficient if it is a substantial cause.

93. Section 23 of the Equality Act provides that, for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

94. Section 26 of the Equality Act provides as follows regarding harassment:

(1) A person (A) harasses another (B) if –
(a) A engages in unwanted conduct related to a relevant protected characteristic , and
(b) The conduct has the purpose or effect of –
(i) Violating B's dignity, or
(ii) Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

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

95. In order to avoid repetition, in the paragraphs that follow, the Tribunal will paraphrase section 26(1)(b) in terms of there being the purpose or effect of harassing the Claimant.

96. The Tribunal reminded itself that in **Richmond Pharmacology v Dhaliwahl [2009] IRLR 336** the Employment Appeal Tribunal commented (while finding for the Claimant) that "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." A certain degree of gravity in the conduct concerned is required for it to amount to harassment.

97. On victimisation, section 27 of the Equality Act 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 pf 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.

98. The "because of" test for victimisation means the same as in the context of direct discrimination.

99. Section 136 of the Equality Act makes the following provision about the burden of proof:

(2) If there are facts from which the court could decide, in the absence of any further 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.

100. In **Igen v Wong [2005] IRLR 258** and **Madarassy v Nomura [2007] IRLR 246** (both decided under the earlier legislation, but applicable to the Equality Act) the Court of Appeal identified two stages to the similar test under that legislation. At the first stage the Tribunal would ask whether the facts were such that, in the absence of an explanation, it could properly find that discrimination had occurred. If it could do so, at the second stage it would ask whether the Respondent had proved that it had not discriminated against the Claimant.

101. In **Madarassy** the Court of Appeal emphasised that at the first stage the Tribunal should consider whether it could properly find that discrimination had occurred. It would not be enough for there to be a difference in treatment and a difference in protected characteristic; there would have to be something more for the Tribunal to make a proper finding of discrimination. The something more might not in itself be very significant, but it had to exist.

102. In **Hewage v Grampian Health Board [2012] UKSC 37** Lord Hope, in the Supreme Court, observed that the two stage test would not be of assistance to Tribunals where they were able to make direct findings of fact as to why particular treatment occurred.

103. Mr Staph relied on a passage from the judgment of the Supreme Court in **Essop v Home Office [2017] ICR 640** for the proposition that the requirement of passing the assessment was a proxy for direct race discrimination. The words he cites are not part of the Court's reasoning on the point that it had to decide, and so do not amount to binding authority, although any observations by the Supreme Court should be accorded great weight. They do not, however, support the point that Mr Staph seeks to make. Paraphrasing Lady Hale's words, the requirement would be "closer" to direct discrimination by way of a proxy for race if all the BAME

candidates, or even all the black candidates, had failed. They did not. The top scoring candidate was BAME and the one who had the third-highest score, and whose application was successful on the basis that he had come within one mark of the pass score, was black.

104. Mr Staph also relied on section 138 of the Employment Rights Act 1996 as giving rise to a statutory right to a 4-week trial period as an LCW, on the basis that this had been identified as suitable alternative employment. He cited the summary of the effect of section 138 given on a government website in the following terms: "You have the right to a 4 week trial period for any alternative employment you're offered." The Tribunal accepts that as a fair summary of the effect of section 138. What is clear is that the right to a trial period arises after the alternative employment has been offered. In the present case, the role of LCW was identified as suitable alternative employment, but it was never actually offered to the Claimant – had it been offered, she would have accepted it and the central issues in the case would not have arisen.

105. Turning to the issues, the Tribunal will set out its conclusions using the numbering in paragraph 9 above for the individual allegations.

106. Issue 1. (Competitive assessment for the LCW role: direct discrimination). It might be said that the factual basis of the issue as defined has not been established, in that when the Claimant took the assessment it was not "competitive" in the sense identified by the Respondent's documents. The Tribunal assumed in the Claimant's favour that the term should be interpreted more widely as meaning a pass/fail assessment. It is the case that the Respondent decided that there should be such an assessment.

106.1 Was there less favourable treatment of the Claimant? The Tribunal found that there was not, because all the ASBO's were the subject of the same requirement.

106.2 In any event, the facts that the Tribunal has found are such that it has concluded that the requirement that candidates should pass the assessment in order to be deployed to the LCW roles was unconnected with race; alternatively, that they do not provide a basis on which the Tribunal could properly find that discrimination occurred. Although the process is open to some criticisms, race has no bearing on any of these, and it cannot be said that the requirement of passing the assessment was a proxy for race.

107. Issue 2. (Not appointing the Claimant to the LCW role: direct discrimination). The Claimant relies on Ms Allen as her comparator. Ms Allen was appointed to the role, and the Claimant was not.

107.1 The Tribunal found that there was less favourable treatment, as the Claimant was not appointed and Ms Allen was.

107.2 For essentially the reasons given in relation to issue (1) above, the Tribunal has found that the decision to appoint Ms Allen, and not to appoint the Claimant, was made on the basis of the outcome of the assessment, and that race was not a factor in this.

107.3 In her witness statement the Claimant referred to "gossip" that Mr Ashplant had given Ms Allen assistance in advance of the assessment. There was no evidence that this had occurred, and no reason put to Mr Ashplant as to why he would do this. The Tribunal accepted Mr Ashplant's denial ("It's just not true that I coached Ms Allen. I would never do that") of doing so.

108. Issue 3. (Ms Sargeant accusing the Claimant of getting angry: direct discrimination or harassment.) The Tribunal has found as a matter of probability that Ms Sargeant said that the Claimant was getting angry, and that she said this because that was her perception. The Tribunal first considered this complaint in terms of the provisions regarding harassment, and reached the following conclusions:

108.1 The Tribunal doubted that saying that someone was getting angry, if that is how the person concerned perceived the situation, amounted to unwanted conduct within the meaning of section 26. The Tribunal had it in mind that there is a threshold of seriousness for conduct to amount to harassment.

108.2 For similar reasons (i.e. the comment was passing and reflected Ms Sargeant's perception), this was not said with the purpose of harassing the Claimant. If it had that effect, it was not reasonable for it do so, for similar reasons.

108.3 In any event, the Tribunal's finding is that Ms Sargeant said what she did because her perception was that the Claimant was getting angry, and that this was unrelated to her race. Alternatively, the facts are not such as could properly form the basis of a finding that the comment was related to race.

109. If considered as an allegation of direct discrimination, the complaint fails because it was not made "because of" race, a higher hurdle than that of being "related to" race. It also did not amount to less favourable treatment, because the Tribunal's finding that Ms Sargeant's comment reflected her perception means that she would have said the same in the case of a comparator of a different race whom she perceived as getting angry to a similar degree. The Claimant relied on Ms Allen as a comparator, relying on the occasion when she spoke angrily at the meeting on 31 July. The Tribunal has accepted that Ms Sargeant and Mr Coils did not remember this incident: the fact that they did not do so shows the difficulty of drawing a comparison in such circumstances, where much depends on how angry an individual was, and on the perception of others in relation to that.

110. Issue 4. (Not offering the Claimant the Floating Housing Officer role: direct discrimination). There was less favourable treatment of the Claimant, as she was not informed of the role when others were.

110.1 This treatment was not confined to the Claimant, as all of the ASBO team were omitted from the email.

110.2 The Tribunal's finding that this was an error excludes this being done because of race; alternatively, on the facts found, there is no proper basis on which a finding of discrimination could be made.

111. Issue 5. (Providing the Claimant's personal number to customers: harassment). The Tribunal's finding is that this occurred because of an error on someone's part.

111.1 The Tribunal doubted that making an error could amount to unwanted conduct within the meaning of section 26, as "conduct" implies something done with a degree of intention. An error could not be committed with the intention of harassing the Claimant, but we considered that it could have that effect, in that it might give rise to an intimidating or hostile environment.

111.2 The making of a mistake, however, could not, at least in the circumstances to the extent that they are known in the present case, be related to race.

112. Issue 6. (Not assimilating, i.e. appointing, the Claimant to the LCW vacancy prior to it being advertised in November 2019: direct discrimination).

112.1 The Tribunal concluded that there was no less favourable treatment of the Claimant, because there was no evidence that anyone was offered the role before it was advertised, nor was there any reason to believe that this would have been done in the case of any hypothetical comparator.

112.2 In any event, the Tribunal's finding is that the reason why the Claimant had not been offered an LCW role before this one was advertised was that she had not passed the assessment. For the reasons given in relation to issue (1) above, this finding excludes this being done because of race; alternatively, the facts found do not provide a proper basis on which a finding of discrimination could be made.

113. Issue 7. (Not shortlisting the Claimant after the LCW role had been advertised: direct discrimination). There was less favourable treatment, as the Claimant was not among the 4 shortlisted.

113.1 The Tribunal has noted that Mr Ashplant's opinion about the shortlisting of candidates evidently prevailed; that he evidently was tougher in his approach than the other two shortlisters; and that it could be said that Mr Arthur had a better idea of the Claimant's abilities than he did.

113.2 None of these, however, provides a reason to find that the decision not to shortlist the Claimant was taken because of race. The facts found did not provide a basis on which the Tribunal could properly find that discrimination had occurred. They showed only that, on a panel of three, Mr Ashplant's opinion had prevailed, and that the shortlisting had been carried out on the basis of the applications, and not any personal knowledge of the candidates.

114. Issue 8. (Investigation of the grievance by Mr Morrissey, i.e. failing to interview witnesses identified by the Claimant; direct discrimination and victimisation). The Tribunal considered that the failure to interview witnesses was capable of amounting to less favourable treatment and/or a detriment.

114.1 The Tribunal has accepted Mr Morrissey's evidence as to why he did not interview the witnesses. His explanation excludes this being because of race; alternatively, the Tribunal's findings do not provide a basis on which it could properly find that discrimination had occurred.

114.2 With regard to the complaint of victimisation, the Tribunal has found that Mr Morrissey did not believe that the Claimant might do a protected act.

115. Issue 9. (Mr Coils describing the Claimant as confused: direct discrimination, harassment and victimisation). The Tribunal has accepted Mr Coil's evidence that he said this because he genuinely believed that the Claimant was confused, and has found that this did not involve any racial stereotyping.

115.1 Referring to the test for harassment, the Tribunal doubted that describing someone as confused, when the speaker had a genuine perception that this was the case, could amount to unwanted conduct within the meaning of section 26, again having in mind the threshold of seriousness for conduct to amount to harassment. In any event, the Tribunal accepted Mr Coils' evidence as to why he said this, which excludes the intention of harassing the Claimant; and for essentially the same reasons, the Tribunal found that saying this could not reasonably be perceived as harassing. The Tribunal's finding also excludes this comment being related to race, or alternatively means that the facts are not such that it could properly find that it was related to race.

115.2 With regard to direct discrimination, the Tribunal similarly doubted that describing someone as confused in these circumstances could

amount to less favourable treatment: there was no actual comparator and no reason to think that Mr Coils would have spoken differently about a hypothetical comparator of a different race who also appeared to be confused. The Tribunal's conclusions about the conduct not being related to race lead it to conclude also that it was not because of race.

115.3 There was no suggestion in the evidence that Mr Coils believed that the Claimant might do a protected act. It was not put to him that he did, nor was it suggested how such a belief might have a causal link with describing the Claimant as confused.

116. Issue 10. (Mr Morrissey dismissing the grievance: direct discrimination and victimisation). The Tribunal has concluded that Mr Morrissey reached the decision that he did on the merits of the grievance as he saw them.

116.1 The Tribunal considered that deciding the grievance substantially against the Claimant's complaints could amount to less favourable treatment and/or a detriment.

116.2 The Tribunal's conclusions on the facts exclude the decision being because of race, alternatively do not provide a basis on which the Tribunal could properly conclude that the decision was because of race.

116.3 Those conclusions also exclude the decision being because Mr Morrissey believed that the Claimant might do a protected act. We have found that he did not have such a belief.

117. Issue 11. (Letter transferring the Claimant to the role of Housing Officer: direct discrimination and victimisation). The Claimant has accepted, correctly in the Tribunal's judgement, that this was a consequence of her not being appointed as an LCW: the decision on this issue therefore follows that on issue 2.

118. Issue 12. (Ms Cook stating that the Claimant had misunderstood elements of the policy: direct discrimination, harassment and victimisation). The Tribunal has found that Ms Cook stated this because she in fact believed that the Claimant had misunderstood elements of the policy. The Tribunal's analysis of this in terms of the complaints of direct discrimination, harassment and victimisation is the same as in respect of issue 9 concerning Mr Coil's similar statement.

119. Issue 13. (Ms Cook's statements in the grievance appeal outcome: victimisation). The Tribunal has found that what Ms Cook wrote about hoping that the Claimant would not go to a Tribunal, and would remain with the Respondent and take up a Housing Officer role should be taken at face value.

119.1 Ms Cook evidently did believe that the Claimant might do a protected act, as she referred specifically to the prospect of a Tribunal claim.

119.2 The Tribunal found that it was not, however, a detriment to write that she hoped that the Claimant would not go to a Tribunal. The Tribunal has also found that it was not a reasonable interpretation of Ms Cook's expression of hope that the Claimant would remain with the organisation to take this as a threat of dismissal. That also did not amount to a detriment.

120. Issue 14. (Ms Sargeant's reference to probation and the extension of the trial period: direct discrimination and victimisation). The Tribunal has found that what Ms Sargeant said could not reasonably be interpreted as a threat and that the extension of the trial period was, if anything, a benefit to the Claimant.

120.1 These matters did not amount to less favourable treatment of the Claimant. There was no actual comparator and no reason to believe that a hypothetical comparator of a different race in the same in the same circumstances would have been treated differently. What Ms Sargeant said was a statement of fact which, the Tribunal considered, could not reasonably be left unsaid at that time. Extending the trial period was, if anything, favourable to the Claimant in giving her additional time to adjust to the role. For essentially the same reasons, the treatment was not detrimental to the Claimant.

120.2 The Tribunal concluded that Ms Sargeant said what she did in order to inform the Claimant of the situation she was facing. The facts were not such that the Tribunal could properly find that discrimination had occurred, as there was no reason why the Claimant's race should have been a factor in explaining the situation to her.

120.3 There was nothing in the evidence to suggest that Ms Sargeant said what she did because she believed that the Claimant might do a protected act, nor was it put to her that this was the case.

120.4 The reasoning in sub-paragraphs 2 and 3 above are equally applicable to the extension of the trial period.

121. The effect of the above is that the Tribunal has found against the Claimant on each individual complaint. At this point, the Tribunal paused to consider the overall picture in order to ask itself whether, on looking at the case in the round, we considered that we might reach any different conclusion from that which follows from considering the individual components. We found that we would not do so.

122. Given the Tribunal's conclusions on the merits of the complaints, it was not necessary to address the issue of time limits.

123. The outcome, therefore, is that all of the complaints are dismissed.

124. There will be a further hearing, if required, on 30 March 2021 to determine any applications arising from this judgment.

Employment Judge Glennie

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Employment Judge Glennie

Dated: ……………..……23 March 2021………………

Judgment sent to the parties on:

23/03/2021..

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For the Tribunal Office