



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH
BEFORE: EMPLOYMENT JUDGE HYDE
MEMBERS: MS C BECKETT
DR N WESTWOOD

BETWEEN:

MR FAISAL RAFIQUE

Claimant

AND

1. DEPARTMENT FOR HEALTH AND SOCIAL CARE
2. ANN JENKINS

Respondents

ON: 24, 25 & 26 August 2020
And in-chambers on 20 & 21 October 2020

APPEARANCES:

For the Claimant: In Person
For the Respondents: Mr J Dixey, Counsel

RESERVED JUDGMENT

The unanimous Judgment of the Employment Tribunal is that the complaints under the Equality Act 2010 alleging:

1. Direct race discrimination;
2. Direct religion and/or belief discrimination; and/or

3. Victimisation;

were not well founded and were dismissed.

REASONS

1. Reasons are provided in writing for the above Judgment as the Judgment was reserved.
2. These reasons are provided only to the extent that the Tribunal considers it necessary to do so in order for the parties to understand why they have won or lost. Further, they are only provided to the extent that the Tribunal considered it proportionate to do so. Thus, there were many factual issues which were dealt with in evidence which the Tribunal did not consider it necessary to include findings about in these written reasons. That does not mean, however, that those matters were not fully considered by the Tribunal.
3. Finally, all findings of fact were reached on the balance of probabilities.

Preliminaries

4. At all material times, the Claimant worked for Public Health England (“PHE”) in the grade of Senior Executive Officer (“SEO”). PHE is an executive agency of the First Respondent, the Department of Health and Social Care (the “DHSC”).
5. On 5 September 2018, Mr Rafique applied for the role of HR Programme and Project Lead (Grade 7, a grade above SEO) within the DHSC (“the September 2018 vacancy”). The Second Respondent, Ms Jenkins, was employed by the First Respondent at all material times and was the named Vacancy Manager in respect of the September 2018 vacancy.
6. By a claim which was presented on 13 December 2018, Mr Rafique made allegations against the Respondents described above, and Sir Christopher Wormald, Permanent Secretary in the DHSC. He alleged that by not selecting him for an interview for the post, in breach of the relevant provisions of the Equality Act 2010, the Respondents had
 - a. subjected him to direct discrimination on the grounds of race and/or religion or belief;
 - b. and had victimised him.
7. Before that, on 22 January 2018, Mr Rafique had commenced proceedings in the Employment Tribunal against PHE alleging that he had been discriminated against on the grounds of race and/or religion or belief following an unsuccessful application for two posts within PHE. The Respondents’ case was that Ms Jenkins had some minor involvement in

dealing with aspects of that earlier claim. This was the background to the victimisation claim before the Tribunal.

8. By a response presented on 6 February 2019 on behalf of all Respondents, the claims were denied. In particular, it was said that Sir Christopher Wormald, the Second Respondent at the time, as the Permanent Secretary for the First Respondent DHSC, had had no involvement in the sift process being complained about in this claim, nor indeed in the recruitment process. Further, it was said that Ms Jenkins was Deputy Director of HR for the DHSC but had also had no direct involvement in the sift regarding this recruitment.
9. No detail was provided in the response of the reasons for the Claimant's application not passing the sift, beyond the statement that he was unsuccessful for the role because he had provided minimal evidence to show how he met the competencies: para 10 of Grounds of Resistance (p28). The detail in support of this defence was set out for the first time in the Respondents' detailed witness statements.
10. At a Preliminary Hearing on 31 October 2019 (pp32-38), EJ Tsamados directed/recorded *inter alia* that:
 - a. The final hearing would be listed for 3 days to consider issues of liability only.
 - b. The Claimant clarified that for the purposes of this claim, his race is British Asian (Pakistani) and his religion is Islam.
 - c. The claim against the then Second Respondent – Sir Christopher Wormald – was dismissed on withdrawal by the Claimant. This was confirmed in a Judgment sent to the parties on 29 November 2019 (p38).
 - d. The claim against the then Third Respondent – Anna Jenkins – was clarified.

Evidence Adduced

11. The parties agreed on the contents of a joint bundle consisting of just over 500 pages which was marked [R1]. In addition, the Claimant provided a supplementary bundle with another 50 pages of disputed documents. This was admitted into evidence and marked [R2]. Reference was made to documents in Claimant's bundle [R2] during the hearing.
12. At the commencement of the hearing, Mr Dixey provided an opening note for the Tribunal which included a statement of the issues and also a spreadsheet listing each of the candidates for the September 2018 vacancy. That document was marked [R3].
13. Further, at the Tribunal's direction, on 24 August 2020 the Respondents

produced the unredacted copies of the application forms of all the candidates for the September 2018 vacancy so that the names and other details potentially relevant to the race and religion complaints were made available to the Tribunal and to the Claimant. This direction was made as the Respondents did not dispute that it was the unredacted versions of the application forms which were considered at the sift stage. These pages were therefore inserted into [R1] in substitution for pages 82 – 172, the redacted versions.

14. The Claimant gave evidence on his own behalf and relied on a witness statement as his evidence in chief, which the Tribunal marked [C1]. It consisted of 52 pages.
15. The Tribunal heard evidence from four witnesses on behalf of the Respondents, each of whom gave evidence in chief by way of a written witness statement. These were, in the order in which they gave evidence:
 - a. Anna Jenkins, Interim HR Director from May to 6 August 2018 in the DHSC when the new HR Director, Jennie Richardson took up her post. Ms Jenkins then reverted to her substantive post of Deputy Human Resources Director, Organisation Design and Engagement. Ms Jenkins had 25 years' experience of working in Human Resources and was a Fellow of the Chartered Institute of Personnel Development. She had worked as a civil servant in HR roles since 2008.
 - b. Rochelle Fisher, who from June 2016 to February 2019, was one of two Deputy Human Resources Directors in the DHSC, the other being Ms Jenkins. Within that time frame, from January 2017 her remit extended to talent and capability, diversity and inclusion, health and welfare, reward and performance. She remained in her substantive post while Ms Jenkins acted up as Interim Director until early August 2018. She left the First Respondent and took up the post of Deputy Director HR Expert Services in the Department for the Environment, Food and Rural Affairs in February 2019. She held an MSc in Personnel and Industrial Relations and had twenty years' experience in Human Resources, gained during her work in the Civil Service.
 - c. Further, evidence was heard from Rosie Borland. Although she had acted up into Ms Jenkins' substantive post while the latter was Interim Director, by September 2018, Ms Borland was back in her substantive role as an HR Business Partner with responsibility for Business Partnering, Organisation Design and Policy, reporting to Anna Jenkins, until March 2019 when Ms Borland left the DHSC. She was a Member of the CIPD and had worked in HR for 8 years both in the private sector and in the Civil Service.
 - d. Finally, Ms Karen Perry gave evidence on behalf of the Respondents. After joining the Civil Service in 2002, she worked in both the Cabinet Office and the Department of Health and Social

Care primarily in support and administrative roles. From about 2017, she was Private Secretary to the Director General of Finance and Group Operations in the First Respondent (Mr Williams). Mr Williams had responsibility for several of the department's policy areas including human resources.

16. The witness statements relied on by the witnesses for the Respondents were marked [R4], [R5], [R6] and [R7] respectively. They ran to 13 pages, 21 pages, 15 pages, and 12 pages, respectively.

The Issues

17. In Mr Dixey's opening note he helpfully set out what the Respondents understood to be the issues for the Tribunal to decide, based on the record of the discussions at the Preliminary Hearing and on the matters set out at paragraph 50 of the Claimant's statement. The Tribunal agreed this List with the parties and used it as the basis for consideration of the complaints. For the sake of simplicity, the Tribunal amended the references to Ms Jenkins as the Third Respondent, to the Second Respondent, given that Chris Wormald had earlier been discharged from the proceedings.

18. In respect of the direct discrimination claim (contrary to ss.39(1) and 13 of the Equality Act 2010)

- a. Whether the First Respondent – through the selection panel members – treated the Claimant less favourably than it treats or would treat others by not selecting him for interview for the role of HR Programme and Project Lead because of his race and/or his religion or belief.
- b. Whether the First and/or Second Respondents treated the Claimant less favourably than it treats or would treat others by:
 - i. "Not undertaking a blind-sift";
 - ii. "Twice falsely informing [the Claimant] that [the] sift was undertaken blindly";
 - iii. [S]tating "there is no requirement to have sift sheets";
 - iv. Informing the Claimant that "there is no requirement to give feedback including no justification and failing to response to requests for feedback as promised";
 - v. "[D]estroying notes"; and/or
 - vi. "Failing to respond to [the Claimant's] Data Protection Act/GDPR request within the statutory timeframe";

because of his race and/or his religion or belief.

19. In respect of the victimisation claim (contrary to s.27(1) of the Equality Act 2010)

- a. Whether the First and/or Second Respondents subjected the Claimant to a detriment by:
 - i. Not selecting him for interview for the role of HR Programme and Project Lead;
 - ii. [S]tating “there is no requirement to have sift sheets”;
 - iii. Informing the Claimant that “there is no requirement to give feedback including no justification and failing to response to requests for feedback as promised”;
 - iv. “[D]estroying notes”;
 - v. “Failing to respond to Data Protection Act/GDPR request within the statutory timeframe”; and/or
 - vi. “Twice falsely informing [the Claimant] that [the] sift was undertaken blindly”.
- b. If the Claimant was in fact subjected to such detriments, whether this was because he had brought proceedings in the Employment Tribunal against PHE.

Closing Submissions and Relevant Law

20. Both parties made oral closing submissions. In addition, at the outset of his summing-up, the Claimant produced copies of various Employment Tribunal Judgments as follows: -
 - (i) *Francis v London Probation Trust*, Case Number 3202353/2011 Judgment of Employment Judge Prichard and two lay members;
 - (ii) *Valdez v London Borough of Camden*, a decision with certificate of correction in case number 2204391/2011 by Employment Judge Snelson and two lay members; and
 - (iii) *Bowden v XC Trains Limited, Cross Country Trains Limited*, a Judgment in case number 2505497/2012 of Employment Judge Green and two lay members.
21. The Tribunal explained to him that judgments of other Employment Tribunals were not binding on this Tribunal.
22. The Tribunal did not consider that the legal principles applicable in this case under the Equality Act 2010 were complex, and there was no argument about them during the hearing.
23. During his closing submissions, Mr Dixey referred the Tribunal to the application of the burden of proof under Section 136 of the 2010 Act. The Tribunal was also clear about the distinction between allegations of direct discrimination and allegations of victimisation, and the need in the former to

assess whether there had been less favourable treatment on the grounds of the protected characteristics; and in the latter case whether there had been unfavourable treatment by reason of the protected act having been done or having been suspected to have been done.

24. Further, Mr Dixey invited the Tribunal to reflect upon the case of *Madarassy v Nomura International plc* [2007] ICR 867 CA, particularly at paragraphs 56 and 58.

Findings of Fact and Conclusions

25. The Claimant commenced employment with PHE in August 2015 (pp159-160). His job title at the relevant time was Programme Manager. This substantive post was graded Senior Executive Officer.
26. In January 2018 the Claimant lodged an Employment Tribunal claim alleging discrimination in relation to race and religion against Public Health England. The January 2018 complaint was relied on by the Claimant as the protected act in his victimisation claim and the Respondents accepted that it was capable of being such. The outcome of that claim was not known at the date of the final hearing in this case.
27. On 3 May 2018 Mr Rafique wrote to Sir Christopher Wormald, Permanent Secretary of the DHSC (p74), notifying him that the Tribunal had given the go-ahead for a full tribunal hearing to consider his allegations of racial and religious discrimination committed by fellow PHE colleagues, and that the PHE had failed in its obligation as stated in their guidance to escalate to the General Medical Council ("GMC") the allegation of professional misconduct contained in that claim.
28. He sent another email on 8 May 2018 to the Permanent Secretary, chasing a response (p74).
29. Later that day, Ms Jenkins responded on behalf of the Permanent Secretary ("the PS") (p73). She explained that the PS had passed his two earlier emails to her to deal with, as Interim HR Director for the DHSC, and that the previous HR Director had left the DHSC. She thanked him for confirming the outcome of his Employment Tribunal application and stated that as his concerns were now being dealt with by the Employment Tribunal, it was not appropriate for the Department to comment any further on the matter. In relation to his point about an allegation of professional misconduct, she informed him that this was a matter for PHE, who she was sure would respond to him separately. She continued, that if Mr Rafique was not satisfied with their response, he had the right to complain independently, and she informed him how he could access the information about that process.
30. Mr Rafique responded early on 9 May 2018 to Ms Jenkins (p73). He referred

to the professional misconduct issue and PHE's alleged failings. He concluded by informing Ms Jenkins that he would await PHE's response on the professional misconduct issue.

31. That was the end of communications between Ms Jenkins and the Claimant until after he submitted his job application on 5 September 2018.
32. The Claimant relied on this correspondence as evidence that Ms Jenkins had knowledge of the protected act. Ms Jenkins accepted (R4, para 6) that while acting as Interim HR Director she became aware of the fact that the Claimant was bringing Employment Tribunal proceedings alleging racial and religious discrimination during the recruitment process for a vacant post in one of the department's executive agencies, PHE. She also accepted that she was made aware, in correspondence received from Ms Tilley (the out-going HR Director) in the first half of April 2018 as part of her hand-over of the HR Director role to Ms Jenkins (p501- 503), that Ms Tilley had been the independent member of the panel which considered the Claimant's appeal against the outcome of his grievance. The grievance alleged religious and race discrimination in the application of the selection criteria for recruitment to two PHE posts. It was not upheld on appeal.
33. Ms Jenkins' position was that she did not recall considering the contents of the email on receipt nor did she remember it at the time that she was preparing the reply to the Claimant in respect of his correspondence dated 3 and 8 May 2018. The Tribunal accepted this evidence from Ms Jenkins on the balance of probabilities, given that Ms Tilley's involvement on the grievance appeal panel was tangential to the post of Director of HR. Further, on the face of the correspondence between Ms Tilley and the Claimant, there were no outstanding issues to be dealt with by the DHSC HR Director.
34. The Claimant relied on this as the link between the protected act and the adverse treatment he complained of in the instant case. However, as will be set out in the findings below, the Tribunal accepted that Ms Jenkins was not part of the panel which conducted the sift for the September 2018 recruitment. We found that these were Rochelle Fisher, who took part in the process remotely, Ms Borland, and Ms Perry, the latter two of whom were in the same room when this exercise was conducted.
35. The Tribunal further accepted that Ms Jenkins was on leave from 3 to 10 September 2018 inclusive (para 31 of R4).
36. It was not in dispute that the Grade 7 HR Programme and Project Lead vacancy in the DHSC for which the Claimant applied was advertised across the Civil Service and that the closing date was 5 September 2018 (p76). This was also the date on which the Claimant submitted his application (pp158 – 172). In those circumstances, therefore, the Tribunal was satisfied that Ms Jenkins had no knowledge whatsoever that he was a potential

candidate until after her return from holiday.

37. In the job advertisement (pp78-81) Ms Jenkins was said to be the contact point for applicants (p79). The sift and interview dates were not stated.
38. There was no contemporaneous evidence put before the Tribunal to confirm the date on which the sift took place. It was not in dispute that some of the information provided at the time by the Respondents to the Claimant about the process turned out not to be accurate. Further, parts of the paper trail evidencing the process of the sift and the recruitment were missing.
39. We found that the Claimant was informed on 14 September 2018 that he had not been short-listed for the role, by way of an email received through the Civil Service portal (C1 para 24). There was no documentary evidence of this before the Tribunal, but the Respondents did not dispute this.
40. Shortly after this, on 17 September 2018, he sent an email to Ms Jenkins making a request under the Data Protection legislation and process, for the sift assessment sheets (p173). There was an almost identical further email in the bundle referenced by the Claimant apparently sent at the same time and on the same date, making the same request but adding a request for the names of the members of the sift panel also (pp210 & 211). The timing of these requests was consistent with the finding above that Mr Rafique had heard on 14 September that he had not been successful.
41. The email requesting both the names and the sift assessment sheets was acknowledged by Ms Jenkins on 20 September 2018 at 13:57 (p211), stating that she would get back to Mr Rafique as soon as she could with the information requested.
42. By then, Mr Geraghty, PA to the two Deputy Directors of HR (Anna Jenkins and Rochelle Fisher) had written an email to Ms Jenkins at 10:58 on 20 September 2018 (pp174 – 176) providing Mr Rafique's numerical scores on the sift, the overall assessment that there had been minimal demonstration of qualification for the post, and that the outcome was that he was unsuccessful. No comments supporting the individual competency scores or overall assessment were set out in the email.
43. It appeared likely to the Tribunal that Mr Geraghty provided this information to Ms Jenkins at this point at her request.
44. The Claimant expected his request to lead to the provision of the sift panel's comments and feedback and scores against his application, and possibly also the sift assessment sheets of the individual panel members. He had made similar requests under the Data Protection regime to various Civil Service departments which had not shortlisted or appointed him after interview for vacancies. There was a conflict on the evidence about what the sifters were required to record, and on what documents, and about what

the expression 'sift assessment sheet' meant. The Tribunal assessed this issue in the context of a discrimination/victimisation complaint which required us to determine what the sifters' genuine beliefs or understandings were about what was required of them, and whether they followed this. If they did not, to the detriment of Mr Rafique, we had to decide whether racial and/or religious or belief considerations had affected the sifters' actions or omissions.

45. In particular, the Claimant relied on his request to a Department of Health manager, Ms Rebecca Mead in July 2017 ([C1 para 29]) for "my shortlist assessment sheet". He had not been shortlisted. Ms Mead responded inter alia, as follows (p40):

"DH policy is that we do not ordinarily give feedback at the sift stage and you'll be aware Civil Service Resourcing process is anonymised. However, on this occasion I contacted our HR team to find out which application was yours."

46. Mr Rafique followed up with an email to Ms Mead sent on 18 July 2017 (p39) in which he made the inaccurate assertion that he had requested "the shortlist assessment sheets under DPA which should have been completed by the panel for the post..." He urged her to comply with this request, failing which, he would "...be forced to escalate this to the DH legal team."
47. Ms Mead responded on 21 July 2017 by email (p39). She provided what she described as Mr Rafique's "...request for further feedback...". As well as providing the feedback, she attached the score sheets from each panel member to provide Mr Rafique with some written feedback on his competency scores.
48. The Tribunal had to assess whether this was a requirement under the First Respondent's procedure, or whether the panel in the instant case could legitimately provide feedback which did not provide the scores or assessments of the individual panel members.
49. The agreed bundle contained a copy of the First Respondent's guide on sifting and interviewing candidates (pp317 – 327). At p320 was the guidance about keeping notes while sifting, interviewing and scoring. It stated:
- "When scoring you, and other panel members, will need to fill in score forms. These forms are a mandatory part of the process and you will not be able to progress your vacancy without completing these. Please note that from April 2016, written feedback is no longer required at sift. However where vacancies are advertised on CS Jobs, scores must be collated against each of the competencies at the written sift stage and scores and feedback must be collated against each of the competencies at the final assessment stage and kept for audit and grievance procedures. Notes should be taken at the written sift stage to*

support the overall marking. This applies for all advertising approaches. Scores for both sifts need to be input and written comments input at the final sift stage (usually interview stage). The vacancy will not be able to progress to the next stage on CS Jobs until the scores and feedback (at final assessment), have been input for each candidate.”

50. The Tribunal was satisfied that this did not require the scores of individual panel members to be kept or made. Nor was such a requirement apparent in any other part of the Guide.
51. For some reason, which remained unclear at the end of the evidence, Mr Geraghty had access above that which he would normally be expected to have had on the system. This allowed him to access unredacted forms of the application forms, containing the candidates' names and other personal details such as gender. He provided these to the sift panel. There was no documentary evidence in the bundle about when and how this was done.
52. The First Respondent, through Counsel, accepted that there had been administrative errors which the First Respondent regretted. Mr Dixey acknowledged that the forms should have been anonymised when made available to the sift panel. He further accepted that the Panel members should not all have been of the same gender. These two constituted serious breaches, and in his closing submissions, he directed the Tribunal to contemporaneous evidence which indicated that the First Respondent had taken the issues seriously.
53. He further accepted that as a result of a delay in uploading the scores, by the time the Claimant's complaint was made, such notes as had been made by the panel members during the sifts, had been destroyed. The Tribunal questioned Mr Dixey about whether the evidence in the case supported a finding of a causal connection in relation to the point he made about the destruction of the notes.
54. The most contemporaneous record of the date and timing of the sift exercise was an email from K Yates, the PA to Jenny Richardson sent on 28 November 2018 to Ms Richardson and copied to Ms Jenkins providing a report of the sift and recruitment process. This stated that the sift had taken place on 7 September 2018 between 2pm and 3pm (p240). In their oral evidence the Respondents' witnesses suggested that the sift process had lasted somewhat longer than one hour.
55. On the Respondents' case, this report was also inaccurate in that it stated that the members of the panel at the resulting interview on 19 September were Jennie Richardson, Anna Jenkins and Rochelle Fisher. The Respondents' case at the hearing was that the interview panel on 19 September 2018 included Ms Perry (R7 para 27) and not Ms Fisher (R5 para 35).

56. Ms Jenkins expressly denied that she had given Mr Geraghty the greater access to the data base (“GRS”).
57. Ms Jenkins said that it was not unusual for the vacancy holder as named on the advertisement to be on leave during the period while the recruitment was live, and this could also apply to the vacancy holder not taking part in the sift.
58. Ms Jenkins also confirmed that she knew Ms Perry, Ms Borland and Ms Fisher as colleagues but that they were not all in the same directorate.
59. The other issue which by the time of the hearing the Respondents agreed was an error and not in compliance with the department’s diversity policy was that the sifting was done by a single gender panel. The Tribunal considered that this was also relevant given that the panel members carried out the sift using unredacted application forms which gave considerable clues as to the gender and religion/race of the candidates. None of the witnesses involved had ever been involved in a recruitment process where the personal information or identifying information about the candidates was left available for them to see, i.e., unredacted. Ms Fisher who effectively chaired the sift panel indicated that she had addressed this by way of asking the other members of the panel if they were of any conflict of interest in relation to the candidates and they said that they did not. The Tribunal considered that this might have been sufficient to address conflict issues, but it did not begin to address the issue that “blind” recruitment panels were designed to address, namely conscious or unconscious bias or discrimination against the candidates.
60. The First Respondent had guidance documents which covered the issues of unredacted application forms and which records of the interviews should be retained (pp 317 et seq).
61. On the somewhat unsatisfactory contemporaneous documentary evidence before us, and on the basis of the evidence from the Claimant and Ms Jenkins, we concluded on the balance of probabilities that the relevant chronology of the sift and the rest of the recruitment effort by the First Respondent for this post was as follows:
 - 3 Sept 2018 Start of Anna Jenkins’ (“AJ”) annual leave
 - 5 Sept 2018 Closing date for HR Programme and Project Lead position (pp75 - 81). AJ named as contact point for applicants.
 - 7 Sept 2018 Sift for shortlist took place. Done by Rochelle Fisher, Karen Perry and Rosie Borland. Ms Fisher, who chaired the meeting took part remotely ([R6] para 13), by video link [R5] para 28.
Ms Richardson still on leave ([R5] para 24).
 - 10 Sept 2018 End of Anna Jenkins’ annual leave
 - 14 Sept 2018 Claimant notified that he had not been shortlisted for

- interview ([C1] para 24 – no documentary evidence but not disputed)
- 17 Sept 2018 Claimant sent email to Anna Jenkins requesting under DPA/GDPR confirmation of members of the Sift Panel, and sift assessment sheets [p173]
- 19 Sept 2018 One interview took place – Panel consisted of AJ, Jenny Richardson new HR Director, and KP [R4 para 38].
- 20 Sept 2018 Joseph Geraghty, PA to AJ, sends email @ 10.58 to AJ stating Claimant's scores (pp174 – 176).
Anna Jenkins acknowledged Claimant's request by email and said she would get back to him with the information requested as soon as she could (p211).
- 1 Oct 2018 Interview of further shortlisted candidate arising out of 7 Sept 2018 sift took place – Panel was AJ & HR Director [R4 para 38].
Both shortlisted candidates rejected.
- 9 Oct 2018 Further recruitment campaign started for same post. Open to external candidates. No candidate recruited in this campaign out of 36 applications.
Post eventually filled by lateral move by internal candidate.
62. The Tribunal accepted the evidence of Ms Jenkins [R4] para 31 and Ms Fisher [R5] para 24 to the effect that because of where the new post stood in the organisation and the manager to whom the new post holder would have to report, it would have been expected that the new HR Director, Ms Richardson, and Ms Jenkins as the vacancy manager, would have sat on the panel with one further independent panel member. This did not take place because both Ms Richardson and Ms Jenkins were due to be away on annual leave. We accepted Ms Jenkins' evidence that Ms Richardson as the new HR Director was keen to press on with filling this post although both she and Ms Jenkins were due to be away at the time of the closing date and the period immediately after that.
63. As appears from the latter part of the chronology set out above, in the event there had to be a further recruitment campaign extended to external candidates as well in October 2018. When that also proved unsuccessful, an internal candidate was appointed. The initial desire by Ms Richardson to proceed with some pace therefore ultimately failed. Ms Jenkins and Ms Richardson participated in the shortlisting/sift process in the second campaign in October 2018.
64. It also appeared to the Tribunal that it was likely that the attempt at haste in filling the vacancy probably accounted for the procedural errors committed by the September sift panel (application forms not redacted and all female panel) as both Ms Fisher, the chair, and Ms Borland appeared to have been asked to step in at short notice. The Tribunal was satisfied however that the presence of Ms Fisher and Ms Borland on the panel was not contrary to the First Respondent's procedures.

65. Ms Fisher was working from home on Friday 7 September 2018 according to the account of the preparation for the meeting in her witness statement. She had taken the application forms home after the closing date on 5 September, but when she started to prepare for the sift process on the morning of 7 September 2018, she realised that, in breach of what appeared to the Tribunal to be a well-known and well-established convention in the Department, the application forms which had been given to her in hard copy by Mr Geraghty, had not been anonymised. We were satisfied that the application forms made available to Ms Borland and Ms Perry had also not been anonymised.
66. It was also clear to the Tribunal that Ms Fisher saw this as a matter which could negatively impact the impartiality of the panel, but only on the ground of possible conflicts of interest – familiar territory, it appeared to us, for a senior civil servant. This was consistent with the evidence given by Ms Fisher in her witness statement about her decision right at the outset of the sift meeting, to ask each panel member to check the names of the candidates as they appeared on the applications, and to indicate whether any name was known or familiar to them. All three panel members apparently stated that they had no knowledge of or familiarity with any of the candidates. There was no suggestion in the hearing that this was wrong. Mr Rafique merely speculated that they might have acquired some such knowledge from Ms Jenkins about the Claimant's protected act.
67. Ms Fisher's case was that although she had noted that the requirement to anonymise the application forms had not been complied with, she considered that as no conflicts were disclosed by the panel members on 7 September, and as she understood that the vacancy was business critical, the panel should continue with the sift.
68. She did not consider the potential ramifications of the panel seeing details about the candidates which should have been anonymised, such as their names, on the panel carrying out its role objectively and without potential unlawful bias.
69. The Tribunal fully acknowledged that names did not give a definite indication of a person's racial or ethnic background or gender. That did not however mean that the name details could not raise an assumption about these characteristics in a panel member's mind. Thus, we were satisfied that knowledge of first names like Duncan, Lara, Moses, Victoria, Samantha and even Raul could lead to assumptions in the minds of the panel members as to those candidates' genders. Similarly, last names like the Claimant's, Popoola, Nadat and Mistry probably gave rise to an assumption, be it true or false, that the candidate was not White Christian. Taking certain of the first and last names together, the likelihood of such assumptions about racial/ethnic background, and/or religion was even greater. The Claimant's name therefore was in our view unlikely to lead a panel member

to the assumption that he was white Christian.

70. In short, the practice of anonymising the personal details of the candidates served to provide for the panels a shield of absence of knowledge of the protected characteristics of the candidates, which the panel in this case could not avail itself of. It was particularly disappointing that neither the Chair of the panel, nor the other two members appeared to have appreciated the full ramifications of what the First Respondent maintained in the Tribunal hearing, was an “administrative error”. It appeared to us to be a matter of some substance. In marking our disappointment, we took into account the experience and qualifications of both Ms Fisher and Ms Borland in the field of Human Resources, and the senior HR positions they both held in a major Government Department. Ms Perry did not have that specialist background but had held responsible positions within the Civil Service for well over a decade by 2018 and had been involved in recruitment exercises previously.
71. Further, although it was not directly relevant to the complaints in this case, all three panel members, as women, had benefitted from involvement in internal recruitment processes in which the ostensible impartiality flowing from the use of mixed gender panels had been secured.
72. We reminded ourselves that the failure of the panel to consider anonymised application forms did not mean conversely that the knowledge of the personal details and on which assumptions could have been based, had led to discrimination under the Equality Act 2010. We had to assess the totality of the evidence to see whether such a conclusion, on the balance of probabilities was justified.
73. Further, whilst the Respondents were unable to produce contemporaneous records of the justification for each of the panel member’s marks, we considered that as there was no dispute as to the content of the Claimant’s application form, and there were no reasonable grounds upon which we could find that the copies of the other candidates’ application forms were not genuine, it was appropriate for the panel members to provide their reasoning for the marks allocated, after the event. We then considered the content of the application forms and assessed whether it was appropriate to find that there was evidence of less favourable treatment on grounds of race and/or religion or belief, and/or whether he had been victimised in the respects complained about.
74. Returning to the chronology, matters then took a further turn for the worse in terms of the responses provided by Ms Jenkins to the Claimant about the recruitment process followed. These contained inaccuracies which did not inspire confidence in the Claimant about the fairness of the process by which he had not been shortlisted. These further inaccuracies also led the Tribunal to assess the Respondents’ evidence about its actions with some rigour.

75. The Claimant had been promised a response to his email enquiry about his marks on 20 September 2018. His case (p14 Particulars of Claim & para 31 of [C1]) was that when he had received no such response by 23 October 2018, Mr Rafique emailed the Permanent Secretary at the DHSC Sir Chris Wormald to complain that the Department had failed to release the information to him within the thirty-day period specified under article 15 of the GDPR. He also expressed the view that the breach was deliberate, given Ms Jenkins' knowledge of the Employment Tribunal case against PHE. There was no copy of this email in the bundle.
76. It was not in dispute however that on receiving Ms Jenkins' reply of 23 October, Mr Rafique wrote to the Permanent Secretary on 24 October at 0951 attaching Ms Jenkins' email and expressing his dissatisfaction with Ms Jenkins' reply and stating that he considered that the reply fell outside the required timeframe. He complained about the absence of the assessment sheets giving a narrative for the scoring as he had requested, and he asked if he could meet the Permanent Secretary to discuss the matter as he had requested previously (p196). Ms Jenkins was copied in to this email by Mr Rafique. We were not shown a document in which Mr Rafique alleged victimisation by Ms Jenkins at this stage, as alleged. It was not in dispute that the Claimant had engaged in a good deal of correspondence with others, more senior to Ms Jenkins, about the issues in this and the PHE case.
77. On the balance of probabilities, we did not find that he had written the email described on 23 October alleging victimisation.
78. On 24 October at 0946 Ms Jenkins responded to the Claimant's GDPR request by email. She stated, wrongly, as the Respondents conceded at the hearing, that the applications had been sifted "blind" by a selection panel and that she could not disclose the names of the shortlist panel due to GDPR restrictions. Additionally, she confirmed that the sift panel's score of his application totalled 13, and that this was an overall rating of "minimal demonstration" of the competencies required for the post (pp207 – 209).
79. This erroneous statement as to the panel having sifted the applications "blind" was repeated by Ms Jenkins in correspondence to Mr Rafique (25 October 2018 at 11:52 pp204 - 205), before ultimately being corrected in a letter to Mr Rafique from Ms Richardson sent on 6 December 2018. The Tribunal was satisfied on the balance of probabilities that at the time she made the statement, Ms Jenkins was unaware that it was inaccurate. She gave the assurance of her own volition, not in answer to a specific question about it, and in doing so, relied on her knowledge and experience of the way in which the Department conducted its recruitment exercises. As stated above, we were satisfied that none of the three people who sat on the sift panel had ever previously been presented with applications forms which were not anonymised. We were short of contemporaneous

documentation establishing precisely what enquiries Ms Jenkins had made at this stage to address Mr Rafique's enquiries, but the Tribunal was struck by the absence of any evidence that the three sift panel members had raised with her as the vacancy manager, on her return, the failure to have carried out the sift with anonymised application forms. We considered that if she had been made aware of this failing, it was unlikely that she would have made a false assertion about the compliance with this of her own volition, as she did on 24 October 2018 (pp196 – 200).

80. Ms Jenkins responded to the Claimant's email of 24 October to the Permanent Secretary on 25 October 2018 at 1152. She gave a fuller response than she had in her email of the day before (pp204 – 205) addressing Mr Rafique's assertion that the GDPR time limit had been breached, and that he had not received the assessment sheets with the narrative for scoring. She acknowledged that the prescribed time limit had been breached by six days and apologised to him for this. She explained that it was a one-off oversight on her part.
81. As to whether he was entitled to see the assessment sheets with the narrative for scoring, Ms Jenkins disputed that the Government recruitment process required assessment sheets to be completed at the sift stage, or that the First Respondent was required to give written feedback, due to the volume of applications received. Instead, she explained, the requirement was for panel members to independently mark applications, moderate their scores and enter these marks onto the Government Recruitment Service ("GRS") system. Therefore, she continued, all they held were the marks, which had been sent to the Claimant.
82. This was one of the key factual disputes in the case.
83. Ms Jenkins went on to say that the "application form" on which the marks were noted was destroyed following the sift and so she was able to assure Mr Rafique that no personal data on him was held. The factual basis for this proposition was also not established on the evidence before the Tribunal, but the Tribunal made it clear to the parties that we did not have jurisdiction to decide breaches of GDPR. Our jurisdiction was limited to deciding if an agreed breach was an act of direct discrimination or victimisation as alleged. This applied to the complaint that Ms Jenkins' response was outside the statutory framework Issues 12(b)(vi) and 12(c)(v) – direct discrimination and victimisation respectively.
84. Ms Jenkins then asserted again, wrongly, that the personal details, eg names, were removed and so the panel members would not have been able to identify candidates during the sift process.
85. Mr Rafique was not content with Ms Jenkins' response and once again forwarded her letter to Sir Christopher Wormald and complained to him about what he believed to be her misinterpretation of the required sift

processes. Primarily he referred to specific sections of parts 1, 4 and 6 of the DHSC guidance as follows:

“

- *Page 4 (Guide 4): At written sift stage, notes should be taken to support overall marking.*
- *Page 10 (Guide 4): This is the list of critical information to be uploaded in the GRS online system after each stage of the recruitment process: Sift feedback and scores for all candidates*
- *Page 6 (Guide 1) To ensure that appropriate notes are taken for each candidate and written feedback is drafted, agreed and entered onto the GRS system.*
- *Page 1 (Guide 6): Feedback must be given against each considered competency, and in addition, an overall summary statement must be provided to show how the evidence gathered justified the awarded ratings. If you have decided to use a lead competency at sift you may give feedback on this one competency, but you must have informed candidates that this will be the case on the vacancy information template when advertising the role.”*

86. As before, the Permanent Secretary's office referred the matter back to Ms Jenkins to deal with and reiterated the position that any data protection issues were to be directed to the relevant section of the Department (p214).
87. Mr Rafique chased a response from Ms Jenkins on 30 October (p214), and she in turn, on the same day, promised him a response by early the following week. Mr Rafique followed up with another email to Ms Jenkins and the data protection team to whom he had been referred by both Ms Jenkins and the Permanent Secretary's office. He indicated that he was looking forward to Ms Jenkins' reply on the absence of feedback and justification for the sift decision, contrary to the terms of the policy. He also set out more detail about his GDPR points for the data protection team (213).
88. He chased the promised response from Ms Jenkins by email sent on 6 November 2018 (pp212 – 213). By email sent on 7 November at 1407 Ms Jenkins indicated that she would respond to the query as soon as she could, and thanked Mr Rafique for his patience (pp212 and 216). She noted that “*for ease*” she would also respond on the data protection query raised. She set out the email to be used for data protection issues.
89. By further email from the Claimant to the Permanent Secretary of the DHSC and Ms Jenkins, Mr Rafique informed them that he had initiated the ACAS early conciliation process (p216). Ms Jenkins wrote to acknowledge receipt of his email on 9 November 2018 (p215). She stated that as he had referred the matter to ACAS she would await contact from ACAS and correspond

with the Claimant through this route. She told Mr Rafique that she would ensure that her data protection colleagues responded to his 25 October 2018 DPA request.

90. As usual Mr Rafique responded promptly to her email. He made no demur to her proposals (p215).
91. The eventual substantive response to Mr Rafique came from Ms Richardson, HR Director of the DHSC and Ms Jenkins' manager, on 6 December 2018.
92. In the meantime, as appeared from contemporaneous documentation in the bundle, Ms Jenkins was briefed by Geoff Nash the First Respondent's Head of Employee Policy Improvement and Innovation, about relevant recruitment policy sources (p217). Among other things he confirmed the Civil Service's commitment to improving diversity of opportunity and creating an inclusive working environment attracting the best talent. He also cited the default practice of anonymised recruitment to ensure candidates would be judged on merit and not on their background, race or gender. He stated that anonymised recruitment would not be appropriate in a small number of cases where there was "*a clear and justifiable business need, such as intelligence or national security roles*". There was no suggestion by the Respondents that anything other than the default position of using anonymised application forms was appropriate in this case.
93. Also before Ms Richardson's response was sent to the Claimant, her Personal Assistant Kay Yates sent an email dated 28 November 2018 to Ms Richardson, copied to Ms Jenkins providing the information which they had gathered about the recruitment to the Head of HR Programme post (pp240 - 241). It has been referred to above. It appeared to have been compiled in conjunction with or after liaising with Joe Geraghty and another person referred to as Geoff. It provided, among other information, the dates of the campaign including sift date, numbers of applicants and numbers shortlisted, and names of sift panel members.
94. Against this chronology the Tribunal reviewed the contents of the letter from Ms Richardson to the Claimant sent on 6 December 2018 in which she responded to the Claimant's queries, in Ms Jenkins' stead (pp243 – 245). We also considered the relevant parts of the text of the DHSC Guidance then in force (dated April 2018), as referred to by the Claimant in his email, in assessing whether the explanations and information given by Ms Richardson were accurate. The parts referred to were: Guide 1 *How to plan your recruitment* (pp 298 – 305); Guide 4 *How to sift and interview candidates* (pp317 – 327); and Guide 6 *How to give good feedback* (pp332 – 334).
95. Ms Richardson dealt with the Claimant's points in the order in which he made them in his email and as set out above in these reasons. The same

order is followed here.

96. It was correct that within two paragraphs under the sub-heading “Sifting, interviewing and scoring”, in Guide 4 (p320), it was stated that “Notes should be taken at the written sift stage to support the overall marking.” The Tribunal considered that it was appropriate to set out the two most relevant paragraphs in this section. There were as follows: -

“When scoring you, and other panel members, will need to fill in score forms. These forms are a mandatory part of the process and you will not be able to progress your vacancy without completing these.

Please note that from April 2016, written feedback is no longer required at sift. However, where vacancies are advertised on CS Jobs, scores must be collated against each of the competencies at the written sift stage and scores and feedback must be collated against each of the competencies at the final assessment stage and kept for audit and grievance procedures. Notes should be taken at the written sift stage to support the overall marking. This applies for all advertising approaches. Scores for both sifts need to be input and written comments input at the final sift stage (usually interview stage). The vacancy will not be able to progress to the next stage on CS Jobs until the scores and feedback (at final assessment), have been input for each candidate.”

97. Later, on internal page 5 (p321), there was a note to the panel indicating that agreed scores must be input to CS Jobs prior to results being issued to the candidates. It continued that whilst it was the expectation that the Chair of the panel (usually the vacancy holder) would upload results into CRS, any panel member could input the scores and on behalf of the panel, provided that they were registered on CS Jobs.
98. Having reviewed the terms of the guidance in this respect and having considered all the evidence, the Tribunal concluded that, as stated in Ms Richardson’s letter to the Claimant, the guidance made clear that it was only the scores and overall comments which were to be recorded or inputted into the system.
99. Further, the Tribunal agreed with Ms Richardson’s statement that, as set out in Guide 4, at the written sift stage DHSC was not required to provide more detailed written feedback, and that this had been the case since April 2016.
100. The Tribunal therefore accepted Ms Richardson’s statement and the Respondents’ case in this respect that the Claimant’s application scores had been uploaded onto the Government Recruiting Service System on 10 September 2018 together with the overall comment of ‘minimal evidence applied’, and that this was compliant with the requirements of the Guide.
101. There was some further information provided in Ms Richardson’s response to the Claimant’s query about the matter of when and if any handwritten

notes made by the panel during the assessment process had been destroyed. We did not consider that this issue was material to our decision in this case. In any event, the Tribunal had no contemporaneous evidence to confirm it. There was some cross-examination on this issue. The Tribunal did not consider it surprising that the witnesses did not recollect the position specifically, given the amount of time that had elapsed, and the fact that this task was not the responsibility of any of the witnesses called. There was no contemporaneous record of what had happened to the notes, prior to Ms Richardson's letter to the Claimant on 6 December.

102. The next point made by the Claimant was also under Guide 4 at page 10 (p326 of the bundle). The Claimant relied on this as an indication that the First Respondent's process required the sift panel to upload sift feedback and scores for all candidates onto the GRS online system. Ms Richardson, in her response, did not disagree that that was the wording of the guidance. The disagreement between the parties was what was meant by "feedback". The Respondents' case at the hearing was that this meant the assessment referred to above namely "minimal demonstration", i.e., that the candidate had demonstrated limited positive evidence of the competency. The label "minimal demonstration", and the definition just cited, were taken from the Guide (p321). Each of the seven potential ratings of the candidates was listed with a label and a definition of that label (p321, internal p5 of Guide 4), in the Section referred to above, headed 'Sifting, interviewing and scoring'.
103. The Tribunal did not consider that there was anything in the written guidance which undermined the interpretation that Ms Richardson put forward. It was also consistent with what had occurred in this case. The only basis on which Mr Rafique disputed it was because of his experience earlier where he had been sent the greater detail. However, the Tribunal reminded itself of the terms of the correspondence with Ms Rebecca Mead in July 2017 in which she had stated that the department's policy was that they did not ordinarily give feedback at the sift stage (emphasis added).
104. The Tribunal also took into account that these guidance documents were not legally enforceable and therefore did not contain the sorts of provisions that might be expected in such a document such as a formal, binding definition of the terminology used.
105. In all the circumstances therefore, the Tribunal accepted that there had not been a failure by the Respondents to provide the usual feedback to the Claimant beyond the statement that there had been minimal demonstration.
106. The next point made by the Claimant was that the First Respondent had not complied with the guidance about note taking and provision of written feedback as set out on page 6 of guide 1 (p303). The text he relied on was from a half-page section under the sub-heading "Selection Panel". Mr Rafique relied on the text of this section to support his contention that there

was a duty to ensure that appropriate notes were taken for each candidate and written feedback was drafted, agreed and entered onto the GRS System. That requirement of the panel was one of four bullet-points describing the role of the panel. However, the detail of the requirements in terms of entering onto the GRS System was in guide 4, already referred to above. The Tribunal did not consider that the wording of this section tended to support the Claimant's contention as to the extent of the notes that had to be taken and entered onto the GRS System. Taking into account the other evidence on this issue, the Tribunal accepted the statement in Ms Richardson's letter to the Claimant on this issue at p244 of the bundle to the effect that the requirement for written feedback only applied to the interview stage.

107. Finally, the Claimant had relied on page 1 of guide 6 at p332 of the bundle in his letter of 25 October 2018. The text cited by the Claimant appeared following a paragraph under the sub-heading "Verbal Feedback". The main point made in the preceding paragraph about verbal feedback was that it was not acceptable to give feedback verbally and then to refer to that conversation in a statement such as "Feedback Given Verbally".
108. The guidance provided that if feedback was given verbally, it must be captured in the competency feedback statements as per the recommendations in the guidance.
109. Then followed the paragraph referred to by the Claimant. This set out in some detail guidance as to how written feedback should be expressed to a candidate. The Tribunal considered that it was clear in the context that this was not a reference to the records of the assessment of the candidates at the shortlisting stage. This was addressing subsequent written feedback to candidates and against the context of the other text or contents of this guidance that the Tribunal had been referred to, the Tribunal accepted Ms Richardson's statement that it was directed at feedback following interview.
110. As with all the references to the guidance, the Tribunal was satisfied that these were statements of good practice. It was relevant in the context of the causes of action, for the Tribunal to decide whether the witnesses believed that this was something that they were required to do and/or whether this was something that they did in other cases. The Tribunal was satisfied that both limbs were met in terms of the Respondents' witnesses namely they considered the position to be as set in Ms Richardson's letter at pages 243-244 in terms of what the guidance required and also that was what their normal practice was.
111. The next issue that Ms Richardson covered was the First Respondent's failure to provide an anonymised application forms to the sift panel and the fact that the sift was done with those application forms. It was described by Ms Richardson as a "slight correction to the information provided in Anna Jenkins' email of 25 October". It appeared to the Tribunal that this was a

turn of phrase designed to underplay the error which had been made by the sift panel, and by the administrative support to the sift panel. The Tribunal acknowledged that the Claimant would not have been aware of this error if he had not been told by Ms Richardson, and to that extent the Tribunal accepted that the Respondents had been honest with the Claimant about this.

112. She then set out the position as referred to above by Ms Fisher namely that the panel had agreed that they would not review the names or personal details of the candidates on the application forms during the sift and she continued that, as such, the applications were sifted “as if they were anonymised” so that personal details were not taken into consideration.
113. During the hearing the Tribunal expressed some scepticism as to whether it was, indeed, possible to ignore the various references in the application forms to the names and indications as to the personal background of the candidates and their likely gender. The Tribunal refers above but does not reiterate here its disappointment at these issues passing, apparently without notice by the Human Resources personnel, until sometime in late November/early December 2018.
114. Ms Richardson then apologised for needing to make the correction. She characterised the original error and the fact that this did not come to light earlier as “clearly unfortunate” and whilst she did not believe that these amounted to serious breaches of the recruitment process, she informed Mr Rafique that she had commissioned a review of this recruitment process and the lessons learned. This was to be led by someone independent of DHSC.
115. She addressed the data protection issue but the Tribunal has already stated that, to the extent that there was a delay in the timeframe, this was an agreed matter and there were no other matters which the Tribunal had to make a decision about in relation to data protection.
116. She also addressed Mr Rafique’s requests for a face to face meeting. Once again, that is not a matter that the Tribunal needed to address in these reasons.
117. On 6 December 2018 Mr Rafique responded to Ms Richardson expressing his complete disagreement with her conclusions, given what he described as “the discrepancies in her and Ms Jenkins’ narratives”. He also referred to the assessment sheets which had been given to him by Ms Mead following his application for a job in July 2017 as demonstrating that the assessment sheets in the DHSS were kept in line with the DHSC Recruitment Policy, i.e., for grievance/audit reasons.
118. Ms Richardson acknowledged his correspondence on 7 December 2018 and regretted Mr Rafique’s stated intention to proceed to the Employment

Tribunal.

119. Later, on 7 December at 17:35 (pp247-248) Mr Rafique wrote again to Ms Richardson setting out more detailed points of dispute with the contents of her letter. His initial email had expressly been sent after only skimming Ms Richardson's letter. He picked up on the difference between the two positions as to whether the application forms had been anonymised. The Tribunal has already set out its findings about that above. Mr Rafique was only aware of the fact that the application forms had not been anonymised when he received Ms Richardson's 6 December reply. He set out his view that this discrepancy was not only an anomaly but inferred that the decision not to shortlist him was a deliberate act to victimise him as he had already got an on-going case with the Tribunal against PHE. He pointed to the fact that his application form stated his name which Ms Richardson had acknowledged was not the usual practice. He stated that Ms Jenkins was aware of the Tribunal proceedings with PHE since May 2017 prior to the shortlisting for this post.
120. The Tribunal noted also that by this stage it did not appear to have been made clear to the Claimant that Ms Jenkins was not part of the shortlisting panel which the Tribunal has found above to have been the case.
121. Mr Rafique also indicated that he believed that an adverse inference should be drawn from the fact that Ms Jenkins had failed to respond to his responses within the timelines that she herself had set. He also pointed to Ms Richardson's indication that an independent review would be commissioned as evidence that things had gone wrong and that this was another basis for an inference which supported his case.
122. Up to that point, it appeared to the Tribunal, that Mr Rafique's case was that the Data Protection Act had been breached and that he had been victimised on the basis of the other case on-going against PHE – the implication being that Ms Jenkins had made the connection between his candidacy and his PHE case.
123. He made a further point in relation to feedback and stated that his argument was that feedback was not required to be placed on the CS Jobs Portal but that reasons/justification should be kept in case this was asked for.
124. He made some further points about the DHSC guidance and expressed surprise at how quickly the notes had been destroyed and that this was the basis for "another inference".
125. Finally, he made a point about the process to be followed when a candidate had applied under the "GIS". This is the scheme by which certain candidates were guaranteed an interview if they were disadvantaged otherwise by reason of disability (p320). However, it was not relevant to this case directly for two reasons. First, the Claimant did not complain of

disability discrimination; and second it was still a requirement that the candidate had to achieve the minimum pass mark of 4 for each competency before he could take up a guaranteed interview. This therefore did not add anything to the Tribunal's general consideration of the question of whether the assessment of Mr Rafique's application merited an interview.

126. The independent review which Ms Richardson had asked to be done was conducted by Ms Debra Biggs, who was Joining and Leaving Policy Lead in the Civil Service Employee Policy Department. She sent a letter by email to Ms Richardson copied to Mr Matthew Davis also of the CSEP on 8 March 2019 (pp276 – 278). She reported that her "light touch review" of the selection exercise had focussed on the use of diverse panels, provision of sift feedback and the use of anonymised data in selection. She had reviewed documents and policies and had spoken to some of the people involved including the members of the sift panel and some of those involved in supporting the policy. As a result, she had identified a number of weaknesses in this particular selection exercise and her examination of the guidance had also pointed to wider inconsistencies and in the assurance regime. She acknowledged that the weaknesses that were identified in this selection exercise could well have been present in other campaigns.
127. Under the first heading "Diverse Panels and Anonymisation" she identified four areas in respect of which clarification needed to be given and confirmed, as the Tribunal also found, that the importance of anonymisation was partly to avoid conflicts of interest but was actually to ensure that there was no unconscious bias in the process.
128. She also advised clarity in terms of the roles and responsibilities, and that the First Respondent should ensure that there was a process for checking that there had been compliance with the policies. The Tribunal saw nothing surprising or objectionable about any of these conclusions.
129. Under the next sub-heading of "Provision of Candidate Feedback", she highlighted two aspects. The first was the First Respondent should check that there was consistency in terminology and that this reflected the model/GRS approach and clearly distinguished between the sift and interview actions required. She concluded that guidance in place at the time of Mr Rafique's selection process was not clear and consistent but included the best practice position that only scores and not written feedback was provided as at the sift stage and that this is what had happened in this case. The Tribunal agreed with this conclusion.
130. The second area that she advised should be clarified was as to whether the sift panel members needed to keep their individual notes or just record the marking. Once again, this was consistent with this Tribunal's consideration of the relevant policy and guidance documents namely that there was not a clear statement of the requirements on the panel members at that time on this issue.

131. Under the sub-heading “Audit/Record Keeping and Assurance”, Ms Biggs highlighted four aspects. She asked for two aspects of record keeping, and the time limits in relation to complaints procedures, to be clarified. She further advised that the First Respondent should articulate record keeping requirements under roles and responsibilities to ensure that records were not incorrectly destroyed as in this selection exercise. Finally, she advised that the First Respondent should establish a pragmatic compliance checking regime for the selection process.
132. Once again, the Tribunal considered that this set of weaknesses reflected the picture that the Tribunal also gleaned from the relevant evidence.
133. Under the sub-heading “Roles and Responsibilities”, she advised that the First Respondent should articulate and clarify roles and responsibilities in the guidance; should review the role of the vacancy holder as vacancy manager and consider provision of central DHSC advice/support; and finally, should clarify the rules on GRS access, review current access permissions and ensure that relevant training and assurance was in place.
134. The Tribunal considered that this was an obvious area to be looked into given our findings above about the error in providing non-anonymised application forms to the selection panel. The second point in relation to the role of the vacancy holder as vacancy manager was also relevant given our findings about the failure to raise irregularities with the selection process with Ms Jenkins for some considerable time after the sift had taken place.
135. Finally, under the sub-heading “Guidance and Policy”, Ms Biggs raised four other points which the Tribunal does not consider it necessary to repeat in these reasons (pp276-278).
136. By letter dated 29 March 2019 Ms Richardson, as Director of Human Resources, wrote to the Claimant informing him of the fact that the review had been concluded and attaching Ms Biggs’ findings in an annex. She stated in her letter to Mr Rafique that she had been open from the start of the correspondence that there were elements of this particular process which could have been improved and that in the spirit of transparency, she was very happy to share the outcomes of the review with him. She confirmed that the review had identified recommendations for improvement and stated that the review showed that there had been no breaches of the policy or processes that applied to internal cross-government competitions. She stated that this was the conclusion of the review and that if Mr Rafique had any further correspondence or questions, he should direct these to the legal advisor at the Government Legal Department (pp279-281).
137. During the hearing, there was questioning and comment about the fact that Ms Perry was not an appropriate ‘independent panel member’ in that she was female as were the other members of the sift panel. This did not

comply with the First Respondent's usual practice. However, in this case as there was no allegation of sex discrimination, the matter simply went to the inability of the First Respondent to rely on compliance with all its equal opportunities/diversity procedures.

Summary

138. The Tribunal considered that it was helpful to comment on or reach findings about the various factual propositions with which Mr Rafique concluded his application form to the Tribunal, presented on 13 December 2018 (pp18-19).
139. The first proposition was that Ms Jenkins knew of the Claimant's Employment Tribunal proceedings against PHE since 8 May 2018 as per her email to the Claimant (p73). He stated that Sir Christopher Wormald was also aware of this. The Tribunal has already stated, as set out above, that whilst it was clear that Ms Jenkins had been asked by the Permanent Secretary to deal with correspondence from Mr Rafique, by way of her 8 May 2018 email to Mr Rafique, there was no reason for her to have retained any particular recollection of this given her peripheral involvement namely simply being put in the picture about it as she prepared to cover a locum position and the claim being something which related to another branch of the Department of Health, as it then was. Her response to Mr Rafique was hence relatively brief, mainly explaining various procedures to him.
140. Mr Rafique followed up with a response to Ms Jenkins on 9 May 2018 (p73) acknowledging receipt of her email, asserting that PHE had failed in their duty to report misconduct to the GMC, and stated that as an internal employee he was entitled to have the Minister's email address, to raise his concerns, and not the address provided in the link Ms Jenkins had sent him in her email.
141. Further, there was nothing from 9 May through to the Claimant's letter to Ms Jenkins in mid-September 2018 which would have led Ms Jenkins to recollect the earlier correspondence with or about Mr Rafique. It appeared therefore that it was more accurate to say, although this was a matter outside of Mr Rafique's knowledge at the time, that Ms Jenkins had been informed of the Tribunal proceedings by a colleague on 8 May 2018.
142. It followed that if we were satisfied that Ms Jenkins had no recollection of Mr Rafique and his case against PHE by August/September 2018, the same applied to Sir Christopher Wormald, whose involvement in the May 2018 correspondence was even less. There was no evidence he had any further involvement in any issues concerning Mr Rafique after early May 2018.
143. The Claimant further contended that Ms Jenkins, a Senior HR Director was the contact point for applicants when applying for the HR Programme and the Project Lead vacancy. This was accurate. However, as set out above, we found that she did not take part in the sift.

144. Mr Rafique further stated that Ms Jenkins twice stated that his application was 'blind sifted', but that Ms Richardson stated that this had not been the case. The Tribunal also agreed that this was an accurate statement and we reached the same finding. However, as the Tribunal has set out above, the Tribunal did not consider that this led to any sort of necessary inference against Ms Jenkins, and was explained by her non-participation in the sift, and the fact that she had assumed that it had been done "blind".
145. Mr Rafique then stated that Sir Christopher Wormald had instructed Ms Jenkins to respond on this matter many times. Again, the Tribunal accepted that this was correct but considered that this was consistent with their respective positions within the organisation. Thus, for example, the Tribunal noted that after the Claimant had written to Sir Christopher Wormald, he had been informed by Sir Christopher Wormald's personal assistant that the response would come from Ms Jenkins, who at the time was Interim HR Director. The degree of involvement in correspondence has also been set out above.
146. The Claimant indicated that Ms Richardson admitted that paperwork was destroyed. This was in relation to the application forms actually assessed. The Tribunal accepted that that is what Ms Richardson told the Claimant. The destruction of the original application forms had no effect on our ability to assess the validity of the complaints in this case however. The assessments were in effect simulated in the written and oral evidence before us, and there was no suggestion that the application forms produced were not genuine.
147. The Tribunal has already commented above on the Claimant's view as to the commissioning of an independent review as a demonstration that things had gone wrong, a further point he made in his Tribunal application form (p18).
148. The Claimant next referred, in his concluding propositions, to the necessity of providing feedback where a candidate had applied under the GIS Scheme which is a guaranteed interview scheme for people with a disability. It was not admitted by the Respondents that the Claimant had, in fact, applied under that scheme, or had been entitled to. However, the Tribunal concluded that even if he had, the GIS Scheme would not have led to him being shortlisted because his application form had not been assessed as meeting a sufficient number of the competencies. To that extent, therefore, consideration of the Claimant under the GIS was irrelevant.
149. The Claimant further made the point that the recruitment of staff to the Civil Service needs to be based on merit with fair and open competition, and he referred to the fact that it was taxpayers' money that was being spent. There was no reason for the Tribunal to disagree with those statements.

150. The Tribunal has already made its findings above about the Claimant's penultimate proposition in the list of bullet points, to the effect that notes should be preserved for grievance and audit purposes.
151. He made an additional point which did not feature in the evidence about the data protection email address which he was provided with by Ms Jenkins and other members of staff of the First Respondent. This was, therefore, not a matter that the Tribunal made a finding on.

Failure to shortlist

152. It was apparent to the Tribunal that the Claimant's primary case was an allegation of victimisation under the Equality Act based on the fact that Ms Jenkins had knowledge or had been informed of his claim against the PHE. In relation to his race and religion or belief complaint, the Claimant did not put forward any background matters other than the issue of the application forms not having been anonymised. In respect of all three of these complaints, therefore, the Tribunal had to assess whether there were grounds for concluding, on the balance of probabilities, that the Claimant had been victimised and/or discriminated against on grounds of race and/or religion or belief. This required an analysis of the merits of the Claimant's application and that of the other candidates especially those who were shortlisted.
153. On 22 August 2018 a job advertisement went live for the role of HR Programme and Project Lead within the DHSC (pp76-81). The position was at grade 7. The advertisement explained that applications would be assessed by reference to five competencies namely:-
- Seeing the big picture;
 - Making effective decisions;
 - Delivering at pace;
 - Achieving commercial outcomes;
 - Leading and Communicating.
154. More details of these competencies were set out in the Civil Service Competency Framework document (pp455-500).
155. It was not in dispute that the Claimant submitted numerous applications for alternative positions at about this time.
156. Relevant to the victimisation claim under the Equality Act, prior to his job application in September 2018, the Claimant had commenced proceedings in the Employment Tribunal against PHE on 22 January 2018. He alleged that he had been discriminated against on the grounds of race and/or religion or belief following unsuccessful applications for two posts within PHE. This was the litigation which the Tribunal has referred to above in terms of Ms Jenkins being put on notice of its currency but in respect of

which she had only minor involvement.

157. The Respondents accepted that the bringing of the claim in January 2018 constituted a protected act under the Equality Act 2010. The factual and substantial questions therefore in relation to the victimisation complaint were the degree of knowledge on the part of those involved in shortlisting (which the Tribunal accepted did not include Ms Jenkins) for the Programme Manager post and also therefore whether the failure to shortlist the Claimant was caused by the fact of the earlier protected act.
158. At the time the Claimant made his application for the September 2018 position, Mr Rafique was employed as Programme Manager, Immunisation and Counter-Measures, National Infection Service, Public Health England. As such, he was a Senior Executive Officer ("SEO"), i.e., a grade below grade 7 within PHE. Eleven other individuals applied for the role.
159. The final scores allocated to the three candidates (B, C and G) who were successful at sift were either 21 or 22, rated 4 or 5, meaning acceptable and good demonstration respectively. However, before the interview, candidate C withdrew from the process. The rest of the candidates were unsuccessful at sift. One was rated 3, meaning moderate demonstration, having scored 18 points. The rest were rated 2, meaning that they fell within the category "minimal demonstration", having been allocated scores of between 11 and 16. The scores allocated to the Claimant totalled 13. (p321 and Annex to R3).
160. The evidence provided by the First Respondent as to the background of the candidates was by way of a diversity and inclusion report for this vacancy (p272-272A). It recorded various elements of the process, for example, the number of applicants who had a disability or who were of male or female gender or who preferred not to say, or in terms of ethnicity who were BAME or white and in terms of sexual orientation and age group. There was no record of declared religion.
161. Thus, in this particular case, there were white candidates who were not shortlisted so out of a total of six white candidates, three were not shortlisted. The Respondents relied on this as evidence which was relevant to show that there was not sufficient evidence to shift the burden of proof.
162. Further, as already stated, there was scant evidence available about religion. Indeed, the Claimant himself had not stated his religion in his recruitment papers. The Tribunal considered in this context that if there had been discrimination related to religion or race, these would have been assumed on the part of the sift panel in all the circumstances. This has been discussed above.
163. There was also no information available to the Tribunal as to which of the job applicants, for example, had a disability or was female or male or BAME,

etc. To a certain extent the Tribunal has already covered this above in discussing the failure to anonymise. The Tribunal considered that in this application process, there was scope for bias only on the basis of presumed race and/or religion or belief.

164. Candidate C having withdrawn prior to interview, candidates B and G were rejected after their interviews. Completely coincidentally, candidate C had scored the highest mark of 22.
165. The Respondents' case was that by virtue of the scores awarded, it could be seen that this batch of application forms did not provide examples of perfect applications and that the candidates in the main scored just over the minimum in terms of demonstrating the relevant or needed competencies.
166. Helpfully, included as an attachment to Mr Dixey's opening note on behalf of the Respondents [R3], was a spreadsheet listing each of the candidates anonymously by letter but referencing the location of each application within the bundle, the scores awarded in respect of the relevant competencies individually, and then each candidate's overall scores. The annex also included the grade of the relevant officer at the time of application.
167. Candidates B and C were already in grade 7 positions at the time of the application and candidate G, the third candidate who was successful at the sift stage, was an SEO at the time of the application. Most of the other candidates including the Claimant were SEOs at the time of the application but there was a further unsuccessful candidate who was already in a grade 7 position.
168. As set out above, there was no contemporaneous documentary evidence of the values allocated, but the Tribunal considered that the subsequent explanations as contained in the witness statements and oral evidence, adequately established this on the balance of probabilities given that they were commenting on the agreed application forms.
169. A general piece of evidence which was not disputed by the Claimant was that this application was one of approximately fifty which he had made in 2018. He had made (p377) nine applications between 4 March and 28 October 2018 to the Civil Service, all of which were unsuccessful, some after an interview. Further, (p379) in 2018 he applied for a minimum of thirty jobs within the NHS. He agreed that all the jobs that he applied for across either the NHS or the Civil Service were at grade 7 or pay band 8, and that all the applications were important requiring some care and attention from him. He also agreed in cross-examination that it was important to tailor his application to the competencies which were relevant for any particular recruitment exercise.
170. The Tribunal considered that this was relevant because it was clear that the

Claimant either did not have the time or the ability to tailor the content of this application form to the job that was advertised. Thus, for example, during the course of his evidence, he referred to evidence provided to establish competencies for other jobs, but which were not the same as this job and which he had included in identical terms in the application form which he submitted for this job.

171. The Tribunal agreed that it was likely that this was relevant in terms of our finding above that the Claimant had not dedicated sufficient care and attention to this specific application. He also conceded that he frequently used the same text and examples in the applications for many jobs. His view was that the marking of the competency frameworks was dependent on the comprehension of those competencies by the sift panel on that particular day, i.e., it was a highly subjective exercise. He believed that on the same information in his application viewed a month or a couple of months later, a sift panel might change the scores. He referred to his own experience of responding to complaints when he was working for the Home Office when he had to tell candidates for posts that it was a subjective process.
172. The Tribunal considered that the Claimant had failed to take on board that the process which the competencies anticipated was designed to reduce the element of subjectivity by requiring specific and clear answers from a candidate addressing the objective competencies.
173. His case was also that he believed that he should have been scored more highly given the content of his application [C1, para 42]. In evidence he elaborated that this meant that he should have had between four and five points for each of the five competencies, five points being the maximum score which could be awarded for each competency.
174. The Tribunal's findings were based on both consideration of the candidates' application forms as they were considered by the sift panel and also the written evidence in the statements of both the Claimant and the First Respondent's witnesses and, indeed, the cross-examination of all the witnesses on the way in which the application forms had been assessed against the competencies. As most of this information was in writing it is not proportionate to repeat it, but examples follow.
175. In relation to the programme manager experience which was an issue that we dealt with in evidence (para 99 of the Claimant's witness statement), the Tribunal agreed with the Respondents' submission that whilst the Claimant set out the experience he had, other candidates better demonstrated their transferable skills as against the requirements of the post being applied for. The Tribunal considered that this was also a consequence of the application form that the Claimant sent in not being tailored for the post he applied for.
176. We accepted the Respondents' submission that when one compared the

Claimant's application to those of the candidates that made the sift, namely B, C and G, various matters emerged which put their application forms ahead of his. As referred to above, the Claimant's answers tended to be a set of statements with very little evidence to support them. For example, he would assert that he had done a certain thing required in the framework but did not give an example and the Tribunal accepted that for a grade 7 position this was not an adequate response. A specific example of this appeared at the Claimant's answers at p165 in relation to the competency "Leading and Communicating". The Claimant made the generalised statement that he "empowered stakeholders in decision-making process to feel valued and acknowledged praised [*sic*] on achieving key milestones". He did not specify what he had actually done as an individual, what was the decision-making process that he referred to; how he assessed whether the stakeholders felt valued, etc and what were the key milestones achieved.

177. The Tribunal further noted that the application form had called for "an example of when you have demonstrated this competency". The Tribunal considered that this invited the candidate to provide an answer with the specifics referred to above.
178. The Tribunal took a similar view in relation to the Claimant's application under the competency "Delivering at Pace" (p164).
179. We accepted the evidence of the three sifters as to the question of how they assessed the Claimant's application.
180. Ms Perry commented that while the examples that the Claimant gave were relevant, they rarely got to the 'how'. The Claimant had made a lot of statements that were not backed up by evidence and his application form was also not particularly well drafted.
181. In her evidence Ms Fisher stated that overall the Claimant's application was not tailored to the role nor to its requirements and that throughout it lacked detail.
182. Finally, Ms Borland was also of the view that overall the Claimant's application did not evidence examples at the required standard for the role and that at times it was unclear as to the Claimant's role and his personal impact in the examples that he gave.
183. In summary, we were satisfied that Mr Rafique's application lacked sufficient detail and was not tailored to the role or to the requirements of the role. Further, he had failed to convey to an adequate level his role in or personal impact in the examples that he gave as evidence of his achieving the competencies. We accepted that the assessment of his application contained in the First Respondent's witness statements and confirmed in their oral evidence was justified. This adequately explained on the balance of probabilities the scores which he was given.

184. In all the circumstances, the Tribunal concluded that the scores given to the Claimant were understandable and appropriate and did not raise an inference that they had been given for discriminatory reasons and/or because of knowledge of a protected act.
185. In relation to the procedural errors listed in issues 12(b) in support of the complaint of direct discrimination, the Tribunal considered that there was no basis for inferring that the errors were caused by or could have been caused by the Claimant's race and/or religion or belief.
186. The Tribunal considered this issue very carefully given that the Respondents did not have the "shield" of anonymised application forms. However, the Tribunal has set out above its findings about how this came to pass. Our view was also informed by the absence of an apparent case of the Claimant's application form having been under-marked.
187. In relation to the complaint about the delay in responding to the Claimant's Data Protection Act/GDPR request within the statutory timeframe – issue 12(b)(vi), the Tribunal accepted Ms Jenkins' explanation as to why she had responded late. There was no dispute that the response had come in late. The Tribunal considered that her explanation was credible given the roles that she had taken up just around the time of the recruitment process. In short, she was very busy. There was also no comparator or comparable situation involving her in the evidence before the Tribunal which would have led the Tribunal to believe that she had dealt with this case differently than she would have dealt with any other case because of considerations of race and/or religion or belief.
188. Given the findings that we reached above in relation to the procedural matters and the delay, the Tribunal was satisfied that the allegations of direct discrimination were not well founded and were dismissed.
189. In relation to the victimisation allegations, we reached the following findings.
190. In relation to allegation 12(c)(i), we were satisfied that Ms Jenkins was aware of the Claimant's protected act but:-
- a. She was away from 3 September until after the sift was carried out.
 - b. The Claimant's application was submitted on 5 September so Ms Jenkins would not have known about it and there was no suggestion that Ms Jenkins or anyone else involved in the sift or the administration of it would have known that the Claimant was planning to apply for this post.
 - c. On the balance of probabilities, we accepted that the sift took place on 7 September 2018.
 - d. We accepted that Ms Jenkins was not involved in the sift on the balance of probabilities. It had been completed by the date of her

return to work on 10 September.

- e. The candidates were told on 14 September of the outcome of the sift as the Claimant described.

- 191. It did not seem to us that there was anything in the surrounding circumstances to suggest that Ms Jenkins had been involved. Therefore, there was a failure to establish a knowledge of the protected act on the part of those involved in the sift. Indeed, Ms Jenkins' inaccurate portrayal to the Claimant of the sift having been "blind" confirmed that she was unaware of what had actually taken place during the sift.
- 192. The complaint about the two false statements by Ms Jenkins that the sift had been blind as complained about in issue C(vi), did not in the Tribunal's view, point to evidence of victimisation. It was simply evidence of Ms Jenkins' expectation of the procedure which should have been applied. The Tribunal also noted above that it was something which she volunteered and that this was more consistent with her lack of knowledge of what had actually taken place.
- 193. In relation to the question of knowledge by members of the panel, it was correct that Ms Perry had stated that she could not "rule out" that she knew about the Claimant's email to Mr Wormald but once again, the Tribunal considered that on the balance of probabilities, we saw no reason to find that such a passing reference to the Claimant out of context in approximately early 2018 would have been remembered by Ms Perry when she dealt with the application form some five to six months later.
- 194. Further she spent very little time reading the application forms before the meeting and the meeting was said to have lasted only about an hour or so.
- 195. In all the circumstances, we considered it highly unlikely that she had any recollection of Mr Rafique when she dealt with the sift in September 2018.
- 196. In relation our findings about the complaint that the Claimant had been subjected to a detriment by the statement that there was no requirement to have sift sheets; issue C(i), our findings were the same as set out above in respect of the direct discrimination complaint. There was no basis for a finding that Ms Jenkins reached the view that she did because of the Claimant having made the earlier protected acts.
- 197. Further to the extent that there was a difference in view in the correspondence between the Claimant and Ms Jenkins as to what the correct procedure to have followed was, the Tribunal considered that this did not assist the Claimant, as the substantive complaint was about the fact that he had not been shortlisted. This had already happened by the time Ms Jenkins became involved in correspondence with Mr Rafique about the process followed.

198. The same considerations apply in respect of the complaint that the Claimant was informed that there was no requirement to give feedback including no justification and failing to respond to requests for feedback as promised: issue C(iii).
199. In relation to the complaint about destroying the notes, as the Tribunal has found, this is something which applied to the people conducting the sift. First, there was no requirement as the Tribunal could see at the time for them to keep their individual notes, it was optional not mandatory. In any event, it could not be an act of victimisation because the people involved in the sift had no knowledge of the protected act and therefore could not be motivated by it.
200. So, issues C(i) and (iv) applied to the sifters only. The other allegations were against Ms Jenkins.
201. The Tribunal has quoted from Ms Biggs' report and hopes that the First Respondent will have taken the appropriate action on her recommendations.

Employment Judge Hyde

Dated: 19 August 2021