EMPLOYMENT TRIBUNALS

Claimant:	**Mrs Rajni Singh**	
Respondent:	**Convatec Ltd**	
Heard at:	**Wrexham**	**On: 16, 17,18, 19, 20 November & 21 December (in chambers) 2020**
Before:	**Employment Judge R Powell**	
	Ms S Hurds	
	Mr B Roberts	

Representation:

Claimant:	In person
Respondent:	Mr Williams, of Counsel

RESERVED JUDGMENT

The unanimous judgment of the tribunal is:

1. The allegations against Ms E Cook were dismissed upon withdrawal.

2. The claims of direct discrimination are not well founded and are dismissed.

3. The claims of harassment are not well founded are dismissed.

4. The claims of victimisation are not well founded and dismissed.

REASONS

1. In a claim form, presented to the employment tribunal on 22 December 2018, Mrs Singh alleged that her employer, Convatec Ltd, had subjected her to a course of race discrimination between November 2008 and 4 December 2018.

2. The respondent denied the claims and asserted that many of the specific incidents of alleged discrimination had not been presented within the requisite time limit for the purposes of the Equality Act 2010.

3. Three preliminary hearings took place before the list of issues was satisfactorily summarised by Employment Judge Brace on 13 September 2019. She identified 16 factual allegations which were alleged to be incidents of direct race discrimination, or in the alternative, acts of harassment. She further identified three incidents of alleged victimisation. Those particulars of the claim were summarised in her judgement of 13 September 2019 and were a useful guide to our deliberations [69-71].

4. At Employment Judge Brace's direction, a further preliminary hearing took place on 16 January 2020. That hearing was conducted by employment Judge Powell, who now sits with Ms Hurds and Mr Roberts on this liability hearing.

5. At that preliminary hearing it was determined that a claim which arose from a decision made by the respondent in November 2008 was not within the Employment Tribunal's jurisdiction. That single claim was struck out. An additional claim was admitted as an amendment. It read as follows:

   "On 10 January 2019 Mr G Pearson asked the claimant if, following a discussion about her work, she would be withdrawing her employment tribunal claim. The claimant avers that this conduct amounted to victimisation consequent to the presentation of her employment claim; a protected act."

6. Thus, the tribunal today is asked to consider 19 factual allegations, 15 of which are pleaded as incidents of direct race discrimination and/or harassment and 4 further allegations pleaded as incidents of victimisation.

7. Before the tribunal began to consider the evidence in support of those allegations it was asked to determine several preliminary issues. Each of these issues were considered, and

judgement, with reasons, was given on the first day of the hearing. There has, at the date of this written judgement, been no request for written reasons in respect of the preliminary issues and so they are set out here in summary form only.

8. The claimant sought to persuade the employment tribunal to reconsider the 16th January 2020 rejection of her earliest complaint of race discrimination; a decision by the respondent in November 2008 to ring fence her remuneration. Whilst the tribunal sits as a panel, in this case the character of the application was one which, in the absence of an appeal, necessarily was viewed as an application for reconsideration of 16 January 2020 decision. For this reason, it was considered by Employment Judge Powell alone in accordance with rules 70 and 71 of the Employment Tribunal Rules of Procedure.

9. Mrs Singh argued that it was in the interests of justice to allow the reconsideration because of the very nature of the allegation itself; race discrimination. Employment Judge Powell accepts that matters of race discrimination are very serious allegations and are considered by many to be the most serious form of discrimination. On reviewing the decision, and the reasons, for that original decision the claimant's argument did not persuade him that the original decision contained any error of law or had failed to take into account any relevant consideration, including the point put forward by the claimant. In those circumstances the reconsideration application was not allowed.

10. The claimant made applications for witness orders in respect of four of the respondent's employees. After discussion with the claimant, it was not apparent what relevance those persons might have to the agreed list of issues. The tribunal, recognising that the claimant was acting in person, went to some lengths to understand the potential relevance of these potential witnesses by reference to each of the individual allegations of discrimination as identified by Employment Judge Brace. The claimant, in the end, simply put her case as an invitation for the employment tribunal to determine whether those individuals were relevant witnesses. At the time of the application, considering the case of Dada v Metal Box Company [1974] IRLR 251 NIRC) we concluded that such orders would not be in the interests of justice as we could not see the relevance of the proposed witnesses. Further, there was no indication that any of those witnesses had declined to attend, or indeed, that the claimant had made a request for their attendance.

11. The claimant made applications to admit a number of documents. The respondent took a pragmatic approach and agreed five should be included in the bundle of documents. It objected to the inclusion of a judgement, with reasons, of the Cardiff employment tribunal from 2013. That judgement concerned the claim which had been brought against the respondent by the claimant's husband. That claim had resulted in findings of discrimination and victimisation against the respondent.

12. The tribunal adopted the same approach it had taken with regard to the request for witness orders; seeking to identify how the content of the judgement, concerning events that predated the allegations in this case by seven or eight years, was relevant.

13. The claimant initially struggled to identify relevance to the specific issues in her claim but rather than determine the matter at the outset of the hearing, the tribunal concluded it would be in the interests of justice to reserve consideration of this application until the

claimant had given her evidence to the tribunal in case it became apparent how her husband's judgement could assist this tribunal in the tasks before it.

14. The judgement was subsequently read by the tribunal (after the claimant had herself ready for the first time on the evening of the third day of this hearing). The claimant set out in detail the paragraph numbers of the reasons in her husband's judgement which she considered pertinent to her own claims. Tribunal read each paragraph and considered her points in respect of each. We concluded that none of the paragraphs were likely to assist us in determining what had happened between the claimant and her managers and colleagues some seven years later. For that reason, we did not admit the judgment as evidence.

15. That said, we understood why the claimant hoped to rely on the judgement because there were one or two incidents of behaviour which a lay person might see as relevant because of a parallel between events in 2010 and the claimant's own perceived perception of her own experience in 2017. However, the persons involved in each case were different and there was no indication of any policy or practice which bridged the two claims.

The evidence

16. To determine the claims, we heard from Mrs Singh who gave evidence in accordance with her witness statement which she had prepared herself and, as is common, further evidence, emerged in the course of cross-examination.

17. Mrs Singh had the benefit of assistance from an official interpreter. On the whole Mrs Singh preferred to address questions asked in cross-examination in English without interpretation. Given the tribunal had, from documents within the bundle, an understanding of how well Mrs Singh was able to write in English, some knowledge of her academic ability (educated to degree level and formerly a teacher) we were content in most respects to allow Mrs Singh to make the judgement on whether she declined the assistance of an interpreter. However, on a number of occasions, particularly on points of substance (for instance on an occasion where her answer was an admission that one of her claims had no real prospect of success) we required questions to be put through the interpreter, albeit Mrs Singh's answer with the benefit of interpretation, did not alter. Further, the tribunal clarified and explained the gravity of the claimant's statement before recording the withdrawal of the claims which were Made against Ms E Cook of Face2Face limited.

18. The respondent called five witnesses. The first was Miss Carla Williams, formerly a junior colleague of the claimant who was later promoted to a position of seniority over the claimant. She was a person against whom several of the allegations of direct discrimination and harassment were levelled. Miss Angharad Vaughan, the claimant's shift leader, who was accused of directly discriminating against the claimant and witnessing incidents of discriminatory behaviour by Miss Williams. Mr Stuart Foster, a colleague of the claimant, who was also described as a person who had discriminated against the claimant and witnessed the alleged conduct of Miss Williams. Mr Gary Pearson, an Associate Director of Manufacturing, was accused of victimisation of the claimant. Miss Sharon Devlin, Associate Director of Human Resources, who gave evidence about the respondent's management of

an independent investigation into the claimant's grievance, procedural matters concerning training and efforts to redeploy the claimant following the outcome of her grievance and a subsequent appeal.

19. The tribunal notes at this juncture, that it is imperative in a discrimination claim that the tribunal should not make decisions on individual issues without considering all of the evidence in the round. We have followed that guidance in this case but we must necessarily identify the evidence relevant to each allegation for the purposes of these reasons.

Findings of fact

20. The tribunal makes the following findings of fact based on the evidence put before it. Our findings are unanimous and we have at all times applied the civil standard of proof.

21. The respondent is a business which manufactures dressings and treatments for wounds. It is based in Deeside. The claimant had been employed by the respondent at its premises in Coventry before she transferred to Deeside. In Coventry she had been employed as an operator and she retained that role at Deeside.

22. In November 2016 the respondent reorganised its staff, simplifying its structure. Whilst there are many roles within the respondent's business our concern has focused on the roles associated with operating and managing the production lines. Of those, two are of concern.

23. Under the new structure there was a role titled Process Operator; these were people who worked on the production line involved in tasks such as creating liquid gels, inserting raw materials, inserting woven materials for cutting, packing the processed materials, labelling the boxes of the manufactured goods and maintaining records. Senior to the operator role were those employed as process owners, there were 33 such positions.

24. It is common ground that in November 2016 restructure the most senior position the claimant applied for was that of process operator. It is also common ground Miss Carla Williams, who prior to this restructure had worked for many years in a role which was junior to the claimant's position, was subsequently appointed to the role of process owner. Thus, Ms Williams became senior to the claimant.

25. We find that the relationship between Ms Williams and the claimant had been uncontentious for around 14 years prior to the change in their respective seniority within the respondent's business. There has been no suggestion of any discriminatory conduct by Ms Williams in those preceding years.

26. The claimant laid great emphasis upon her belief that Miss Williams was gifted the role of process owner. She challenged the evidence of Miss Williams, Miss Devlin and Mr Pearson that Miss Williams had applied for the process owner post and the claimant points to a document which reflects the applications all of the staff involved in the restructure and she notes (398) that the entry for Miss Williams does not record that she made an application for the process owner role. It is not alleged that the claimant was subject to a detriment on

the grounds of her race by Ms Williams' appointment; the claimant had chosen not to apply for the more senior role. Further, when she requested promotion, she was offered a "development" process owner role without an interview or the post being advertised. She took up that role in August 2017. It was around this time that the first alleged act discrimination is said to have occurred.

27. The claimant's consistent concern (in her cross examination and her oral submissions) that Ms Williams' appointment to a role senior was made without a recruitment process lent weight to the respondent's case that the cause of difficulties between Ms Williams and the claimant was not the conduct of Ms Williams but the claimant's adverse reaction to Ms Williams sudden, and unexpected, seniority over the claimant.

28. We turn now to the specific allegations.

Allegation ii[1]

29. The claimant's witness statement, at paragraph states;

"I was not having difficulty in my new role; the only problems were Carla Williams, Stuart Foster and Angharad Vaughan who didn't want me to be a process owner."

30. She goes on to identify the 21 September 2017, when she was involved in mixing a gel and also associated with looking after a stitch bond process. She asserts that Miss Williams told her that she should cease mixing the gel and the claimant refused to do so, saying it was against the respondent's process instructions so to do. She then relates the following account:

"Carla Williams called me into the airlock and questioned why I turned the stitch bond 1 down. I tried to explain to her that you can't put the gel down midway through the process. Again, she wouldn't listen to me. She left the airlock making the racial remark; Indian bitch! I was very upset. I rang Angharad Vaughan and explained what happened, omitting the racial abuse as I felt utterly humiliated. She told me briefly "you have to listen to Carla ". I didn't want to say much because I had just been awarded my new role and my training had not yet started, so I went quiet."

31. Miss Williams account is set out in paragraph 4 her statement:

"This is completely untrue. I would never say something like that to anyone and I am appalled by this allegation. This was not something she previously raised in the grievance process either. Aside from this alleged comment, I don't recall this incident at all and have never got angry or shouted at Rajni in the way being suggested."

32. There were no other witnesses to this incident and Ms Vaughan had no recollection of the claimant reporting any incident to her at this time. She expressly denied telling the claimant that "you have to listen to Carla".

[1] The numbering from the Order of EJ Brace [pages 69 -71] is retained for ease of cross referencing. The first allegation was dismissed at the 16th January 2020 preliminary hearing.

33. In cross examination of the claimant Mr Williams, counsel for the respondent, traced the history of the claimant's previous descriptions of this event. As the claimant accepted in her own witness statement, she did not mention to her line manager the use of the overt racist phrase "Indian bitch" on the day. Similarly, she did not that assert those words had been said in her written grievance of 11 July 2018 nor in her supplemental letter of 25 July 2018. The first description of this incident described Miss Williams' behaviour as follows:

"start bullying me saying I should go out and do some handpick. I said Carla you don't know the process, how it works, I can't leave the room [172]".

34. In the claimant's letter of 25 July, she described the same incident in the same terms but attributed some further words of her own:

"because I have to check the water temperature and weighed the powder".

35. During the claimant interview with Elizabeth Cook, the external investigator of the claimant's grievance, the claimant described the incident as follows:

"EC: when you say Carla spoke to you aggressively, was she shouting?
RS: yes, she was shouting
EC: was it just you Carla in the room?
SR: yes, just us in the airlock
EC: what was it said about, what she was saying that was angry?
RS: she said you should have switched off the water. I would have had to start the process again and Vicky has to go to do the filter, but Vicky wasn't doing anything. Vicky would only have to cover for 10 minutes on SB1 line.
EC: you were very upset?
RS: yes - I was very upset, no one was listening to me. I was doing my job as per process. I haven't seen this sort of behaviour with anyone else."

Further on in the interview the following exchange is recorded:

"EC: you think this is because you belong to ethnic community but there are no specific examples related to your race, is there something else you want to tell me?

RS: I haven't seen Carla talking to other people the way she talks to me, and when she speaks to me, she speaks differently and speaks to me angrily. When I give suggestions about a machine to Carla, because I know the machines well and I have done these lines, she doesn't want to listen and disregards my suggestions. She listens to other people suggestions…"

36. The overtly racist phrase was not mentioned in the ET1 particulars of claim. The claimant accepted in cross examination that the first occasion on which she had referred to the phrase "Indian bitch" was her further and better particulars claim dated 20 November 2019.

37. Mr Williams put to the claimant that the absence of a clear reference to the openly racist statement she described November 2019, for a little over two years after the event,

indicated that she had created this allegation for the tribunal proceedings and, if those words had truly been used in September 2017, the claimant would have told the grievance investigation, the grievance appeal and set them out in her ET1.

38. The claimant denied that she had falsely adopted the phrase. She stated that she was reticent about making an overt allegation because she had witnessed her husband's experience when he raised allegations of race discrimination against the same employer and was subsequently victimised for doing so.

39. It was put to the claimant that her explanation was illogical; she had raised a grievance alleging multiple incidents of race discrimination and had been expressly asked to identify why she thought the respondent's behaviour was discriminatory but chose not to share with the investigator her clearest example of racist conduct by the respondent. The claimant was firm in her response and, when the same argument was put to her concerning the absence of the phrase in her claim form, she remained consistent in her explanation.

40. Miss Williams was cross examined by the claimant. Miss Williams answered questions directly, the tribunal would describe her manner as humble, direct and consistent with her witness statement and the account she had given during the grievance investigation.

41. Ms Vaughan did not deviate from her the account in her witness statement.

42. The tribunal concluded that on the witness evidence and the relevant documentary records, it was more likely than not that the account of Miss Williams was the more reliable. Whilst the evidential burden of proving the essential facts which are the foundation of the claim rests upon the claimant, we are clear that Miss Williams evidence, left us in no doubt that she had neither shouted nor described the claimant as an "Indian bitch".

43. We have therefore concluded that the claimant was neither shouted at nor subject to the alleged overt racist insult on 21 September 2017.

Allegation iii

44. This allegation stated that Ms Williams had shouted at the claimant during an exchange alleged to have taken place in September 2017. The claimant's case is set out in paragraph 7 of her witness statement:

"… Carla Williams came to the mixing room and told me to put water in the mixer and to go outside on gel hand pack. I told Carla I couldn't leave the room because I always take every responsibility for the job, I am doing in Convatec. The gel I was making was going on someone's wound and I didn't want to go against process instruction so I told Carla, again, I couldn't leave the room until the process was finished."

45. This account is materially the same as that which the claimant wrote at paragraph 6 of her 25th of July 2018 grievance letter [190]. Neither account describes a raised voice, aggressive vocabulary or other aggravating feature.

46. Miss Williams response set out paragraph 6 of her witness statement:

> "… I have no idea what she is referring to here and exactly when this is meant to have happened; however, I don't believe this is true as this just isn't how I treat people. What's more, 3 to 4 people always work on the hand pack so if I had been abusive, other people would have seen this. Only when the mixing is completed, would I have asked Rajni to go onto the hand pack."

47. As we have noted above, this we found Miss Williams to be a reliable and straightforward witness and we have not identified for ourselves, or being taken to by the parties, any document or other witness statement which could reasonably lead us to consider that her account of this event was flawed. We must therefore consider the claimant's evidence and Ms William's evidence and determine which is the more reliable.

48. As will be apparent in our later findings, there are instances where Ms William's account is corroborated by other witnesses. Similarly, there are instances where the claimant's account is contradicted by other witnesses.

49. We have reached a unanimous conclusion that we prefer the evidence of Miss Williams to that of the claimant. We have therefore concluded that the claimant was not spoken to in an unpleasant manner as alleged.

Allegation iv

50. This allegation is one made against Miss Angharad Vaughan and is set chronologically between September 2017 and March 2018 this appears to be out of the chronological order the list of issues and we address it later on in these reasons.

Allegation v

51. We then turned to the fourth allegation which alleges that on 15 March 2018 Amy James employed as the shift leader of the claimant's shift failed to investigate the claimant's complaint that her locker had been broken into and a mask removed.

52. Miss Amy James has not provided a witness statement or attended as a witness. The tribunal has been informed Miss James is no longer an employee of the respondent.

53. At page 195 in the bundle is an email from the claimant to Miss James it is dated 19 March 2018. It states as follows:

> "Hi Amy, in unit 33 where all mask stored in the airlock for gel filler line and mixing line, my mask was stored in the cage with labelled name on it and cage was locked, today my cage is open and no name on it and no mask in. I only had new mask last year and if I need it, stores will not issue me another mast. I asked Alan, he said he don't know who remove my mask. Regards Rajni".

54. Ms James replied at 06.44 the following morning:

"Hi Rajni, how are the cages locked? Do you have a key? Please investigate this on your shift. Pam, Shirley, please can you investigate this on B shift. Thanks Amy"

55. The claimant replied:

"hi Amy, I had key for the cage and it was locked regards, Rajni"

56. To which Miss James replied:

"How has the locker been opened? Has it been damaged to get into it?"

57. Because Ms James was not a witness the claimant focused her cross examination about this issue on Ms Vaughan and her part in investigating the damage to the locker. Ms Vaughan explained that at the time of the incident she had been away from work on bereavement leave and, when she returned, she was on a phased return. For these reasons she had not become involved with Ms James' management of the investigation.

58. The claimant's cross examination of Miss Vaughan alleged that Ms Vaughan had failed to comply with the respondent's dignity at work policy in respect of the damage and removal of the mask. Ms Vaughan's response to that allegation was no different to the one noted above.

59. Tribunal notes for itself, that on a comparison of the character of the dignity at work policy, which refers to eliminating discrimination in the workplace in respect of the protected characteristics described in the Equality Act 2010, the claimant's complaint in her email to Ms James, would not, in our judgement, alert the reader of the claimant's email to a possibility of discrimination or harassment.

60. That said, we are aware that the claimant (because she was aware of her husband's treatment by other employees of the respondent some years earlier) would make a rational connection between the damage to his locker and his personal possessions and her own experience. However, that connection had not been articulated to Ms James or Ms Vaughan at the time of this incident.

61. We have concluded that Ms James did not fail to deal with the claimant's complaint; she asked questions and then delegated the investigation stage the claimant and two of her colleagues who were shift leaders.

62. On the evidence before us no one found any evidence of the person, or the reason why the protective mask used by the claimant had been removed and the claimant did follow the matter up prior to her grievance.

Allegation vi

63. The next allegation states that in March 2018 Carla Williams verbally abused and humiliated the claimant by instructed her to "get back to work". The claimant's evidence on this point set out in paragraph 8 of her witness statement:

"In March 2018 when I went to put my name down for overtime in unit 35, during my morning break, Carla stopped me and shouted at me, asking what I was doing there and to get back on my line. It was on my own time people were on break on that time. I have seen Carla when she talks to other people, she will talk to them very nicely but with me her behaviour was very different. She was always very high-handed with me."

64. Miss Williams account is set out in paragraph 9 of her witness statement, inter alia, she said:

"Again, this is not true. I do not mind what Rajni does on her break; it's not of my business. There is also no reason why I would want to stop her putting her name down over time either. The area of the site which Rajni is referring to is one which lots of people passed through regularly. The overtime wall is in the corridor in unit 35 between the men's and women's toilets in the vending machine is also nearby. This means it can be quite busy there particularly during breaks that it wouldn't be at all unusual for Rajni to be there so I don't understand why I would have said this to her."

65. The tribunal is again asked to determine the factual allegation by reference to the oral evidence of the claimant and Miss Williams. We note that in this instance the claimant's account in her grievance [171-172] is consistent with the account she gave evidence.

66. For the same reasons as we have set out above in respect of relative reliability, and the further detail on that subject to which we will refer subsequently in these reasons, we have concluded that it more likely than not that Miss Williams did not shout at the claimant nor did she tell her to get back to her own line.

Allegation vii & Allegation viii

67. It is common ground between the parties that the agreed list of issues states the incorrect date and this tribunal is asked to determine what took place between the claimant and Miss Williams on 15 March 2018.

68. The next allegation alleges that on 19 March 2018 the claimant was verbally bullied and harassed by Carla Williams and secondly, that the incident was reported by the claimant to Amy James the B shift leader who failed to deal with her complaint. It is convenient to start with the manner in which the complaint was raised to Amy James, this is found in the email. dated 15 March at 07. 21 and states as follows:

" this morning went into SB2 line 2 do QC sample, full bin was there I put bin on SAP and Carla was not happy she said you were meant to run line not put bins on SAP, SB7,2,1, gel are my lines and am doing batch records as well. She was raising her voice, she said will speak to Amy about this and Mike and Hayden were in the room at that time.

According to PDP we should respect each other.

Before that I had tea L5 and slit a line.
Regards, Rajni"

69. Miss James replied the same day inviting the claimant to come and see her the following day. The evidence before us leads us to conclude that the claimant did not take up that offer.

70. The tribunal has been taken to copies of witness statements, which were recorded in the course of the claimant's grievance appeal process, at page 265 and 266. Neither Mike (Birks) or Hayden (Bartley) had any recollection of a person shouting at the claimant. We note that these interviews took place on 25 September; six months after the date of the incident.

71. The claimant's evidence on this issue as set out in paragraph 10 of her statement:

"On 19 March 2018 Carla Williams told me to do QC checks on stitch bond 2 line and I was running stitch bond 1. I stopped my line went to do the QC checks on SB 2 as instructed. Carla came in and started shouting at me asking what I was doing. I explained to her that she had told me to do QC checks and I had put one in in the system. She would not listen to me. She told me to get back on my line as the others were all hers. She was very aggressive at this point. Mike Burke and Hayden Barkley were in the same room at this time. I sent an email to Amy James about this incident. No investigation, to the best of my knowledge, has been done as no one has spoken to me about it since..."

72. Ms Williams accounts was as follows:

"Once again, this is not true. This was raised as part of the grievance and I believe this relates to a time where I had to speak to her about communicating better with me, and making sure she put the line down (i.e., turning it off) if she moved away from it. This occurred at a time when we were suffering from problems with the fibre that is then used in the final production. Poor quality of fibre can cause customer complaints and product recall so it is something we would have to avoid… However, despite this, Rajni had gone from one end of the room to the other to put another bin on (which means putting finished product on SAP to go to the warehouse). … I told her that if she is going to put the bins on, she should let me know as I was about to put more on. I also told that she should not leave the stitch bond 1 running, as we had been told not to do this. I didn't do this in an aggressive way. I was just telling her we need to communicate with each other and to remind her not to leave her machine running."

73. The tribunal noted that in the course of cross-examination of Miss Williams there was something of an exchange between the claimant and Miss Williams concerning the surrounding events and circumstances. Ms Williams gave a differing account to that of the claimant. The claimant seemed to accept Miss Williams account, and adopted that account as the basis for her continuing cross-examination of Miss Williams.

74. We must again consider the competing account of Miss Williams and the claimant. We note the claimant's email to Miss James which, although not express, through its reference to "respect" does indicate to us the claimant felt Miss Williams had not treated her with respect. We note that the two witnesses to whom the claimant referred did not

corroborate her account. We also note that those two gentlemen were not asked for their recollection until six months after the alleged incident. On either parties' general evidence about the character of the workplace, the alleged conduct of Miss Williams would be an extraordinary, and therefore perhaps memorable event, but that must be balanced with the delay noted above.

75. The tribunal also considers that it must distinguish between honest, but subjective, perceptions of events, which of course we take into account, and any more objective available evidence. In our judgement, we consider it more likely than not that Miss Williams, in her role as process owner, reasonably directed the claimant's performance. We also find that the claimant who was in some respects more experienced than Miss Williams was offended by the management instructions she was given by someone whom she considered to be less experienced and who she believed had obtained her seniority over the claimant without an application or a competitive interview.

76. In our judgement the conduct of Miss Williams, on the evidence before us, was reasonable in its character and her comments were delivered in an appropriate tone.

77. With respect to the allegation against Ms James, we find that following receipt of the claimant's email (as noted above) Ms James responded promptly and invited the claimant to come and see her to discuss the content of the claimant's email. We have found that the claim on did not take up that offer.

78. We also find that, on the wording of the claimant's email, there was nothing that would alert Miss James to the potential for discriminatory bullying or harassment. In our judgement Ms James's response appears to be proportionate to the content of the claimant's email.

79. In our judgment the alleged discriminatory conduct did not occur.

Allegation ix

80. The next allegation alleges that on 25 April 2018 the claimant was subject to a reprimand and shouted at by Miss Vaughan.

81. The reason for the that alleged conduct was an email which the claimant had sent to the plant director. The claimant's email was sent to a number of staff including Gary Pearson and Ms Vaughan. The email refers to the claimant's knowledge that several of the stitch bond machines were to be replaced. She expressed the hope that they would not be replaced and gave examples of why, in her opinion, the current machines were operating well, if not better, than the newer machines.

82. Miss Vaughan accepted that she had spoken to the claimant about her email. She did so on instruction from Mr Gary Pearson who directed Miss Vaughan to firstly explain the respondent's rationale for changing machines and secondly to ask the claimant to initially approach either Ms Vaughan or Mr Pearson with ideas or concerns that she had.

83. The claimant's account is that Ms Vaughan shouted at claimant and told her that she had "no right" to write to the senior management as she had done. Ms Vaughan disputes that account. She denies shouting, she denies saying the words "no right".

84. The tribunal did not find any reference to this incident in the claimant's grievance documents or the interviews with witnesses who were part of the grievance process.

85. Again, the tribunal has the task of determining which of two accounts, neither corroborated nor undermined by documentary or witness evidence, save their own. On the balance of probabilities, the tribunal found Miss Vaughan to be the more reliable witness. In part, our rationale included aspects of our earlier decisions about the claimant's reliability and took into account other aspects of Miss Vaughan's evidence; which are addressed in our subsequent reasons, as set out below.

86. We therefore find that Ms Vaughan did not shout at the claimant nor did she tell the claimant that she had "no right" to communicate directly with senior managers.

Allegation x

87. The next allegation is dated as occurring in April 2018. The claimant's further and better particulars of claim [49] state that the claimant went to see Miss Vaughan about the respondent's employee engagement survey form and that Ms Vaughan told her to fill it in during a break after work.

88. The claimant's witness statement gives a slightly different account. She states that whilst she was working on the DOYEN 2 line, she asked Ms Vaughan when she could complete the employee engagement survey.

89. Ms Vaughan's account is very different. She recalls that the claimant was the process owner on the Doyen 2 line and there was an issue with the product on that line but, rather than address the issue, the claimant had gone onto the computer to complete the employee survey. Ms Vaughan stated that she told the claimant to prioritise sorting out the problem on the line and that she would need to go back to the employee survey later on. She denies telling the claimant to do the survey during her break or after work.

90. In the course of cross-examination by the claimant Ms Vaughan gave detail of her presence on the line, her view of the claimant and the computer screen which showed the employee survey. The claimant's questioning of this appear to accept Ms Vaughan's account of the surrounding circumstances and in particular did not challenge that there was an issue on the line which needed to be addressed. We of course take into account that the claimant is a litigant in person but we also take into account that, across the three days of evidence from witnesses, the claimant was robust in her own evidence and determined in her cross examination. Rather than dispute Ms Vaughan's account of the surrounding circumstances, the claimant adopted that account as the foundation for her subsequent questions.

91. Again, taking into account our general perception of the claimant's reliability as a witness, the consistency of Miss Vaughan's account and the detail with which she was able to

address questions from the claimant in respect of her own evidence we have concluded that it is more likely than not that Ms Vaughan's account of events is correct. We therefore find that Miss Vaughan did not ask or instruct the claimant to complete the employee engagement survey during her break or after work.

Allegation xi

92. The next allegation concerning events in June 2018. The claimant alleges that Miss Williams deliberately left a piece of work on a line following the clearing and tidying of the line which is known as "line clearance ". Further claimant asserts the conduct of Miss Williams was intended to get the claimant into trouble for failing to complete the clearance of her line. The claimant further states that Miss Williams shouted at her.

93. Ms Williams agreed that she had offered to help the claimant's team finish the clearance of the line they were working on because the claimant needed to finish some paperwork. She agreed that she and others had been responsible for clearing the line itself, underneath the line and around the line.

94. It was put to her that she had been working at the end of the line where a sachet had been found. Miss Williams said that she had worked with the team and was involved in helping clear the entirety of the line and tidying around it; she had not been allocated to one part. She denied she had left a sachet on the line. She accepted that the claimant accused her of doing so and that the claimant had spoken to in a raised voice.

95. The claimant did not see Miss Williams leave anything on the line and it is common ground that other people were involved in the clearance process.

96. At its highest, Mrs Singh's allegation is a belief or suspicion. There is no documentary or witness evidence which lends weight to her belief.

97. On the balance of probabilities, we find Miss Williams denial and her explanation of her involvement to be more likely true than the claimant's belief, without direct evidence, of the reason for a sachet on her line. Not least amongst our reasons is the fact that there were a number of persons involved in the cleaning operation who were equally capable of the error.

Allegation xii

98. The claimant's next allegation is that she was verbally reprimanded by Miss Vaughan and Mr Stuart Foster a process owner, without the facts being established. Further, this reprimand was in front of colleagues on the shopfloor.

99. In her witness statement the claimant stated the following:

"Pam Wood, another shift process owner, put the wrong T0 on the slit a job and I was shouted at by Angharad and Stuart on the shopfloor for her mistake. They didn't want to listen to me."

100. Ms Vaughan's statement at paragraph 12 states:

"I didn't speak to her in relation to this matter, but do recall Stuart speaking to Rajni about taking ownership of the process and making sure the issue in question got sorted. She was a development process owner and someone ought to have contacted the warehouse about the incorrect transfer order, or spoken to Stuart about it, to ensure it got resolved. This was something Stuart believe Rajni should have taken ownership of and that it didn't matter who was at fault, it was about getting the issue resolved. I did not speak to Rajni myself about this and certainly didn't shout at her as a consequence."

101. Mr Foster's evidence set out in his witness statement at paragraph 7 and 8. In paragraph 8 he said as follows:

"I explained to Rajni that if she had known there was a problem on the Monday, she should have told myself for any about it and we could have sorted it out. By not doing that, I had to recall the whole job (30 pallets in total) to find the palate with the wrong T0 on it. I told that as we are on the early shift, so the first ones in, we need to take ownership and get these things sorted. I wasn't shouting at her operating her at all. I was just explaining to her what she needed to do in future when these things happen. The next day Rajni came up to me and said she had spoken to her husband, who used to work at Convatec and he had said that she was right and I was wrong, so she clearly hadn't taken notice of what I had told her."

102. Mr Foster's evidence corroborates Ms Vaughan's denial that she was involved in this incident. In the course of cross-examination, the claimant challenged Mr Foster as to the truth of his statement that any boxes of product were recalled. The basis for this allegation of dishonesty by Mr Foster was that she herself had not seen the pallets or boxes. Whilst we acknowledge that it is perfectly possible, in principle, for several witnesses to lie in their evidence in order to avoid a finding of discrimination, we are again faced in a diametrically opposed account between the claimant and a colleague, in this case Mr Foster. We also have to take into account the claimant's assertion that Miss Vaughan was involved is contradicted by both Miss Vaughan and Mr Foster. We also take into account that there is no witness to the alleged behaviour of Vaughan and Foster, although this incident is alleged to have taken place in the factory area.

103. On the balance of probabilities, we consider it to be more likely that the account given by Mr Foster and Miss Vaughan is the accurate version of events. In our judgement the claimant was not subject to a verbal reprimand in front of colleagues on the shopfloor as she alleges.

Allegation xiii

104. The last of the allegations concerning incidents on the shopfloor occurred on 9 July 2018. The claimant alleges that Carla Williams berated the claimant in front of colleagues regarding a piece of work found in the slitter bin. Further, Carla Williams was allowed to berate the claimant by Miss Vaughan.

105. This incident occurred in the course of the processing of a fibre fabric roll. There is no dispute between the parties that a SAP document directed that the roll should be cut to a width of 460 mm. Nor is it disputed that after seven roles have been cut to that width, the claimant told Miss Williams that, in her past experience, the correct width for cutting was 465 mm. The claimant told Ms Williams that this was the best practice even when the written directions were to the contrary. Miss Williams who accepted that the claimant had more experience in this process than she did, went to call her mother, a manager with the respondent, to check if that was correct and was told it was not. Nevertheless, Miss Williams acquiesced to the claimant's certainty and the remaining rolls were cut at 465 mm. As a consequence, the documentation and labelling of the boxes had to be changed. This led to 20 pallets of material being returned from the warehouse.

106. The claimant alleges that Ms Williams berated her in front of Miss Vaughan over the incident. Miss Vaughan and Miss Williams deny any such behaviour. The tribunal was particularly impressed by Ms Williams in respect evidence of this issue. She accepted that the claimant had more experience, she accepted that she had bowed to the claimant's insistence and she accepted that she was the person who was responsible.

107. Of course, the behaviour of the witness in a tribunal environment is often a poor indicator of their day-to-day behaviour in their work environment, however, we note that Ms Williams behaviour before us is consistent with the way in which she was described by her colleagues during the grievance investigation and by the respondent's witnesses who attended to give evidence before us.

108. We have concluded that, on the balance of probabilities, the account provided by Ms Williams is more likely to be correct than that provided by the claimant. We find that there was a discussion between the claimant and Miss Williams after the width of cut had been changed and the box pallets returned. The purpose of that discussion was "a root cause analysis" and that it was a calm and rational discussion.

109. We therefore conclude that the claimant was not berated or subjected to any shouting.

110. The three subsequent claims of direct discrimination and/or harassment share the same factual foundation as the three pleaded allegations of victimisation (as set out on page 70 of the bundle). Whilst the legal matrix for each type of claim is discrete, it is appropriate to set out the majority of our relevant findings of fact for these three instances of alleged unlawful conduct together.

Allegation xiv (section 13 & 26)
Allegation xiv of victimisation

111. This Allegation was formally withdrawn by the claimant. Nevertheless, we set out our findings in respect of this matter.

112. Claimant raised a grievance by letter dated 11 June 2018 and provided further evidence in support of her grievance in her second letter of 25 July.

113. It is agreed that the claimant's grievance, her evidence to the grievance investigation and her grievance appeal contained protected acts for the purposes of section 27 of the Equality Act 2010.

114. The respondent instructed an external investigator from a limited company called Face2Face. That company is associated with peninsular a business which provides advice to employers and in this case, at some point, it provided legal advice to the respondent.

115. We accept the evidence of Miss Devlin that Face2Face was not subject to any guidance or instruction as to how it investigated the claimant's grievances, the extent of the investigation, the manner of the investigation or the conclusions it reached. In our judgement, based on the evidence before us, it was not acting as the servant or agent of the respondent in this case.

116. The independent investigator was Miss Elizabeth Cook. She conducted interviews with a number of witnesses in respect of the allegations but she did not interview the two gentlemen whom the claimant said had witnessed one of the incidents of shouting, these two persons were eventually interviewed for the appeal. The claimant originally alleged that the reason these two gentlemen were not interviewed by Miss Cook was the claimant's ethnic origin.

117. We find that the factual allegation made by the claimant is proven.

118. As this is not an allegation of discrimination, we need make no further findings of fact.

Allegation xv (sections 13 and 26)
Allegation xv of victimisation

119. Mrs Singh alleges that an outcome she sought from her grievance was a move to a different shift and that request was not addressed in the grievance or the grievance appeal. That failure amounted to a refusal of her request.

Allegation xvi

120. Mrs Singh final alleges that on the 4th December 2018 her request to stepdown to the role of process operative was refused.

121. In respect of both of the numbered above allegations Mrs Singh's witness sets out the following:

"I returned to work on 28 August 2018 on a part-time basis. I requested HR move me permanently onto B shift or change my unit. I was told by Penny Clark that I had to go for mediation and I went for mediation on 17 October 2018. In the middle of mediation Carla Williams left the room, then Howard Vaughan followed her and then Stuart Foster left the room and no one came back, so it didn't go well. Even in mediation, with witnesses, they

were unwilling to listen. I repent requested Convatec again change my shift or unit but got no answer. I also gave Convatec the following options:

1.Change my shift
2. change my unit
3.Move me to nights.
I was so afraid I asked to step down from process owner role.

It was never said that Convatec was going to change my shift or unit. I waited and waited but got no answer. After sending emails and letters, I felt that now I had to work with the same group of people and I sent a letter to HR that I was stepping down from the developing process owner position, but my misery was not over. The company said there was no available position operator. I asked HR where my old operator position had gone because I was only in a development role.

There were jobs advertised on nights of process owners in November 2018 the Convatec clearly didn't want me to work as they have rejected all other suggestions and it felt like the company was closing doors on me. They did, however, suggest I take a severance package."

122. Unlike other aspects of the disputes before us, from August 2018 onwards a more substantial body of documentary evidence exists. It is common ground between the parties that the claimant did request a move from her shift in the course of her grievance.

123. The outcome of the grievance [241] concluded that there was no evidence to suggest victimisation, bullying or harassment took place.

124. It recorded that the claimant had requested a shift change and for training to be provided as a possible outcome of the grievance. Ms Cook recorded that she had reviewed the list of training provided the claimant found that extensive. She went on:

"whilst EC does not uphold the grievances made by RS, she does note that there is damage to the working relationships between RS and CW, AV, and some extent SF. EC believes that this is causing disturbance to the workplace and therefore would recommend that they consider workplace mediation in order to build a professional working relationship between all parties."

125. Claimant, at that time was absent from work due to ill health consequent to her perceived discrimination, on 23 August 2018 she emailed Mr Gary Pearson about her intended return to work. She asked Mr Pearson to confirm which shift she would be working and reminded him of her requests to change from A shift to B shift during her grievance. She also indicated that she would need to return on a phased basis, initially working four hours a day and gradually increasing the hours thereafter.

126. The following day Miss Devlin responded informing the claimant of her right to appeal against the grievance outcome, confirming that it was considered appropriate for her to work in the alternative manufacturing unit for a temporary period and that, in light of the recommendations, consideration would also be made as to whether mediation

should be arranged with Carla Williams, Stuart Foster Annie Vaughan and possibly, Amy James.

127. The claimant presented her written grounds of appeal by letter dated 28 August 2018 [246 -259] but in the meantime she continued to work on a different unit to those who were accused. The outcome of the grievance appeal was communicated to the claimant letter dated 28 September 2018. The conclusion of the appeal did not assist the claimant; the original grievance findings were upheld. The relevant outcomes of the appeal were twofold: the intention to arrange mediation and a conclusion that the evidence was not sufficient to warrant a change in the claimant's shift [268].

128. The claimant continued to work away from those against whom she had brought complaints and a mediation session took place on 24 October 2018. It is common ground between the parties that when the claimant stated to Miss Williams that she had behaved in a racist manner Miss Williams became upset and left the mediation. The process also broke down with regard to her other colleagues. In light of the unsuccessful conclusion of the mediation the claimant again asked that her shift should be changed.

129. The tribunal accepted the evidence of Mr Gary Pearson; from time shortly after he met the claimant on 28 August, the claimant had been moved to unit 33, on a phased return and she was also moved to the alternative shift. However, that move was not permanent it; it was to provide a "breathing space" whilst the claimant's grievance appeal, and potentially thereafter mediation, took place.

130. We find that as of 28 November 2018 the claimant was still working on the B shift when she wrote to Helen Thomas of the respondent stating she wished to step down from her development aspect of her operator role [272-273] and return to being a process operator.

131. A Miss Thomas responded by email dated 4 December 2018. She indicated that in principle it was possible for the claimant to return to a process operator role but in order to accommodate the request there must be a vacancy/opportunity and it needed to be a viable option from the business' perspective. She also responded to a comment from the claimant concerning her change of shift and reiterated that the claimant had moved shift and had been moved to unit 33 previously.

132. Before turning to the interactions between parties, the tribunal makes the following findings of fact.

133. On 22 October 2018 an employee of the respondent had prepared an advert for two process owner vacancies. At that date, those vacancies had not received managerial approval.

134. That from 11 December 2018 to 18 December 2018 the claimant was absent from work due to acute stress.

135. Thirdly, that the respondent's business was inactive over the Christmas period.

136. The claimant wrote to the respondent on 6 December stating her view of events since the mediation session of 23 October 2018 which elicited a reply from Miss Helen Mawson (née Thomas) similarly restating the respondent's position; that the claimant's shift and unit had been discussed previously but there was a need to review the changes.

137. In the course of cross-examination claimant put to Miss Devlin that one of the new process owner roles had been identified as a nightshift position and should have been available to the claimant. Miss Devlin was certain, albeit there was no documentation in the bundle, that the posts had been filled before the Christmas break of 2018.

138. On 2 December 2018 claimant presented a claim to the employment tribunal.

139. On 10 January 2019 Mr Pearson met with the claimant in the company of Chris Thift {the claimant's trade union representative and colleague). Notes of meeting were recorded by the respondent in meeting the following exchanges recorded:

"GP: Okay stay okay B shift, opportunity coming up for operator role, you mentioned dropping into this-still want to do this?

RS: yeah, problem I face before applying for a job

GP: if you're sure that's something you want, we can offer operator in U 20 in new ASBS if you would be interesting, would be TL anymore, staying on shift currently on which is B, and would be interacting or seeing people had mediation with. Something would like to progress? We have vacancy if happy to take that?

RS: yeah fine, thanks

GP: if we're able to do that, obviously being through investigation, grievance, and mediation and would that be the end of this process and agreeable to yourself?

RS: yeah

GB: happy to do that, and I think we were fairly clear that process was still ongoing to review operational requirement so risk surprised to receive by ET plate last night?

RS: yeah

GP: so if we can do this now for you, happy to withdraw the ET complaint?

RS: need to speak to some people first.

HM: who would this be? Have you been to see a lawyer?

RS: notes and friends.

GD: okay, so if you can let me know next Thursday is that okay?

140. On the same day, after the above meeting, the claimant left work because she was upset [287].

141. That note does not appear to capture all that was discussed. On Friday, 11 January 2019 Miss Helen Mawson emailed the claimant with a summary of 10 January 2009 meeting within that note was the following:

"Gary discussed with you that if this has resolved your concerns, would you resend the employment tribunal complaint. You said you needed to speak to some friends before coming confirming this decision. Agree that Gary will check in with you on Thursday next week to see where your thoughts are, after you asked for longer than a week to consider. Gary also queried on your behalf what would happen should you not withdraw your complaint. I confirm that you would need to appoint the legal team as it would as would we and if the issue couldn't be settled out of court you would proceed to argue in court."

142. On 17 January 2019 a further meeting took place in the presence of the claimant's trade union representative where the terms of the claimant's move to a new role were confirmed towards the end of the meeting the record reads as follows:

"HM rechecked about the concerns raised during our discussion last week about ET, and if anything needs to be discussed, or are all concerns now resolved.
Gary reiterated steps taken such as B shift, new unit et cetera.
RS confirmed carrying on with ET.
GP: okay, but is there anything else we can do/put in place to help or are concerns resolved?
RS: no all okay."

143. Mrs Singh's claim asserted that there had been no discussion about her potential move to different shift and unit. We had the benefit of looking at a note, prepared by the respondent which we accept is a reasonably accurate summary of what was said between claimant and Mr Pearson [245]. That note is corroborated by the respondent's letter dated the 24th August 2018 [243] insofar as it indicated the intention to transfer the claimant to a different unit; one which was apart from those about whom she had complained.

144. We also considered Mr Pearson's evidence at paragraph 18, and accepted that evidence.

145. Based on that evidence we find that;

146. The grievance and grievance appeal did not make any finding that a shift move was appropriate, partly because it did not conclude that the claimant had been subject to discrimination and partly because mediation was seen as the best way to resolve the difficulties between the relevant parties. In light of the claimant's withdrawal of her the allegation against the Conduct of Ms Cook we need make no finding upon her motivation.

147. When the claimant returned to work an agreement was reached, and implemented to change the claimant's unit and then her shift. That agreement continued beyond the end of the mediation process.

148. From around the 12th November 2018 the respondent was aware that the claimant did not wish to try a further mediation session. It did not did not alter the claimant's shift but nor did it press on towards any permeant arrangement.

149. The Tribunal finds that, in the absence of an application by the claimant for the night shift Process Owner role, the respondent would not have considered her for that role; her development to that date had (by reference to her training record, the evidence of Mr

Pearson and the evidence of Mr Foster) not progressed at the expected rate and she was not ready to take on the full role in November or December 2018.

150. By the 28th November the claimant had requested that she could cease to be in "development" and return to the role of process operator [272] and the respondent, by an email fo the 4th December, agreed to investigate that request subject to the operational requirements of the business.

151. No progress was made in December 2018 but a vacancy on the shift and unit which would avoid the claimant working with the relevant colleagues had been identified by early January 2019 and the claimant attended the meeting of the 10th January 2019 which we have noted above. We also find that Mr Pearson became aware of the claimant's employment tribunal claim during the evening of the 9th January 2019.

The Legal Matrix

152. Section 13 of the Equality Act 2010 states:

153. In some cases of alleged direct discrimination, the discrimination alleged is inherent in the act complained of and there will be no need to enquire further into the mental process, conscious or unconscious, of the alleged discriminator (see **Amnesty International v Ahmed** [2009] ICR 1450 per Underhill J, then President of the Appeal Tribunal, at paragraphs 33 and 34).

154. In other cases, by contrast, discrimination is not inherent in the act complained of as it does not by its nature strike at the protected characteristic, but the act complained of may be rendered discriminatory by the motivation, conscious or unconscious, of the alleged discriminator. **Nagarajan v London Regional Transport** [1999] IRLR 572 is an example of such a case. The present case is also in the same category: that is, in the latter class of case and not the former. The belated recognition of the Appellant as an employee and the withholding of wages from her until a late stage did not by its nature strike at the protected characteristic of her sex; that is to say, it did not by its nature target the fact that she was a woman and not a man. It could in principle be discriminatory or not, depending on whether a man (actual or hypothetical) in the same position as she was would or would not have received treatment that was not less favourable.

155. In the latter class of cases the Employment Tribunal asks itself what the reason for the alleged discriminator's act was, and if the reason is that she possessed the protected characteristic, then direct discrimination is made out. As Lord Nicholls has pointed out in **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285 HL at paragraph 10 of his speech, the answer to the question what the reason was for the treatment, also answers the question whether a Claimant was treated less favourably than was or would have been another person in the same position as the Claimant but who does not possess the protected characteristic.

156. In neither case is a benign motive relevant; nor is it relevant whether the alleged discriminator thought the reason for his or her treatment of the person with the protected characteristic, was that characteristic; see **Nagarajan** at paragraph 17 in the speech of Lord Nicholls, where he said this:

"17. I turn to the question of subconscious motivation. All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did. It goes without saying that in order to justify such an inference the tribunal must first make findings of primary fact from which the inference may properly be drawn. Conduct of this nature by an employer, when the inference is legitimately drawn, falls squarely within the language of s.1(1)(a). The employer treated the complainant less favourably on racial grounds. Such conduct also falls within the purpose of the legislation. Members of racial groups need protection from conduct driven by unrecognised prejudice as much as from conscious and deliberate discrimination. Balcombe LJ adverted to an instance of this in West Midlands Passenger Transport Executive v Singh [1988] IRLR 186, 188. He said that a high rate of failure to achieve promotion by members of a particular racial group may indicate that 'the real reason for refusal is a conscious or unconscious racial attitude which involves stereotyped assumptions' about members of the group."

157. The statutory reversal of the ordinary burden of proof dictates the evidential steps in the required chain of reasoning in an Employment Tribunal; see section 136 of the **Equality Act 2010**, subsections (2) and (3) of which provide as follows:

"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

158. It is good practice for an Employment Tribunal to follow the two-stage process there set out. However, failure to arrive at its decision by following both the first and second steps in that two-stage process is not necessarily an error of law. There are cases in which it is unnecessary to follow the two-stage approach: see Mummery LJ in **Brown v London Borough of Croydon** [2007] IRLR 259:

"38. The essential primary facts in the case were not in dispute apart from whether Mr Johnston made the '"not fitting in" remark' on which the tribunal accepted the evidence of Mr Johnston that he had not said that. Apart from that point the focus was on the reason for the treatment and it was therefore natural to move from the evidence as to a prima facie case of discrimination to the explanation of the council and Mr Johnston at the second stage. On that issue the tribunal accepted the non-discriminatory explanations given by the council and by Mr Johnston that Mr Brown's race was not the ground and therefore concluded that the council and Mr Johnston had proved that there was no discrimination on the ground of race.

39. This approach to the burden of proof is consistent with the approach laid down by the House of Lords in *Shamoon* to the substantive issues of less favourable treatment and to 'the reason why' question posed by less favourable treatment.

…

41. In general it is good practice to apply the two-stage test and to require the claimant to establish a prima facie case of discrimination before looking to adequacy of the respondent's explanation for the offending treatment. But there are cases, of which this is one, in which the claimant has not been prejudiced in matters of proof of discrimination by the tribunal omitting express consideration of the first stage of the test, moving straight to the second stage of the test and concluding that the respondent has discharged the burden on him under the second stage of the test by proving that the offending treatment was not on the proscribed ground."

The claim of victimisation contrary to section 27 fo the Equality Act 2010

159. The Equality Act 2010 defines victimisation in section 27 which states:

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

(a) B does a protected act, or

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

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

(a) bringing proceedings under this Act;

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

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

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

160. The parties cited no authorities but the tribunal has directed itself as follows:

161. The act of victimisation must be 'because' of the protected act: **Greater Manchester Police v Bailey** [2017] EWCA Civ 425.

162. That necessarily the respondent had the requisite knowledge of a protected act or the belief for the purpose of section 1(b).

163. The motivation of the respondent maybe conscious or unconscious; **Nagarajan v London Regional Transport** [1999] ICR 877.

164. The protected act need not be the only consideration affecting the respondent's conduct but it must be 'of sufficient weight'*:* **O'Donoghue v Redcar and Cleveland Borough Council** [2001] EWCA Civ 701.

Discussion and Conclusions

165. With respect to the claims of direct discrimination and harassment it is for the claimant to establish that it is more likely than not that she suffered the pleaded less favourable, or unwanted, treatment.

166. In this case, having looked at the overall landscape of the evidence before considering the individual allegations, we have generally found the claimant to be the less reliable witness when in conflict with the evidence of Ms Williams, Ms Vaughan and Mr Foster.

167. Their evidence, albeit the burden of proof did not lie upon them on this issue, has persuaded us that their conduct was not as the claimant alleged.

168. In respect of allegations ii, iii, iv, vi, vii, ix, x, xi, xii and xiii we find that the respondent did not act as alleged and accordingly the claimant was not subject to the pleaded less favourable or unwanted treatment.

169. For these reasons those claims are not well founded and are dismissed.

Allegations v and viii

170. Two allegations; v and viii were made against Ms Amy James who did not attend to give evidence. Both concerned allegations of failure to investigate complaints. The incident of the 15th March concerned a complaint of "Carla raising her voice" [194], the 19th March concerned the damage to a mesh locker and the removal of a protective mask [195].

171. On both occasions Ms James responded to Mrs Singh's complaint, on the 19th Ms James delegated the task of investigating the removal of the mask to three members of staff, one of whom was the claimant.

172. The tribunal directs itself that a respondent will very rarely accept that its conduct was discriminatory and that very often a claimant will have no direct evidence of the respondent's conscious or subconscious motivation; the employment tribunal must be willing to drawn inferences from the surrounding facts.

173. The employment tribunal also directed itself in accordance with the dicta in **Madarassy v Nomura International Plc** [2007] EWCA Civ. 33, which stated at paragraph 56.

"The court in Igen v Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of

discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination). It was confirmed that a Claimant must establish more than a difference in status (e.g., race) and a difference in treatment before a tribunal will be in a position where it 'could conclude' that an act of discrimination had been committed." 57. The burden is therefore on the Claimant to prove, on the balance of probabilities, a prima facie case of discrimination.

174. The claimant did not identify a comparator in respect of these two allegations (as she had done in respect on one allegation) and the tribunal therefore considered whether a person of British national origin or of apparent Caucasian ethnicity would have received different treatment and thereby enabling the claimant to establish less favourable treatment for the purposes of section 13.

175. The claimant's email of the 15th March, was not a grievance nor an allegation of misconduct; she complained that Ms Williams had raised her voice to the claimant about a work issue. On the evidence before us, the claimant's email did not have the tenor of a grievance or an allegation of discrimination.

176. Applying our combined experience, the tribunal were unanimous in our conclusion that Ms James' prompt invitation to the claimant (to come and speak to her) combined with the claimant's lack of response to that invitation led us to believe that, had a person of other ethnicity or national origin made the same complaint and reacted to Ms James' invitation in the same way they would have received no different treatment.

177. We lastly applied the guidance in Madarassy and concluded that the "something else" was not evident in this allegation.

178. For these two reasons we considered that the evidence before the tribunal was insufficient to establish less favourable treatment.

179. Further the evidence did not identify a causal connection between the relevant protected characteristic and the behaviour of Ms James and we were not satisfied that the claimant had established a prima facies case that the conduct of Ms James might be "on the grounds" of her protected characteristic for the purposes of section 26.

180. The tribunal was alert to the near identical nature of the second allegation against Ms James; a further failure to investigate, in this instance the removal of the mask used by the claimant from a mesh locker used by the claimant. Ms James' reaction was to ask the claimant questions about the incident and circumstances and instruct others to investigate. Her reaction to this apparently more serious event was more proactive.

181. The other similarity between the two events was, on the evidence before the tribunal, the inaction of the claimant and the absence of any response by her colleagues. Their cumulative inactivity appears to have been matched by Ms James' subsequent inactivity.

182. In cross examination of Ms Vaughan, the claimant advanced an argument that the respondent's unlawful conduct was its failure to implement a formal Dignity at Work investigation. We have already set out our findings of fact on this issue. Lastly, we noted that at the time of this incident Ms James was required to fulfil her own role and so much of Ms Vaughan's role (who was absent on bereavement leave) as she could accommodate.

183. Taking all of the above into account, and paying particular attention to the similarity of the two allegations against Ms James, we concluded that Ms James had not treated the claimant less favourably because of her protected characteristic. Ms James response had been proportionate to the complaint and her subsequent inaction was, in our judgment, because of the lack of response from the claimant and her two colleagues and the temporary pressure of shouldering some of Ms Vaughan's responsibilities.

184. For these reasons we find that the claimant was not subject to less favourable treatment.

185. With regard to both of the above allegations, the failure to investigate could amount to unwanted conduct. However, we consider that Ms James' conduct was in no sense whatsoever on the grounds of the claimant's protected characteristic.

186. By reason of the above we find that allegations v and viii are not well founded and are dismissed.

187. We now turn to those allegations which are alleged to be instances of direct discrimination, harassment and victimisation; xiv, xv and xvi.

188. The allegation against Ns Elizabeth Cook in respect of the conduct of the grievance investigation was withdrawn by the claimant. Although not strictly necessary, the tribunal sets out its conclusions.

189. The tribunal has found that Ms Elizabeth Cook did not interview two witnesses to whom the claimant referred in her own account of events; Mike Busk and Hayden Bartlett.

190. We also find that Ms Cook was aware of the claimant's complaints of race discrimination and that such complaints were protected acts.

191. The respondent avers that the allegations against Ms Cook, and for that matter Ms James, are not within the Employment Tribunal's jurisdiction as they do not form part of a continuing course of conduct.

192. We note that Ms James' involvement occurred between the 15th and 19th March 2018. Her conduct is not in a similar vein to that alleged against Ms Williams, Mr Foster or Ms Vaughan. She is not alleged to have had any influence on subsequent events.

193. Ms Cook's involvement occurred in August 2018. Ms Cook was not an employee, servant or agent of the respondent and her role was brief and discrete; the investigation and report writing between the 13th and 24th August 2018. She had no prior nor subsequent involvement or influence on the conduct of the respondent's staff.

194. We do not consider that her conduct was part of a course of conduct by, or on behalf of the respondent.

195. The claimant did not advance any reason why it was just and equitable to extend the time for presentation of these claims.

196. For these reasons, had we found these claims had merit we would have concluded that the claims made against Ms James and Ms Cook were not presented in time and are not within the Employment Tribunal's jurisdiction.

197. **Allegation xv** asserts that the claimant's request to move shift was not addressed in the grievance or grievance appeal outcome.

198. Again, the allegations against Ms Cook were withdrawn. Had the allegation not been withdrawn our formal reasons would have been as follows:

199. The tribunal finds that the Cook report did make reference the claimant's request for a change of shift in her report.

200. On a strict interpretation of this allegation, it would fail because the claimant has not established the alleged conduct of the respondent. We went on to consider the respondent's conduct in a wider scope.

201. On a wider scope, the tribunal accepts that the reasons the grievance process did not recommend a move to another shift was the twin conclusions that; the conduct which underpinned the claimant's request (the acts of discrimination) had not been proven and that mediation to repair relationships was a better option. Neither of these reasons, on the respondent's documentary evidence, were tainted by considerations of the claimant's protected characteristic.

202. The tribunal has made findings of fact, at paragraphs 141 to 149 above, that the claimant's request to move shift was agreed, on her return from sickness absence, on the 28th August 2018 and such arrangements remained in place until she took up a process operative's role in January 2019.

Allegation xvi

203. We find that the claimant's 4th December 2018 request to change her role was met with a prompt, albeit conditional, agreement in the respondent's correspondence of the 7th December. The conditions were matters of practicality and they cannot, on any reasonable interpretation be viewed as a rejection.

204. The respondent's subsequent behaviour; culminating in an offer, which the claimant accepted on the 10th January 2020, demonstrates that the respondent acted in accordance with its initial response to the 4th December request.

205. We find that the claimant's alleged detrimental/less favourable/unwanted treatment did not occur and for these reasons this claim is dismissed.

The 10th January 2019 meeting

206. The tribunal finds that Mr Pearson, after he had satisfied himself that the claimant was content to accept a process operator role on a shift and unit that would not bring her into contact with Ms Williams, Ms Vaughan and Mr Foster, did mention receipt of the claimant's ET1 and whether, if her concerns were resolved, she was going to withdraw her claim.

207. We find that Mr Pearson's question was stated after the claimant had accepted the new post and the respondent's offer was not conditional on the claimant with drawing her ET claim and no suggestion to that effect was made. It was not clear to the Employment Tribunal in what way the claimant considered she had been subject to a detriment by the question.

208. The tribunal reminded itself of the guidance in Shamoon; 'One must take all the circumstances into account. This is a test of materiality. Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance cannot amount to 'detriment".

209. It is clear that the claimant did have a sense of grievance but it is less clear on the evidence why she did so. Her witness evidence did not go beyond a short summary of Mr Pearson's words. The tribunal does not find it unusual that an employer who has made a genuine and unconditional action to resolve an employee's concerns would ask whether its offer, when accepted, has achieved its aim. In all the circumstances of this case, the respondent's reference to the ET1 was such a response.

210. We find that the conduct of the respondent was not a detriment and that on the claimant's evidence, which did not articulate any reason for her sense of grievance, it was unjustified.

211. For the above reasons this claim is dismissed.

Employment Judge R F Powell

Dated: 22nd December 2020

REASONS SENT TO THE PARTIES ON 22 December 2020

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS