



EMPLOYMENT TRIBUNALS

Claimant: Ms M Keswani

Respondent: British Broadcasting Corporation

Heard at: London Central **On:** 2, 3, 4, 5, 8, 11, 12, 15, 16, 17 November 2021 and 4, 5, 6 and 7 January 2022 (in chambers)

Before: Employment Judge Joffe
Mr R Baber
Ms S Campbell

Appearances

For the claimant: In person

For the respondent: Mr B Randle, counsel

JUDGMENT

1. The claimant's claims of direct race discrimination contrary to section 13 Equality Act 2010 are not upheld and are dismissed.
2. The claimant's claims of harassment because of race contrary to section 26 Equality Act 2010 are not upheld and are dismissed.
3. The claimant's claim of indirect race discrimination contrary to section 19 Equality Act 2010 is not upheld and is dismissed.
4. The claimant's claims of victimisation contrary to section 27 Equality Act 2010 are not upheld and are dismissed.
5. The claimant's claims that the respondent failed to comply with a duty to make reasonable adjustments contrary to sections 20 and 21 of the Equality Act 2010 are not upheld and are dismissed.
6. The claimant's claims that the respondent treated her unfavourably because of something arising in consequence of disability contrary to section 15 Equality Act 2010 are not upheld and are dismissed.

REASONS

Claims and issues

1. The claimant presented two claim forms bringing complaints of direct race discrimination, harassment related to race, indirect race discrimination, victimisation, and disability discrimination. There was an agreed list of issues which was subject to some concessions during the course of the hearing. There were some additional matters which had to be factored into the list of issues arising from some further particulars provided by the claimant.

Issues

(I) Direct Race Discrimination

3. Was the Claimant subject to less favourable treatment because of her race (Indian ethnic origin) contrary to ss. 13 EqA 2010 and 39 EqA?
4. Did the Respondent subject the Claimant to the following discriminatory acts/omissions:
 - (i) During the Claimant's second interview panellists mocking the Claimant's accent by inappropriately laughing at her even though there was nothing funny being discussed and the Claimant was solely answering interview questions.
 - (ii) Utilising subjective and/or biased criteria during the recruitment process, specifically reliance on 'soft skills' (as set out at paragraph 2 of Claimant's response to request for further and better particulars)
 - (iii) Failing to select the Claimant for the Band E Production Executive role
 - (iv) Failing to provide any or any cogent feedback regarding the Claimant's non-selection of the role.
 - (v) Failing to address and/or delaying the outcome of the Claimant's grievance/grievance appeal.
 - (vi) Failing to disclose and/or delaying the Claimant's DSAR request
5. Did the Respondent treat the Claimant as alleged, less favourably than it treated or would have treated an actual or hypothetical comparator? The Claimant relies on a hypothetical comparator.
6. If so, can the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of her race?
7. If so, what is the Respondent's explanation? Can it prove a wholly non-discriminatory reason for any proven treatment?
8. Did the Respondent take reasonable steps to prevent such unwanted conduct?

(II) Race Harassment

9. Did the Respondent engage in unwanted conduct related to race by any of the following conduct as set out at paragraph 5(i) to (viii) above?
10. Did any of the matters set out above at paragraphs 5(i)-(vi) have the purpose or effect of either:
 - (i) Violating the Claimant's dignity or
 - (ii) Of creating an intimidating hostile degrading humiliating or offensive environment for her?
11. Did the Respondent take reasonable steps to prevent such unwanted conduct?

(III) Indirect Race Discrimination

12. Did the Respondent apply the following PCP to the Claimant?

Use of subjective assessment criteria such as “soft skills” which included an assessment of accent and/or body language and/or personality in the selection process for the Band E Production Executive role.

13. If so, did the Respondent apply the said PCP to persons with whom the Claimant did not share the protected characteristic of her race?

14. If so, did the said PCP put persons with whom the Claimant shared the protected characteristic of her race at a particular disadvantage when compared with persons with whom the Claimant did not share the protected characteristic of race?

15. If so, was the Claimant put at that particular disadvantage?

16. If so, was the said PCP a proportionate means of achieving a legitimate aim? The Respondent relies upon the following legitimate aim: the use of consistent and relevant criteria which are required to successfully carry out the role.

(IV) Race Victimisation

17. Did the Claimant make protected acts by:

- (i) E-mail to Anne Eden-Russell dated 14 April 2020
- (ii) E-mail to Anne Eden-Russell dated 16 April 2020
- (iii) E-mail to Anne Eden-Russell dated 17 April 2020
- (iv) Formal grievance submitted 27 April 2020
- (v) E-mail to the Head of Service Rozita Lotfi on 4 June 2020

18. Was the Claimant subjected to a detriment/s because of having done a protected act or acts in relation to:

- (i) Being steered against submitting a grievance by Jennifer Ashton as this would allegedly put a ‘black mark’ on her name and grievances taking a long time to resolve in the BBC;
- (ii) Failing to address and/or delaying the outcome of the Claimant’s grievance
- (iii) Failing to provide mentoring in accordance with the Respondent’s policy.
- (iv) Failing to disclose and/or delaying the Claimant’s DSAR request.

19. Did the Respondent take reasonable steps to prevent such unwanted conduct?

(V) Race Victimisation - Continued Acts

20. The claimant wishes to rely on this claim (No 2204894/2020) as a new protected act and seeks to rely on the following additional alleged detriments:

- (i) Dismissing the Claimant’s grievance on 18 August.
- (ii) Failing to progress the Claimant’s grievance appeal in a timely manner. Breach of the Respondent’s procedure in relation to the delay in dealing with the Claimant’s grievance appeal.

(iii) Continued failure to provide an adequate, tailored explanation in respect of the use and dissemination of the Claimant's data both internally and externally, as requested on 8 October 2020 and originally submitted by DSAR on 29 April 2020.

(iv) Obscuring that only four candidates had been interviewed for the Production Executive role, whilst representing that five had been.

(v) Andrew Bowman asserting in the Claimant's grievance outcome, dated 18 August 2020, that the Claimant was not the only BAME candidate who progressed to the second round and/or continually failing to disclose the ethnic make-up of the successful candidate(s) (confirmed at paragraph 4 of Claimant's response to request for further and better particulars)

(vi) Continued breaches of the Respondent's Equality and Diversity policies (as set out at paragraph 5 of Claimant's response to request for further and better particulars)

Policy	Breach	Date
Diversity & Inclusion	Failure to adhere to section 2 'Principles'	Throughout the recruitment process and the remainder of the Claimant's employment to 20 October 2020.
	Failure to adhere to section 3 'Resourcing & Recruitment'	Throughout the recruitment process which commenced on 7 February 2020.
	Failure to adhere to section 4 'Learning & Development'	The Claimant requested internal mentoring from June 2020 but this was not provided in accordance with the

		Mentoring Policy as the mentor was 'too busy.'
Mentoring Policy		As above
Grievance Policy	The Policy states that a written outcome will be provided within 90 days from the date the grievance was raised. The Respondent failed to provide a response within this timeframe.	The Claimant's grievance was raised on 27 April 2020 and she did not receive her written outcome until 18 August 2020. The Claimant appealed the outcome on 4 September 2020 and did not receive an outcome until Dec 17 2020.
The Report	Failure to implement the recommendations within The Report.	Throughout the recruitment process
Data Policy	Allowing the Claimant's handwritten notes to be removed from the BBC's premises	During the recruitment process
	Failing to respond adequately to the Claimant's DSAR in a timely manner nor provide the relevant, unredacted data	29 April 2020 to date
Internal Performance Management Policy/ Contracts Management Policy	Failing to provide the Claimant with either a probationary review or a performance appraisal.	Throughout the Claimant's employment.

(vii) Constructively dismissing the Claimant on 20 October 2020.

21. Did the Claimant make protected acts by the matters set out at paragraph 18 above and her extant ET Claim No 22044894/2020 of 13 August 2020?

22. Was the Claimant subjected to a detriment/s because of having done a protected act or acts in relation to paragraph 21 (ix) to (xvii) above?

23. Did the Respondent take reasonable steps to prevent such unwanted conduct?

(VI) Disability Discrimination

(i) Reasonable Adjustments

24. Did the Respondent know or ought to have known that the Claimant had a disability, General Anxiety Disorder?

25. If so, when was the Respondent on notice of the Claimant's disability regarding her General Anxiety Disorder?

The Respondent accepts that the Claimant's General Anxiety Disorder was a disability within s.6 EqA.

The Respondent accepts that it had the requisite knowledge of this disability from 9 October 2020 (upon receipt of the Occupational Health report by the Claimant's line manager)

26. Did the Respondent apply the PCP of a requirement that if there was an appeal hearing, the Claimant would attend the appeal hearing in accordance with the Respondent's appeal policy?

27. Did the PCP put the Claimant at a substantial disadvantage compared to others who were not disabled? The Claimant relies on the substantial disadvantage of placing the Claimant at increased risk of additional stress and anxiety without having her former GP present at the appeal meeting.

28. Did the Respondent fail to comply with a duty to make any reasonable adjustments to the PCPs identified? The Claimant seeks to rely on the following alleged failures:

- (i) Refusing to allow the Claimant's former GP to attend the appeal hearing.
- (ii) Failing to offer the Claimant support and assistance from HR in order to attend the appeal hearing.
- (ii) Discrimination Arising from Disability

29. Did the Respondent treat the Claimant unfavourably because of something arising in consequence of her disability?

30. The 'something arising in consequence of the Claimant's disability' was:-

- (i) The Claimant's inability to attend work every day;
- (ii) The Claimant's requirement for more support and assistance from HR;
- (iii) The Claimant's requirement for support from her former GP at the appeal hearing.

31. The Claimant relies on the following alleged unfavourable treatment:

- (i) Failing to allow the Claimant to attend the appeal hearing with her former GP. The unfavourable treatment was failing to afford the Claimant the support of her former GP.
- (ii) Failing to progress the Claimant's hearing in a timely manner and/or delaying grievance appeal hearing. The unfavourable treatment was subjecting the Claimant to unnecessary delay despite the Respondent being made aware of the adverse impact the delay was having on the Claimant.
- (iii) Failing to enquire regarding the Claimant's welfare upon sight of the Occupational Health Report. The unfavourable treatment was the lack of care from the Respondent despite being aware of the content of the Report.
- (iv) Constructively dismissing the Claimant. The unfavourable treatment was the Claimant's constructive dismissal.

32. If the Respondent did treat the Claimant unfavourably;

- (i) Was the treatment because of something arising in consequence of her disability?
- (ii) Was any treatment a proportionate means of achieving any legitimate aim?
- (iii) If yes, what was the legitimate aim?
- (iv) Did the Respondent know of the disability at the relevant time or times, or ought it reasonably have been expected to know?

Facts

The hearing

2. The hearing was a remote hearing by Cloud Video Platform. The hearing was held in this way because of the limited number of in person hearings the Tribunal is able to accommodate at present due to the pandemic. There were a few technical issues including some intermittent problems with the claimant's Wifi but there was no material effect on the hearing.
3. We heard from the claimant on her own behalf. For the respondent we heard evidence from:
 - Ms A Mishcon, senior head of production, news and current affairs
 - Ms N Gauba, production executive, news and current affairs
 - Ms E White, head of production, news and current affairs
 - Ms R Lotfi, senior news editor
 - Ms D Dubois, head of production, BBC Sport
 - Ms R Wright, head of production, BBC Sport
 - Ms M Adams, talent manager / resourcing specialist, BBC resourcing and talent
 - Ms A Walsh, formerly resourcing business partner, content division
 - Ms A Eden-Russell, resourcing business partner, content division
 - Ms J Ashton, formerly divisional HR business partner, news operations group
 - Ms M Toor, HR case manager, SAW
 - Mr A Bowman, managing editor, BBC Radio Merseyside
 - Ms A Ford, HR case manager, SAW
 - Mr C Patterson, Former head of BBC Wales
 - Ms E Stephens, data protection officer
 - Ms A O'Sullivan: HR Case manager, SAW
4. We had a bundle from the respondent of 1614 pages. The claimant provided a supplementary bundle of 997 pages which included, amongst other materials, a number of pieces of journalism on subjects including race discrimination in the respondent organisation and the utility or otherwise of unconscious bias training.
5. The bundle included handwritten notes of the interviews of other candidates for the post of production executive in BBC Sport. Many of these notes were not readable and we raised that issue with the parties. The claimant said that she was only relying on the notes of her own interviews and her own scoring and the respondent said it was only relying on the scoring for other candidates and some circling of the scores, both of which could be discerned in the notes. We therefore proceeded with the notes in the form they had been presented to us, having raised our concern about legibility with the parties.
6. It is relevant to record that the Tribunal was required to provide a great deal of guidance to the claimant during her cross examination of witnesses. We were very conscious that cross examination is difficult for litigants in person and we endeavour to provide appropriate guidance to ensure that relevant questions are asked. We were aware also that the claimant has been suffering from anxiety and that would likely have an impact both on her ability to cross examine and her presentation to the Tribunal. Even allowing for those factors, the claimant frequently engaged in irrelevant and repetitious questioning of witnesses which at times seemed to us to be oppressive and that she frequently disregarded guidance we had just given to her.

Applications

Postponement

7. The claimant applied to postpone the hearing less than seven days before the start of the hearing and I refused that application on paper, notified to the parties on 1 November 2021. At the outset of the hearing she renewed that application.
8. A case management order will generally not be varied unless there has been a material change in circumstances since the order was made or there are exceptional circumstances: Payco v Sinka UKEAT/0134/19/00.
9. There was no material change in circumstances since the application was refused by me on paper, however it seemed to us that it was appropriate to revisit the application with the benefit of the full Tribunal panel. If we were wrong in that approach, what follows is in any event a fuller fleshing out of the reasons for refusing the postponement in the first place. Reasons were given orally and subsequently requested in writing by the claimant.
10. We had regard to the overriding objective under rule 2 of the Rules of Procedure, in particular the need deal with cases justly and fairly, the need to avoid delay so far as compatible with proper consideration of the issues and the saving of expense.
11. Rule 30A (1) requires an application for postponement be made as soon as possible after the need for postponement becomes known. We did not consider that had occurred. The claimant's application was made on 29 October 2021.
12. The history was that on 22 September 2021, Employment Judge J Burns decided at a hearing to strike out some of the claimant's claims and to reject parts of her application for specific disclosure. The claimant applied for a reconsideration of the strike out decision on 5 October 2021.
13. On 14 October 2021, she was notified that her application was refused, although reasons were not provided at that stage. This was the point at which the claimant would have been aware that the only way of challenging the original decision was by way of appeal. It seemed to us that that was the point at which it would have been apparent that she would need to apply for a postponement in order to allow her appeal to be considered before the full merits hearing. The reconsideration judgment was sent to the parties on 22 October 2021. The application to postpone was still not promptly presented after that, given that a 14 day full merits hearing was looming.
14. So far as the specific disclosure application is concerned, if that is genuinely a reason for seeking postponement, the claimant has been far from prompt. She has known her application was refused in part since 22 September 2021. She was legally represented at the time and her solicitors would have known that the power to vary a case management order exists only if there is a material change of circumstance or exceptional circumstances. There was no material change or exceptional circumstances.
15. Rule 30A (2) provides that where an application to postpone is made less than seven days before the hearing, a postponement will be allowed only in particular circumstances. There was no agreement by the respondent so Rule 30A (2)(a) does not apply.

16. There was no act or omission by the Tribunal or another party which necessitated the application (subrule (2)(b)) so the claimant was required to show that there were exceptional circumstances under subrule (2)(c).
17. The claimant submitted that there were exceptional circumstances because she had an outstanding appeal to the EAT against EJ Burns' strike out order.
18. We accepted that 'exceptional circumstances' might include a case where the nature of the claims struck out was such that attempting to hear the remaining claims would be wholly unsatisfactory because of the relationship of the struck out issues with those that remained live. There could in such a case be a risk that issues could not be heard fairly and/or a risk of significant duplication of time and expense if the appeal was ultimately allowed.
19. We considered that that was not this case. It was not for this Tribunal to second guess the outcome of the claimant's appeal. There were three discrete elements which the claimant challenged the strike out of. The first two were:
 - race discrimination complaints which, in a nutshell, alleged that there was direct race discrimination and harassment of the claimant due to a lack of racial diversity on an interview panel;
 - a direct race discrimination / harassment complaint relating to a failure to follow policies by the respondent.
20. In relation to the first two matters struck out we understand that relevant evidence contained in witness statements and in the bundle will be heard in any event in support of other claims brought by the claimant in relation to the recruitment process which have not been struck out:
 - The complaints of direct discrimination and harassment in relation to the decision not to appoint the claimant to the role of production executive in BBC Sport
 - The claim of indirect discrimination in relation to the decision not to appoint the claimant.
21. If the EAT were to consider the striking out of these complaints to have been an error, it would not be difficult for the matter to be remitted to this Tribunal for further findings on the basis of evidence already fully aired in relation to the remaining issues.
22. The third matter struck out was an issue relating to alleged post-employment victimisation. This was a limited and discrete area on which the Tribunal could hear further evidence in a limited time frame if the EAT concluded this claim should not have been struck out.
23. We concluded that very limited inconvenience and additional expenditure would be caused if the claimant were subsequently successful at the EAT but the full merits hearing had proceeded.
24. We balanced that up against the significant investment of time and resource and cost (including counsel's fees for the hearing) in this hearing and the very significant delay with additional stress to all those taking part, together with potential loss of cogency of evidence as memories further degrade which would occur if the hearing were postponed.

25. It is in the claimant's interest that these matters are promptly adjudicated. It is also in the interests of 15 witnesses who are in one way or another implicated in these serious allegations. It is in the interests of other Tribunal users who are waiting for their claims to be heard that the resources not wasted. Were the hearing to be postponed, there would be irrecoverable expense in terms of legal expenses and the opportunity costs of witnesses who have prepared and made themselves available.
26. So far as the specific disclosure application which is also under appeal is concerned, it did not appear to us that any of the documents asked for are likely to be ordered or that they would have any material impact on the issues we are required to decide. We could not see that they are relevant and necessary to the fair disposal of the proceedings.
27. We were concerned that it could be 2023 before the claims are heard, depending on how quickly the appeal progresses through possible stages in the EAT.
28. For all of these reasons we considered that we could have a fair hearing of the issues which had not been struck out and that it would be in accordance with overriding objective for the hearing to proceed.
29. In the event, the decision of the EAT to reject the appeal on the sift was received on 5 November 2021.

Application to amend

30. During the course of the hearing (sent to the Tribunal and the respondent on the evening of 9 November 2021), the claimant made an application to amend her claim form to add new victimisation complaints as follows:

Lack of transparency and contradictions with the role mapping outcome communicated via emails by Hilary Bishop to the Claimant while obscuring and suppressing the results to maintain the role at BAND D- Production Manager (as an act of victimization post the Grievance submission). This was done by the decisions made in the working group led by Anna Mishcon where there was lack of consideration for the activities in the diary exercise submitted by the Claimant which had not only reflected the nature of work in the 2 week period of the exercise but also the nature of responsibilities undertaken throughout the year by the Claimant which known to Anna Mishcon in relation to the Claimant performing at a higher level than her (Production Manager role- Band D) at the time to also Include BAND E responsibilities. The Diary was signed off by the Claimant's Line Manager Nayantara Gauba prior to its submission.

F. Failing/reluctant to provide 360 feedback to the claimants coach despite an email in March 2020 and June 2020 from the coach Phillipa Thomas to the Claimants Line management/Reporting line consisting of Emma White, Anna Mishcon and Nayantara Gauba.

31. In relation to the application we gave a brief account of our reasons for rejecting the application orally (in the interests of proceeding expeditiously with the hearing) but indicated that we would give fuller reasons in our Judgment.
32. Our discretion to allow amendments is not unfettered; we have to act in accordance with the overriding objective and principles derived from case law.

33. We are required to look as part of the exercise of that discretion at the issues raised by the respondent in response to the application:
- The timing and manner of application and the claimant's explanation for the delay in presenting these claims;
 - Whether the matters are presented out of out of time and whether it is just and equitable to extend time;
 - The prejudice to each party if the amendment is allowed or not allowed.
34. We paid particular regard to the guidance in Vaughan v Modality Partnership [2021] ICR 535 that the overriding principle is to look at the balance of hardship and injustice if the amendment is allowed or not allowed.
35. Looking at that principle in particular but also at the range of factors relevant to the exercise of our discretion, we concluded that it would not be in the interests of justice to allow the amendments.
36. The claims were out of time. Taking into account the fact that this application was made part way through the hearing in circumstances where the respondent had had no opportunity to prepare whether by way of witness statements or by a proper search for and consideration of relevant documents and where memories of the events will now have faded, we considered there would be inevitable and significant prejudice to the respondent if the amendments were allowed. The claimant did not present us with any evidence or arguments as to why it would have been just and equitable to extend time.
37. The claimant had had any number of opportunities to pursue these claims if she wished to do so, having been legally represented until shortly before the full merits hearing, and no explanation was advanced as to why she had not sought to amend sooner. The large number of claims which the claimant wished to bring, from the commencement of her proceedings could be fairly heard without introduction of what appeared to us to be two subsidiary matters.

Inspection of original notes

38. An order of E J Burns dated 22 September 2021 required the original handwritten interview notes and scoring sheets for the claimant relating to her application for the role of productions executive in BBC Sport to be available for the Tribunal. These were sent to the Tribunal by the respondent and we had the opportunity to consider them.

Facts in the claims

Structure of respondent

39. We did not hear a great deal about the internal structure of the respondent, which is of course a very well known public broadcaster. The World Service falls within the News and Current Affairs division. We did not have an account of how the organisation is structured more generally.

Policies and procedures

40. We were provided with a number of the respondent's relevant policies and procedures and we set out what appeared to us to be the relevant parts.

Grievance policy

41. Amongst the principles set out was this:

The purpose of the grievance policy is to resolve individual issues and it cannot be used for dealing with collective matters raised by recognised trade unions.

42. A written outcome to a formal grievance should be provided within 90 days of the notification of the grievance unless there are exceptional circumstances.

Guide to grievances

43. This guide made it clear that the grievance process involves a meeting with the individual who has presented the grievance followed by such investigation as is necessary and then preparation of an outcome.

BBC Appeals Policy

44. In respect of grievances, an appeal is possible:

o If [the complainant is] dissatisfied with the outcome of their grievance procedure due to procedural errors, a failure to consider relevant evidence and/or a failure to address all allegations;

...

Appeals are heard at the level of management above the one at which the decision was taken, provided the manager hearing the appeal was not involved in the original decision

...

A meeting is arranged to hear the employee's appeal and the employee and employer must take all reasonable steps to attend the meeting. Employees will be given no less than 3 working days' notice in writing of the date and time of their appeal meeting, unless a shorter time period is mutually agreed. In some circumstances the employee may request that the meeting is postponed. The hearing manager will advise whether such a request should be granted.

45. The structure of the process is that there is a hearing followed by further investigation if there is new evidence. A written outcome should be provided within 90 days of the notification of the appeal unless there are exceptional circumstances.

BBC recruitment policy

46. This includes the following:

Principles

Vacancies should be filled via a competitive selection process, using fair and robust job-related criteria.

...

Hiring managers must undertake appropriate training prior to involvement in recruitment and selection, as advised by the HR Business Partner assigned to that division.

Diversity and Inclusion Policy

47. We were referred in particular to the following:

5 Key Points of this policy

1. The BBC is committed to diversity and inclusion in all aspects of recruitment and employment and will not tolerate unlawful discrimination or harassment in any form.

2. The BBC is keen to ensure employees are aware of their responsibility for promoting diversity and inclusion at work. Training for everyone on diversity and inclusivity is available.

3. The BBC has targets for gender, disability, ethnicity and sexual orientation and data is used to take action to address any issues of identified underrepresentation.

4. Diversity and inclusion should be considered in review meetings

...

2. Principles

The BBC is committed to diversity, inclusion and equality of opportunity in the workplace. We want each and every person working at or with the BBC to feel respected and able to give their best, enabling us to be a truly creative broadcaster. Our audiences, our people and our suppliers expect it. Our mission demands it. The more diverse our content and workforce are, the better we can reflect our audience.

This is why we are looking at the workforce diversity of the entire supply chain — from our support staff, to commissioning, production, through to the sourcing of talent, on—air portrayal and goods and services.

We celebrate diversity and require an environment free from unlawful discrimination, harassment, bullying and victimisation, which promotes dignity and respect for all, and where individual differences and the contributions of all employees are recognised and valued, and any behaviour that breaches this is tackled. The BBC is committed to diversity and inclusion in all aspects of recruitment and employment and will not tolerate unlawful discrimination or harassment in any form.

We want to support talent and create an inclusive BBC where individuals can progress. In 2018 we published five Culture and Career Progression reports, each with an executive sponsor, containing a combined 128 recommendations for delivery. Links to the reports are below:

...

The BBC believes in providing equality of opportunity, fairness and respect for all in our employment, whether temporary, part—time or full—time. The BBC strives to develop and implement recruitment and selection processes that are open and fair and that enable the selection of the best talent.

Diversity is monitored at all stages of recruitment (application, shortlist, interview and offer) and reported on to assess the impact of our recruitment processes on diversity. Our Resourcing and Talent team are trained in diverse recruitment best practice. We have also launched a network of Interview Champions — once trained, the Champions will be invited to join selection panels to ensure fair and equitable practices are positively promoted throughout the process.

Roles of three months' or longer duration will be advertised as widely as possible in the circumstances to encourage a diverse range of applicants. For all schemes, applications and CVs will be anonymised by the BBC recruitment team before they are passed to the BBC hiring manager - i.e. removing names and ages. Subject Matter Experts will be consulted on the appropriate use of assessments, challenging their use and ensuring they do not exclude certain groups.

For jobs in bands E and F we will ensure there is a BAME candidate on the shortlist.

*In advance of interviews, All BBC hiring managers and employees with recruitment responsibilities are required to complete the BBC's training, Unconscious Bias. Interviews should be conducted by at least two people; never by a single interviewer. **Recruitment panels must always have as diverse a mix of levels of seniority, gender and background as possible.***

Wherever possible, interviews should be arranged flexibly, with sensitivities around reasonable adjustments for people with disabilities, and those with family commitments as well as cultural norms.

48. The claimant's interpretation of the highlighted part of this policy was that if there are BAME candidates at interview, there must be a non-white person on the panel.
49. That interpretation of the policy was rejected by the respondent's witnesses who pointed out that the policy covered diversity in characteristics of a number of kinds and required a panel which was as diverse 'as possible'.

Performance Management and Personal Development Policy

50. It appeared from the policy the Performance Development Reviews ('PDRs') should take place annually or if appropriate at the end of a project. Employees with over 6 months' service should receive a PDR with their manager at least once a year. For new starters with less than six months service, it was recommended that transition objectives were set no later than at the end of the six month probation period.

Respondent's diversity targets

51. We were referred to a document entitled *Report: Reflecting the Ethnic diversity of the UK within the BBC Workforce*.

52. This was a report from 2018. It contained the following account of the project from Tim Davie, CEO of BBC Studios:

Our remit for this project has been clear: identify the key challenges to career progression for BAME colleagues at the BBC and compile a set of actionable recommendations that will materially address the issues identified. This project forms part of our overall diversity and inclusion goals. I hope that it represents a significant first step and a continuing focus on increasing the diversity of those who lead and work across the BBC.

53. The report contained recommendations for targets, including the following:

At least two or 15% (whichever is higher) BAME employees appointed to each Senior Leadership, by 2020.

The BBC to introduce and implement a policy that ensures that shortlists for all jobs at Band E and above have at least one BAME person, implemented by the end of summer 2018.

(HR Directors will need to sign off cases where there is no credible internal candidate).

Dramatically increase BAME representation across our interview panels. This will be achieved by increasing the pool of BAME interviewers from 15 to 100 by the end of 2019.

World Service and English Regions identified as the first areas to implement new approach.

Probationary reviews

54. We did not see any formal policy about probationary reviews. Ms Gauba's evidence was that the practice was not to do a probationary review unless there was a problem with performance. She herself had two production manager hires other than the

claimant in 2019, both white, on fixed term contracts, and did not conduct probationary reviews in respect of either.

Evidence about recruitment processes

55. We heard evidence about recruitment processes in the respondent organisation. Interviewers are required to undertake unconscious bias and fair selection e-learning (ie online training) before conducting interviews.
56. Before a recruitment process, hiring managers would usually meet with an adviser from the Resourcing and Talent department to discuss what type of interview process would be appropriate.
57. In June 2019, BBC Sport introduced strengths based interviewing as part of its arsenal of interview types. If strengths based interviewing methods were used in conjunction with more traditional competency based methods and/or presentation based interviews, the result would be 'blended interviews'.
58. The respondent used training and materials for strengths based interviews provided by an organisation called CAPP Consultancy. We saw slides which formed part of the training which was provided to individuals in BBC Sport who were going to be involved in training interview panels conducting this type of strengths based training. It was 'train the trainers' training, ie it was intended that those who received the training would then train others who would sit on interview panels
59. CAPP also provides the respondent with a bank of questions for use in strengths based interviewing.
60. We were told that the theory behind strengths based assessment is to increase inclusivity as it does not just assess the experience but also the potential of candidates.
61. CAPP included in the slide deck used for the training examples of increased inclusivity experienced by particular clients using its products such as increases in the number of BAME interns and increases in appointment of candidates on the autism spectrum.
62. Some relevant extracts from the slides:
LEARNING OBJECTIVES
By the end of today you will be able to:
Explain to others the benefits of a strengths—based approach
Identify strengths in others
Understand the BBC Sport Success Framework
Understand the Strengths-based Interview, and use the scoring indicators
Assess candidates in a fair, objective, and consistent manner
Give examples of bias and how to avoid them

Understand the legal considerations of assessment

Feel confident in your role as an assessor

...

- *During the assessment you should be engaged in the observation of the candidate's verbal and non verbal communication. Without careful observation you are unlikely to make a fair and accurate evaluation of the candidate's performance.*
- *Verbal and Non-verbal Communication - particularly important within strengths assessment to gather evidence of their levels of energy and engagement with the task at hand.*
- *Pay Due Attention --- ensure that you don't miss any key information or only focus on the positive or more interesting responses a candidate provides.*

Authentic Assessment

RECORD

- *As well as paying attention to what the candidate says and does, it's also important to take an accurate record of the evidence so that you can refer to it later. With a lot of information to take in across the day, the more information you can record the better you'll be able to rate the candidate's performance and discuss them in the wash-up.*
- *What is Said - verbatim information where possible*
- *What is Done - if they raise their voice, speak more energetically, smile more (as indicators of strengths)*
- *Focus on Your Candidate - rather than get distracted by others in the group*

WHAT TO LOOK FOR

- *Rich example --- lots of detail and immediacy, i.e. specific and recent events*
- *Body language -- when the candidate is interested, is leaning forward, animated in their responses*
- *Energy- changes in the candidate's energy as you move through the interview*
- *Authenticity - changes in how genuine the candidate appears, i.e. do they appear comfortable or provide forced responses / examples*
- *Tone of voice ... changes in tone of voice can indicate engagement and enthusiasm*
- *Words and phrases -- "I love"; "It comes naturally to me"; "I've always*

63. There is a section on unconscious bias – which covers areas such 'stereotypes' and 'similar to me effect' and the slides also cover issues around discrimination generally and fairly assessing candidates with disabilities.

64. There was a more detailed 'tool kit' document which had a section on strengths based questioning and had this to say about observations:

The following should be observed and recorded:

- *Content of what the candidate says*
- *Tone of voice*

- *Non-verbal behaviours (e.g. eye contact, posture and hand movements).*

In judging to what extent the candidate has demonstrated engagement in their response to each strength question, you should refer to the observations made of the candidate during the warm—up or baseline question (where they demonstrate natural engagement). Specifically, any changes in terms of the candidate’s tone of voice, non-verbal behaviours (such as eye contact, posture and/or hand movements) and fluency of response may indicate increased/ decreased levels of engagement.

These changes will vary from one individual to another, so you should not compare responses between candidates or look for a 'common marker' of engagement. For example, an introverted candidate may not provide much non-verbal behaviour but their fluency of speech and/or the length of response may be greater when engaged.

Mentoring

65. We were told that formal mentoring within the respondent organisation takes place via a scheme called *BBC Mentor Connections*. This is a voluntary scheme through which would-be mentors and mentees are connected. Mentoring meetings under this scheme take place up to a maximum of nine hours over a period of six to nine months.

Statistics

66. We were asked to look at various statistics about racial diversity in the respondent’s organisation. These can of course play a role in discrimination claims and we consider what role they played on the facts of this case in our Conclusions.
67. Mr Bowman told us that during his investigation of the claimant’s grievance he discovered that there were about 450 individuals in BBC Sport at the relevant time, which covered television, radio and online. There were 16 people within the television leadership team. Three out of 16 at Band F (one of the bands for leadership posts) were BAME.
68. We saw statistics for BBC Sport for the three years 2019, 2020 and 2021 which showed that overall BAME representation had increased from 12.6% to 15.1% and BAME leadership had risen slightly from 8.3% to 8.7%.
69. The claimant drew to our attention that the respondent had failed to meet its aspiration of 15% BAME employees at leadership level by 2020 and the figures was in fact 10.4%. She also produced reports showing underrepresentation of BAME people in broadcasting more generally and we were shown some breakdowns of BAME staff in the BBC by job family, rank etc and reports showing how the BBC compared with other broadcasters in terms of racial diversity. The reports suggested that the UK population as a whole is approximately 14% BAME.
70. Without repeating all of the material which was provided to us, we can say broadly that the respondent does not, at leadership levels in particular, reflect the racial breakdown of the UK and it has accepted that it has work to do to try to address racial diversity.

Training of particular individuals

71. The evidence as to the relevant recruitment training received by particular individuals was as follows:
- 4 December 2014: Ms Adams completed “Getting the Right Person: Fair Selection” training
 - 15 October 2018: Ms Wright completed unconscious bias training
 - 15 November 2018: Ms Dubois completed unconscious bias training
 - 11 January 2019: Ms Dubois completed “Getting the Right Person: Fair Selection” training
 - 13 February 2019: Ms Adams completed unconscious bias training
 - 17 May 2019: Ms Wright completed “Getting the Right Person: Fair Selection” training
 - 5 August 2019: Ms Dubois completed ‘Inclusive Culture’ training
 - 1 November 2019: Ms Wright completed ‘Inclusive Culture’ training
 - 4 November 2019: Ms Adams completed “Getting the Right Person: Fair Selection” training
 - 5 November 2019 Ms Adams completed ‘Inclusive Culture’ training

Remapping process

72. At the time of the events about which complaint is made, there was a remapping process taking place in the News and Current Affairs division. A new Career Path Framework had been introduced in 2018 which placed roles within different job families and management structures. A decision was made to review roles to ensure that individuals were correctly mapped to roles. All production management, business management and administration roles were reviewed. In some cases this led to a change in job title and/or line management arrangements.
73. Ms Mishcon and Ms Ashton led this process. Individuals completed a two week diary exercise in which they recorded their daily tasks. There was then an analysis and mapping decisions were made. A number of people reviewed the claimant’s exercise and concluded that she should remain mapped to her production manager role in 2020. She did not appeal that outcome but has maintained to the Tribunal that the outcome should have been that she was mapped to a role at a higher grade.

Effect of remapping exercise on PDRs

74. The remapping process started in October 2019 and was completed by August 2020. During that period, performance development reviews (‘PDRs’) were not consistently carried out. It appears that many teams paused PDRs because it was anticipated that there would be movement of individuals between production management and business management. A report showed that there was an appraisal completion rate of only 18% in production management during this period

DSARs

75. The respondent has a formal process for dealings with DSARs. Ms Stephens is the data protection officer, responsible for the respondent's relationship with the ICO in respect of data protection matters. That includes oversight and management of complaints.
76. DSARs are managed by the Information Rights Team which is part of the legal department. Ms Stephens would become involved at processing stage only if there was a particularly complex request.
77. The process for handling DSARs is that a senior adviser logs the request, and makes requests for identification and for searches of personal data. When the searches are returned, the DSAR is allocated to an advisor in the team to complete. DSARs are processed on a first come, first served basis.
78. Because of a pre-pandemic backlog the respondent had been trialling a third party software designed to assist with the DSAR process. That was put on hold during pandemic.
79. In 2020, the respondent received 154 DSARs, of which 53 were responded to outside of the statutory time frame.
80. At the time of the claimant's DSAR, there were two DSARs which had been outstanding since July and August 2019. Both were submitted by white individuals.

The claimant's background before joining the BBC

81. The claimant had worked as a production manager at Marjan TV Network, a Persian language service for a Persian speaking audience. She then moved to ITV as a production manager. It was clear that the claimant was keen to join the respondent and progress her career there and that she is a capable and ambitious individual. She is of Indian origin.
82. In March 2019 the claimant applied for a role of production manager in current affairs at the respondent. On 20 March 2019 she sent an email to Ms Mishcon, saying that she had applied for roles at the BBC attaching her CV and explaining her background. Ms Mishcon put the claimant in touch with Ms R Lavender, a production executive in news and current affairs, who spoke with the claimant and arranged for her to watch a filming of Newsnight.
83. In April 2019, the claimant applied for a BBC World Service role; this was a Band D production manager role in the Persian Service. She was interviewed by Mr W Masoud, Ms R Lotfi (Head of Persian Service) and Ms S Reddi.
84. On 24 May 2019, the claimant emailed Ms Mishcon to say she had been successful in being appointed to the Persian Service role and Ms Mishcon subsequently wrote back to congratulate her and say that she would arrange a meeting with the claimant when she started work. Ms Mishcon as Senior Head of Production was the claimant's third line manager. She had 65 people in her team in total.
85. The claimant's employment commenced on 24 June 2019. Her contract of employment contained the following section relevant to these proceedings:

Probation The first 6 months of your employment will be probationary and your Period employment may be terminated by one month's notice at any time either during or at the end of this period.

During the probation period your performance and suitability for continued employment will be monitored, however the provisions of the BBC's Capability Policy will not apply to your employment during the probation period.

86. It was also clear that the claimant saw the role in the World Service as a stepping stone to other roles within the respondent organisation, at higher levels and in other departments and that she was keen to move into an alternative role with some speed.

Ambit of the claimant's role

87. The claimant gave evidence and cross-examined witnesses about what her role entailed. The tenor of her case was that her role was more than a Band D role and that it straddled elements of the unit manager role (also a Band D role but considered to be higher level) and Band E production executive roles. We were not ultimately persuaded that was the case, but more importantly, the size or complexity of the claimant's role did not seem to us to cast any useful light on the issues we had to decide.
88. On 18 July 2020, there was a discussion between the claimant and Ms Mishcon at a work drinks party in Regents Park. The claimant's case was that Ms Mishcon said that she thought the claimant's role would be remapped higher. Ms Mishcon's evidence was that she did not say that and would not have been able to say any such thing at that point before the remapping exercise had been carried out. We accepted Ms Mishcon's account which made far better sense given the timeline than the claimant's account.
89. The claimant said that Ms Mishcon said that, having met the claimant, she was very bright determined and articulate. The claimant's evidence was that, on reflection, she decided that Ms Mishcon made this remark because Ms Mishcon had stereotyped her before the meeting as not being any of those things because of her ethnicity. We did not consider that this was a logical deduction unless there were some other evidence to support it, which we ultimately did not find.
90. The claimant said that she asked Ms Mishcon if she would mentor her and Ms Mishcon said that she would be happy to do so. Ms Mishcon told the Tribunal that saw this as an informal ad hoc arrangement such as she had with a number of individuals to support their development. She aimed to see everyone in her team about once a year. She met with the claimant a total of six times during the claimant's tenure.
91. Ms Mishcon said that during the discussion, the claimant suggested that she put together a presentation setting out her preliminary thoughts and suggestions about her role and ways in which her department could improve. Ms Mishcon arranged a follow up meeting with the claimant on 25 July 2019 at which the claimant presented a set of slides proposing a full restructure of the production management team. Ms Mishcon was surprised, not in a positive sense, that the claimant had done this more

extensive exercise without being asked and that she had such firm views after only six weeks in post.

92. In August 2019 Ms Gauba replaced Mr Massoud as the claimant's immediate line manager. Ms Gauba had responsibility for a team of 37 across the World Service and Panorama. Ms Gauba told the Tribunal that it was apparent that the claimant felt her role was not what she was expecting and that there were administrative elements of the role which she did not engage with to do with scheduling and rotas. She had fortnightly one-to-ones with the claimant in which the claimant indicated she felt that she had been miss-sold her role and that she was looking to progress quickly to another part of the respondent organisation. Ms Gauba nonetheless considered the claimant to be an asset, particularly in respect of work she did in relation to the unit's budget and production management systems.
93. In terms of the claimant's PDR, Ms Gauba considered that it was necessary to await the outcome of the mapping exercise. She needed to know whether the job would remain in the production management job family and whether she would remain the claimant's line manager. The claimant had enrolled on the respondent's Team Leadership Programme, as part of which she was required to work with her line manager to set development objectives in a PDR before the course commenced. They agreed to do that but in fact the claimant submitted her objectives before they had an opportunity to discuss them. Ultimately Ms Gauba sought to discuss the claimant's PDR objectives with her at a meeting on 6 December 2019 but the claimant did not provide the objectives in advance of the meeting although she relayed them to Ms Gauba in the course of the meeting.
94. Ms Gauba asked the claimant to email the objectives to her but the claimant did not do so. Ms Gauba said that she could not proceed with the PDR without the objectives. After the Christmas period, the claimant did not raise her PDR again and their conversations centred round the claimant's desire to move to a different role.
95. Ms Gauba did not carry out PDRs for the other unit and production managers she managed during the period when the remapping exercise was occurring. These other individuals were all white. She told us she thought that the remapping exercise would happen more quickly, hence the ongoing delay with PDRs.

Development opportunities

96. Ms Mishcon, Ms White and Ms Gauba (the claimant's third, second and first line managers respectively) assisted the claimant in looking for development opportunities within the respondent. In late August / early September 2019, Ms Mishcon suggested that the claimant take part in the Production Management Innovation Panel which Ms Mishcon had set up and she arranged for the claimant to be invited to join the panel.
97. Ms White had a total of six meetings with the claimant, far more than she had with any other production manager in her line management chain. They discussed roles and opportunities for the claimant and the claimant's dissatisfaction with her existing role. Ms Gauba investigated shadowing opportunities for the claimant elsewhere in the organisation.

98. In November 2019, the claimant applied unsuccessfully for a unit manager role for Arabic, within World Services Languages.
99. The Tribunal considered that the claimant was provided with high levels of support by her line management chain to explore opportunities other than the role she had been hired for, in circumstances where the respondent needed someone to fulfil the role the claimant was in and might understandably have reacted to her evident desire to move as soon as possible with some dismay.

Recruitment process for Production Executive (PE) role in Sport

100. There were two heads of production in BBC Sport: Ms Wright and Ms Dubois. We were told that the workload had increased in BBC Sport and the regrading of Ms Wright's and Ms Dubois' roles to head of production had increased the gap between production managers at grade D and heads of production at grade F. Ms Wright and Ms Dubois reviewed the structure of BBC Sport against that of other BBC divisions and concluded there was a need for two production executive posts, one reporting to each of Ms Wright and Ms Dubois. The grade D unit manager post had become vacant in the summer of 2019 and they were recruiting for that post at the same time.
101. Ms Wright and Ms Dubois made a business case for the roles which was successful. The roles were advertised at the same time.
102. The unit manager interviewing panel included Ms Wright, Ms Dubois and Mathew Baxter, talent manager. An ethnically Persian (non Arab Middle East) candidate was appointed to the unit manager role in February 2020.
103. On 4 December 2019, the roles were advertised with a closing date of 19 January 2020. Job descriptions were put together from the pan BBC Career Path Framework with content specific to Sport added by Ms Wright and Ms Dubois.
104. On 16 December 2019, the claimant applied for the production executive roles.
105. In January 2020, the claimant had a discussion with Ms Ashton in HR about her role. They spoke about career progression and the claimant said that she felt her role was not what she was expecting. She said there was more business administration in the role and not enough production work. Ms Ashton and the claimant had a good relationship and spoke regularly about HR queries. Ms Ashton is a black woman. She left the respondent in May 2020 to take up an external role.
106. Also in January 2020, Ms Mishcon notified the claimant of a sustainability lead role she had seen advertised as she was aware of the claimant's interest in sustainability.
107. On 20 January 2020 Ms Wright and Ms Dubois received 41 CVs from the resourcing team. They shortlisted twelve for first round interviews for the production executive role for the week of 3 February 2020. Ms Wright and Ms Dubois were on the interview panel. They requested someone from Resourcing and Talent team to sit with them but the two people working with them on this process were away that week and the role was time sensitive so they did not wait for a further panel member for the first round interviews. Both Ms Wright and Ms Dubois are white.
108. We were told the standard of the applications was very high. Of the twelve shortlisted:

Six were internal to BBC Sport, including one BAME candidate;

Four were external to the BBC. One of these had previously worked in BBC Sport but left in 2015 and was known to Ms Dubois and Ms Wright;

Two were from elsewhere in the BBC, including the claimant.

Two candidates in total were BAME, including the claimant.

109. In terms of the makeup of the interview panel (and the subsequent second round panel), Ms Dubois said that they did not wish to have too large a panel, as that could be daunting, particularly for candidates from outside BBC Sport. She told the Tribunal that in order to foster inclusivity, she wanted to make a culture where people could be their authentic selves and could shine. Asked about diversity, she made the point that diversity is not just about race; the panel would have been very large if all characteristics had to be reflected.
110. Ms Dubois is a white woman; she told us she comes from a lower socio-economic background. She is married to an Indian / Mauritian man and has interracial children. She is a member of the respondent's BBC Sport Diversity & Inclusion Steering Group and is a mentor to a BAME member of staff.
111. Ms Dubois was cross examined about whether unconscious bias training was of any utility. The claimant put to her a newspaper article which suggested that there was no scientific basis for unconscious bias training. Ms Dubois said that she had found the training she had had thought provoking and useful.
112. The claimant spoke with both Ms Wright and Ms Dubois prior to the first round interviews about the role and the challenges facing BBC Sport. They also spoke with other candidates who requested discussions.
113. On 7 February 2020, the claimant attended a first round interview for the production executive role. The first round was a competency based interview; the interviewers asked questions expecting answers to be evidenced with examples from working life.
114. Ms Wright and Ms Dubois scored each candidate straight after the interview or during breaks in the day and reviewed scores against candidates previously scored to check consistency of scoring. They told the Tribunal that a later candidate's answer to a particular question might suggest an earlier candidate had been over scored for that question. This moderation process could be seen in the score sheets of the claimant and other candidates, where handwritten scores had been changed in some instances. In the claimant's case, it appeared that one answer had been scored a point lower after the moderation process. The highest scoring candidate had also had her score moderated down. The highest ranking candidates would go through to the next round as would their scores.
115. The highest scoring candidate in the first round received a score of 38. One candidate achieved a score of 36. One scored 35.5. The claimant's score was 35. One further candidate with a score of 34.5 was also taken through to the second round. Ms Dubois said that they had not had a fixed idea of how many to take through to the second round but there was gap between the first five and the other candidates in terms of scoring and they felt they had a good field in the five highest scoring candidates. Two candidates were external to the BBC and two were in the Sports department already in production management roles. The claimant was

internal to BBC but external to Sports. The other shortlisted BAME candidate was sixth and was not taken through to the second round.

116. The claimant agreed in cross examination that she was pleased with how this interview went and felt that she had a good rapport with the panel.

117. On 10 February 2020, she emailed Ms Wright and Ms Dubois:

Thank you so much for taking the time to meet with me and talk about the position of Production Executive in Sport on Friday. It was interesting to learn more about your approach to establishing a strong Production Management Structure while simultaneously working on wider strategic objectives both for Sport and the business as a whole.

Our conversation made me even more excited to join the senior leadership team within Sport considering the highly competitive rights environment we are in as I am eager to be able to apply all my commercial knowledge gained over the past 10 years within the independent sector if I am given the opportunity.

118. The second round interviews were blended interviews. Candidates were required to produce a written document which was a SWOT analysis of the BBC's football output. They then would give an oral presentation based on the document and answer follow up questions. Finally there would be a round of strengths based questions.

119. Ms Adams joined the panel for the second round. She had undergone training in strengths based interviewing and guided the other panel members in this area. She is a member of the BBC Sport LGBTQ+ Advisory Group. She is also an interview champion.

120. The claimant cross examined Ms Dubois about the lack of racial diversity on the second round panel. Ms Dubois said that sometimes they did ask someone from the editorial team to join interview panels to get a perspective from outside the job family but they felt in this case that having four on the panel would be daunting for applicants.

Second round interviews

121. On 13 February 2020, Ms Adams emailed the candidates who were proceeding to the second round:

Role of Production Executive, BBC Sport. Please ensure you read all the information below carefully and keep for your reference.

Please log on to the Careers Hub (<https://careershub.bbc.co.uk/members/>) where you will be able to select and book an interview timeslot.

Please find below further details on your second round interview for the Production Executive position on Thursday 20th February.

The panel will be Debbie Dubois (Head of Production), Rachel Wright (Head of Production) and Mel Adams (Talent Manager).

You will need to deliver a presentation to the panel as part of your interview. The presentation will need to be submitted to the panel via email (to Mel Adams - mel.adams@bbc.co.uk) by 10am Wednesday 19th February.

The format for your presentation can either be word or powerpoint. The brief for this presentation is attached, this provides you with all the background information needed.

In terms of delivering the presentation on the day; the panel will work from your document and you can bring a copy, so no need to bring a laptop into the room.

The interview will follow the format as below :

- ***15 minutes to deliver your presentation to the panel – please ensure that you are able to deliver your key messages in the time allocated.***
- *This will be followed by a Q & A with the panel on the basis of your submission.*
- *The third element of the interview will take the form of strength based questions , rather than the usual competency based format. Further information regarding this is below.*

A strengths-based interview seeks to understand both if you can do something and if you enjoy it.

This style of interview is very different to a more traditional ‘competency-based’ one. Whilst you will still be asked a number of questions during the interview, you are expected to answer with what comes most naturally.

We’re not looking for forced ‘STAR’, or over prepared answers. Instead, we would like to know what you instinctively think about a question. Of course, if you think of an example that naturally relates to the question, we would love to hear it – whether that is from your work or personal life.

The key thing to remember in a strengths-based interview is not to over prepare, and to relax and be yourself.

If you would like to ask questions prior to the interview, please contact any of the panel members only but no one else from the Senior Editorial Teams across Sport, to ensure fairness to all candidates.

122. We note that the need to complete the oral personation to time was highlighted in this email. We were told that part of the reason for timing the presentation was to test candidates’ ability to deliver pitches to time, which was necessary for the role itself.
123. The email also placed a limitation on who candidates should speak to before the interview. The claimant contacted her second line manager, Ms White, who had worked as a production executive in BBC Sport until 2019. She asked to have a chat about her presentation. We observe that although Ms White did not fall within the category of people candidates had been asked not to contact, she was very near to being in that category.
124. On 14 February 2020, there was a telephone conversation between the claimant and Ms White about the second round interview.
125. On 17 February 2020, the claimant emailed Ms White her draft presentation document:

Based on all my prep so far, I have attached my presentation for you to review.

Please let me know your thoughts in terms of:

- *Presentation look and Style*
- *Content covered*
- *Proposed Strategy*

Have I missed anything?

This job is really important to me and I have given it my best so far in terms of prep and I would highly appreciate your feedback.

126. There was then a further telephone conversation between the claimant and Ms White. We saw Ms White's handwritten notes which showed detailed comments she said she had made on suggested content for the presentation. Her evidence was that she made these detailed suggestions about content to the claimant.
127. The claimant told the Tribunal that the only advice Ms White gave her was to shorten the slides and that significant changes in content between the draft and final slides were due to her own research. As to the significant changes between the draft and final slides which appeared to reflect the content of Ms White's notes, she said: 'There is no evidence that that came from Emma. Because I was undertaking a lot of research and all that information is available online'.
128. We accepted Ms White's evidence, which was consistent with the handwritten notes she made at the time and the changes made to the slides. Those changes showed that the claimant included in her presentation information and ideas provided by Ms White.
129. On 18 February 2020, the claimant emailed her presentation to Ms Adams. She received a score of eight out of ten for that component of the second round.
130. On 20 February 2020, the claimant attended her second round interview. Ms Wright's evidence was that the panel asked candidates to take them through their strategy in relation to the pitch but not to worry if it was exactly 15 minutes as they would not cut them off immediately. The intention was not that candidates should over run substantially but they wanted to put them at ease.
131. Ms Dubois and Ms Wright said that other candidates completed their presentations within 15 minutes and did not require prompting. The claimant did not complete her presentation within 15 minutes and Ms Dubois said that she reminded the claimant of time at about the 23 minute mark and said that nearly 25 minutes had passed and she should wrap up and draw out any remaining points. She said that claimant did not precis the information but continued to speak for a further ten minutes so that whole presentation was 35 minutes. For much of the pitch she read the slides verbatim so it was not clear what the key points she was pitching were.
132. The claimant's evidence was that she asked for a five minute heads up and the panel agreed. Ms Dubois said not to worry if the timing was not spot on and that she could have up to 25 minutes.
133. We accepted the accounts of Ms Dubois and Ms Wright on what occurred in this respect. They were consistent with each other and also consistent with the Tribunal's own experience of the claimant in the course of the hearing; having agreed to timescales for questioning of particular witnesses, she required frequent reminders of

time and struggled to summarise or abbreviate the points she wanted to put, frequently repeating the same question a number of times. Whilst we appreciate that Tribunal proceedings are stressful and may affect a litigant in person's performance, so also are interviews. It also seemed to the Tribunal that the fact that the claimant had obtained some of the content of her presentation from Ms White rather than from her own research, probably made it more difficult for her to deviate from what was written in her slides. The claimant was scored five out of ten for this part of the second round.

134. The claimant was then asked two questions drawn from the presentation; these were not the same questions for each candidate as they related to the individual presentations.
135. The first question the claimant was asked was how she might develop staff that she would manage. The notes record that the claimant said that she would look for acting up opportunities for staff and would develop their soft skills, look at what motivated her team and work with them accordingly. The handwritten interview notes include the phrase 'soft skills' as part of what the claimant is recorded as having said in answer to questions on the presentation:
 - *Acting Up — opportunity to act up to cover PE's*
 - *Motivation around what want to do*
 - *Develop soft skills*
 - *Pool*
 - *Personality colours, individual teams, accordingly working with them*
 - *Recognise, strengths and weaknesses in team*
136. The claimant denied in cross examination that she used the phrase 'soft skills' herself and said that might be Ms Wright's interpretation of what she said.
137. The second follow up question was as how the claimant would drive digital audiences in BBC Sport. The claimant referred to putting out small bitesize content, engagement on Twitter, the BBC brand being one in which quality content was assured and engaging talent with the BBC brand.
138. The claimant scored six out of ten for this section.
139. The final section of the interview was strengths based questions. Each candidate was asked the same five questions as well as a warm up and warm down question, the latter two questions not being scored. The claimant scored 22 out of a possible 50 in this section, as compared with the highest scoring candidate who scored 47.
140. We could see from the score sheets that the warm up and warm down questions had not been scored for any candidate. The claimant had raised a concern about not being scored for the last question but had not looked at other candidate's score sheets in this respect prior to being cross examined about the issue.
141. The strengths based questions were scored on a grid system whereby each question gave rise to a letter score, A, B, C, for 'capability' and a score of +, - or = for 'engagement'. The letters and symbols were ultimately translated into numbers for the purposes of determining overall scores. The evidence of the respondent's witnesses was that Ms Dubois and Ms Wright circled the letters and + or - or = on their sheets and Ms Adams worked out the numerical equivalent of each score. The letters and symbols we saw circled married up with the numerical score of 22.

142. The claimant raised an issue about whether her sheets had been properly marked up but we could see no difference between how her score sheets and those of other candidates had been dealt with and no inconsistency in the claimant's ultimate numerical score.
143. The claimant made a serious allegation that Ms Dubois and Ms Wright laughed at and mocked her accent during the second round interview. There had been no laughing or mocking in the first round interview.
144. In her witness statement the claimant said: *Throughout the interview the Panel nodded, smiled but at times I noticed that based on the way I spoke the focus was more on how I was saying things rather than what I was saying ie my pronunciation. This was evident at the time as I noticed the Panel subtly laughing whilst trying to constrain their laughter. This drew attention to my soft Indian accent...*
145. In oral evidence she said:
When I said words with a more Indian tone, they chuckled. I could sense that it was my accent they were laughing at. Debbie laughed and Rachel looked at Debbie and tried to contain laughter. I don't recall Mel laughing.
146. Neither Ms Wright nor Ms Dubois recalled any laughter in the interview but they said that they tried to make sure candidates were relaxed by engaging with them. There could have been laughter if appropriate to something a candidate was saying. Both denied that they had laughed at or mocked the claimant's accent.
147. Ms Dubois said in oral evidence: *This has shocked me the most. In 23 years of interviewing I have never been accused and would never do such a thing. This was not mentioned in conversations or the grievance. I am very clear there was absolutely no laughter or mocking of your accent.*
148. The claimant then said to Ms Dubois in cross examination: *That was how I felt, how I felt that there was a chuckle and laughter.* Ms Dubois replied: *Absolutely not. I would never ever laugh or mock an accent ever.*
149. We find as a fact that neither Ms Dubois nor Ms Wright laughed at the claimant's accent. There were a number of reasons for our finding:
- the fact that the claimant did not raise this allegation internally but only in her claim form. She had already raised serious allegations of race discrimination and we could see no reason why she would have felt concerned about adding this allegation had it reflected her perception at the time;
 - her evidence lacked any specificity as to why she drew a connection between laughing and her accent. What had she said at the time the laughing occurred?
 - when presented with the real person she made the complaint about, Ms Dubois, she appeared to back off the suggestion that there had actually been laughing at her accent to say that was how she 'felt'. This contrasted with her questioning in respect of other allegations;
 - her account of the interview at the time (see below) suggested that she was happy with how it went. That was inconsistent with her account of feeling her accent had been laughed at;

- as we comment later, the claimant on numerous occasions during the hearing misrepresented back to witnesses evidence which had been given. We had reservations about her interpretation of events;

- We found Ms Wright and Ms Dubois consistent and credible witnesses.

150. This was a serious allegation which we reject; we concluded that the claimant made the allegation in circumstances where we were not persuaded she believed it to be true herself.

151. After the interview, the claimant texted Ms White:

Hey Emma, finished my interview. I think it went well and they did smile a lot so am hoping that's positive. They did say that they had to postpone one of the interviews to next week they will let me know by the outcome end of next week.

152. An email the claimant sent to Ms Dubois and Ms Wright on 6 March 2020 said this:

Debbie / Rachel Thank you once again in taking the time to interview me; I had a really good time getting to know you during the two interviews and was very much looking forward to working with the two of you as not only did the work seem exciting with the sort of challenge I was looking for, but you both seemed like a fun. and lovely team to have had the opportunity to work with...

Scoring in the second round

153. The claimant achieved a final score of 76. A table showing the scores of the second round candidates is reproduced below:

	Round 1	Round 2	Round 2	Round 2	Round 2	TOTAL
	Competency Questions	Document	Presentation	Q & A	Strength Based Questions	
██████████ - Appointed - Candidate E	38	7	9	8	47	109
██████████ - Candidate B	36	6	7	7	35	91
Malika Keswani - Candidate C	35	8	5	6	22	76
██████████ - Candidate D	34.5	8	8	7	30	87.5
██████████ - Candidate A	35.5	8	7	7	32	89.5

154. The scores in the table were reflected in the scoring sheets which the Tribunal saw. However the claimant said that her score of 22 for the final strengths based question round had been suppressed. She pointed to a document which was produced in response to her DSAR by Ms Adams. This was a copy of the interview schedule for the second interview on which Ms Adams appears to have handwritten each candidate's score on the strengths based questions. Against the claimant's name, Ms Adams had handwritten 32. Elsewhere in the bundle, there was the interview form on which Ms Adams made her notes and wrote a running tally of the claimant's

scores on particular questions. These scores add up to 22 based on the letter and +, -, = scores. These are consistent with the letters and symbols on the other panel members' score sheets and consistent with a score of 22. The Tribunal was satisfied that the '32' noted on the interview schedule was a typo by Ms Adams. We had no evidence on the basis of which we could conclude that Ms Adams, Ms Wright and Ms Dubois had conspired to lower the claimant's score on the strengths based round. Even had the claimant scored a further ten points, she would not have been appointed, so it is difficult to see what the motive to further lower her score would have been. The claimant said that, had she scored third, the respondent would have had to have appointed her to a role. That is a misunderstanding of the law. Furthermore, if the scores were falsified by each of Ms Adams, Ms Wright and Ms Dubois in their sheets in which the interview is recorded, it would have been peculiarly inept of Ms Adams then to have disclosed the interview schedule which revealed the true position.

155. The successful candidate, candidate E, was an established production executive in sports broadcasting who had previously worked at the BBC. She is a white woman.

156. There was a delay in interviewing one of the second round candidates as the candidate was unwell and in hospital at the time of interview and subsequently had a bereavement. That candidate was eventually interviewed on 11 March 2020.

157. Given that there were two posts available, it was agreed by the panel that the two candidates who had scored the lowest of the four interviewed by that point could be informed that they had been unsuccessful. On 5 March 2020, Ms Adams informed the claimant by email that she had not been successful.

158. The claimant replied by email and asked for feedback:

In terms of feedback, I would appreciate a copy of my score for each section of the interview/questions and a conversation with Debbie and Rachel taking me through it to understand what gave the successful candidates an edge over me.

I would really appreciate knowing the areas in which my skills/experience were lacking in comparison to the successful candidates to know what I need to work on in the future.

Please let me know when it would be a convenient time to discuss and I will make myself available for the same.

159. Ms Adams responded:

Thanks for your email.

We don't discuss specific scores with candidates as we are unable to reveal other candidates scores due to confidentiality and so the scores wouldn't mean a great deal without the context. However Debbie and Rachel would be happy to take you through the interview grid in detail and give you constructive feedback. I'll leave them to liaise with you regarding their availability to do this

160. The claimant replied: *Thank you for coming back to me.*

To clarify, I was referring to a copy of my own scores and notes during the 2 interviews; particularly the second one as I passed the 1st round

...

In terms of feedback, I would like to understand what scores I received for each section including the SWAT [sic] analysis and understand a bit more behind the "why" in terms of a low score E.g 3/ 4 vs 4/ 4 which I assume is what the successful candidates would have received in a particular section.

Eg; I thought my SWAT analysis went really well as I was told everything had been covered. The only 2 questions I was asked was how I would develop the PM team and I responded "Acting up from PM to PE, PC to PM during A/L and busy periods, Mentorships, Awareness about coaching available at the BBC via the leadership programme, Production Management pool between Breakfast, Sport and Children while getting them to rotate to gain more experience, and lastly if "An Exchange of Minds" pitched to news works out then do the same for Sport with ITV in terms of an exchange programme or even IMG who we give 25% of our work to.

The other question was about driving digital audiences (touched upon in the SWAT) after which we moved on to the Strength Based questions; so it would be helpful for me to go through those as well.

Keeping the example above in mind, I would like to understand what my score was and what would have made it a higher score assuming that the missing element is what gave the successful candidates an edge over me; therefore what was that missing element? I went through a similar exercise with Emma White in January for a UM role where she had a copy of my score sheet with answers from the day where she took me through it in detail; even though the job went to the individual who was already covering that particular role and had knowledge of the channel with existing relationships in place, that exercise with Emma was very helpful to me as it helped me prepare for this PE role (However, clearly not well enough).

There are 2 more PE roles I have applied for and if I do get shortlisted (fingers crossed) I would like to apply my learnings from here to the interviews there. I know I am highly intelligent, hardworking and confident with a good breadth of experience and so I do not want to lose out solely because I am not saying certain things which I should be

In general I am very thorough with my work and would like to go through a thorough feedback session too as this impacts my career; if you would like I can come over to Salford where we can go through it in person too.

161. These events of course coincided with the early stages of the pandemic. By 13 March 2020, the respondent was in crisis management mode. Sporting events began to be cancelled and there was uncertainty about the Olympics. Football matches were cancelled so Ms Dubois had to help arrange for replacement content. We accepted that there was a heavy workload for Ms Wright and Ms Dubois at this time, trying to manage a situation of great uncertainty, ensure content was produced and look after the safety and wellbeing of their teams. Ms Adams commenced working from home on this date.
162. On 16 March 2020, government advice was to avoid non essential travel and to work from home where possible.
163. On 17 March 2020, the BBC Director of Sport sent a note saying all non-broadcast critical personnel in BBC Sport were encouraged to work from home with immediate effect. Ms Dubois and Ms Wright were responsible for ensuring the safety of staff and freelancers and planning for how sporting events could be covered safely if they were

proceeding. Ms Wright told the Tribunal that she also had home schooling and childcare to work around and was working irregular hours.

164. On 23 March 2020, the UK went into lockdown.

165. That same day, Ms S Rigby, the claimant's trade union representative. wrote to Ms Adams:

I am writing on behalf of my member, Malika Keswani, to request the score sheets and notes from the interviews she attended for the Production Executive role in BBC Sport (BBC/TP/164/46225).

I understand that in these extraordinary times you are very busy but it has been some weeks now and Malika feels it would be really helpful to understand where she could have improved her scores in order to secure the role. As you will appreciate Malika would like to continue to apply for such roles so any feedback she could get would be incredibly helpful.

166. On 24 March 2020, Ms Adams wrote to Ms Rigby

With the current situation as it is, I am working from home and therefore unable to access any interview notes at this current time.

As per my email of the 6th March the hiring managers, Debbie Dubois and Rachel Wright will take Malika through the interview grid in detail. They are keen to provide Malika with this feedback, however as I'm sure you can appreciate, they are currently dealing with an unprecedented situation, meaning they have had to reprioritise.

I will forward this email onto them and ask that as soon as they are able to provide Malika with the feedback, they do so.

167. Both Ms Wright and Ms Dubois took home their interview notes and score sheets for the production executive role because they were conscious that the claimant had asked for feedback. The claimant suggested that there was a problem with the security of her data in these circumstances. Ms Dubois told us that the notes were kept safely in a cupboard in her home office.

168. Ms Adams corresponded with Ms Wright and Ms Dubois on 24 March 2020 and Ms Dubois indicated that she hoped to look into the matter the following week and set up feedback for the claimant via Zoom.

169. On 1 April 2020, Ms Bishop, a managing editor in the World Service, emailed Ms Mishcon about a discussion she had had about the claimant with Ms Rigby. Ms Mishcon had asked Ms Bishop to speak with Ms Rigby because Ms Rigby had contacted Ms Mishcon about the claimant's concerns about her role and Ms Mishcon was at that time unwell with Covid. Ms Bishop wrote:

The conversation was more or less this - in summary

Sharon said

- *Malika is v unhappy because the role is not what she thought it was*
- *She thinks she was mis-sold the role*
- *She wants the BBC to move her to a role more appropriate to her skills*

- *She has applied for roles and not got them*
- *She is thinking of raising a grievance - not clear against who*

I said:

- *I had looked at the job ad and jd and did not think it had been misrepresented, we did want someone with a strong production background though the team is hybrid*
- *interestingly Malika had applied for, but then pulled out of, the recruitment for the PM role in Africa which is 100% production*
- *Malika had not raised this level of unhappiness with me or Nayan - which is surprising*
- *That Sharon knew that in the BBC we did not just "give" people roles, they had to apply and some staff might be facing redundancy and would have priority consideration for some roles over Malika. Sharon acknowledged this.*

Nayan tells me the roles Malika applied for but. did not get were PE roles, so she may not have the skill yet.

I did not say that we are regrading the role to Unit Manager in Simplification in recognition of its complexity but we are not categorising it as an admin role, though this is relevant.

I discussed this chat with Nayan and she has put in a meeting with Emma for us to think of a way forward. Please let me know if you want to join that or indeed be in it instead of me.

Happy to chat - always hard to capture in email. it was friendly conversation, I know Sharon quite well and we know each other to be reasonable. I think Sharon, who raised another issue with me was a bit exasperated that in these difficult times, staff are thinking of grievances

170. Ms Mishcon also contacted the claimant and arranged to speak with her; they eventually spoke on 8 April 2020.
171. On 2 April 2020: the respondent received an email from the Information Commissioners Office acknowledging the impact of the pandemic and likely delays in complying with DSARs. Ms Stephens' response to that email was that the BBC would like to continue to receive complaints from the ICO and they agreed an approach that BBC would respond initially in 14 days rather than seven.
172. Ms Wright was on annual leave for a few days in early April 2020. Arrangements were made for a Zoom feedback session with the claimant. On 7 April 2020, Ms Wright returned from leave and Ms Dubois sent her an email with notes for the feedback session:

Have looked at both grids and have the following:

Think we should start at the top with the same outline we gave [other candidate] and [other candidate] in that the number of applications and the standard was extremely high and that we only took a handful through to second round.

That Malika should take positives from her performance to get to that final stage from the initial applicants but that we have focused as requested the areas for development

which we will go through with her from the first and second rounds; pulling out the key areas and themes from the various sections.

We should note we have an hour for this session which we will need to adhere to.

First round - Score — 35/ 44 - (for our info - Placed 4th out of the 5 candidates we took to second round)

Headlines are, overall — Strong in most areas —to focus on;

- *Q5- Areas Prod Mgmt could focus and lead on to manage the challenges Sport facing ?*

Additional areas we were looking for - Diversity both on and off screen , Leadership - how we develop our teams so they are skilled in the right areas .

Financial viability of ideas and scope for new ways of working .

- *Question 9- Well established teams, what do you envisage the challenges facing you are : Malika talked about lack of Sports knowledge .*

We were looking for how you would use softer skills here rather than lack of knowledge of sport e.g.- Resistance to change, staff might be anxious about new people coming in. Need to instil a sense of shared goals. Adapting your style to suit different people. important to listen and understand concerns , check if staff seem out of kilter.

Q10- Diversity - Stretching targets, what you will do to help with these - Malika gave a very specific response in relation to a project pitched to Anna.

We were looking for an understanding of the wider benefits to the workplace when you have a diverse workforce. Thinking about the longer term strategy, setting targets and meeting them. Being an ambassador and working with teams to ensure that we are embedding in our teams the most diverse workforce.

173. We were shown notes of feedback provided to other candidates which referred to soft skills in relation to question 9 in similar terms to the feedback the claimant was provided with. Ms Dubois told the Tribunal that what the panel was looking for was for a candidate to explain how they would use softer skills given that the position was a new position, there might be a resistance to change and people might be anxious. There was a need to instil shared goals whilst adapting style to suit different people, to listen to staff and understand their concerns. That feedback was reflected in the notes we saw which were provided to other candidates.
174. It was clear that what the panel had looked for in relation to question 9 was a discussion by the candidate of the kinds of soft skills which would be necessary. This was not a reference to the panel looking for the candidates to display soft skills in the interview or assessing those soft skills.
175. The feedback document then went on to deal with the second round.

Presentation

Good document submission —however, be mindful of the audience you are delivering to and the understanding of what is possible. Good to think outside the box and to push the boundaries but be mindful of the landscape of PSB and ideas that are likely to fly or fall due to the limitations.

Pitch

The pitch it wasn't tailored to the 15 min slot that was allocated, we highlighted this at the start of the pitch and timings wise it was noted at the 20 min + mark that the pitch was running overtime. We are often given a specific slot to pitch in to at Sport Board and working to this timing was as much a part of the process as the delivery of the pitch.

We were looking for key areas to be highlighted here but instead there was a page by page run through of the document which made it difficult to know what the key areas to focus on were.

Sometimes less is more and so the area to develop on here is to note any instructions given and to be succinct in your delivery. Emphasise your key points and be clear about the messaging you are giving.

Question and Answer section

(1) Development of the PM team — Malika suggested acting up opportunities, the skills swap with ITV etc.

We were looking for a broader assessment (audit) of strengths and skills and how we then work with our talent team to pull together (rather than just acting up) . And understanding of where the dept is heading to align their development to key strategic aims. Also projects that individuals can lead on for news of working etc to develop their leadership skills.

Q) Driving Digital Audiences- Malika suggested small bitesize content, talked about twitter and the BBC brand in terms of assurance and quality of content, the engagement of talent to the brand so that we are fully connected.

We were looking for how we can work to satisfy increased appetite for content by delivering across platforms, growing our presence across IPlayer— podcasts etc. Thinking specifically about our younger audiences to tailor content to what they want and need; the utilisation of the resources we have to drive that audience.

Strength based questions

We had 5 questions here, highlighted below a couple that were the weakest scores. Overall this was not a strong section for Malika.

Q1 Team Collaborator - At BBC Sport Teamwork is highly valued. Why do you think this is such a priority for us?

We were looking here for strong evidence of understanding the importance of effective teamwork. Being able to clearly identify a number of ways in which team working would benefit the dept.

The answer was lacking in that evidence and did not identify those specific examples or emphasise the understanding of the value

Malika said; Teamwork is a priority everywhere, team is a group of people who trust each other, support. Both output, Editorial and Prod Mgt.

Q3 Driven Performer- What motivates you at work ? How would you know something was successful?

Looking for strong evidence of understanding their motivations at work, able to clearly define their perceptions of success at work and how to meet these.

The answer given did not have demonstrate the evidence of their motivations at work, or how to achieve success.

Malika said ; Likes challenges and new projects, solving problems . Talked about the Afghan project and the detail of it without a sense of the wider success of this. Noted that it means different things for different people — again this is not clearly defining what success at work looks like or how to meet their perceptions of success.

176. There were further emails about the provision of interview notes. The advice the panel received from HR at this point was that notes could not be provided until the respondent was back to business as usual working arrangements.
177. Ms Wright and Ms Dubois had a Zoom feedback session that day (7 April 2020) at 4 pm with the claimant.
178. The claimant's evidence about that session was that Ms Wright and Ms Dubois said she was a strong candidate but lacked soft skills and leadership. She said that she asked them to clarify what they meant with examples but they could not give any. She said that she asked if they had managed to secure a BAME candidate for the role and they were dismissive and said that was not something which concerned her.
179. Ms Dubois and Ms Wright said that the feedback was based on the written notes in bundle which we have set out in full in this Judgment, as subsequently summarised in the written feedback summary later provided to the claimant.
180. We accepted Ms Wright and Ms Dubois' account of the discussion which was consistent with their scoring sheets and the contemporaneous written document. We could see no reason why they would not have used the hour they had set aside to provide the detailed feedback which had been set out in writing. We considered that the claimant's recollection reflects what she retained from the discussion.
181. On 8 April 2020, Ms Walsh wrote to the claimant explaining that the situation with the pandemic would affect the production of her interview notes.

182. On 9 April 2020, the claimant wrote to Ms Walsh, Ms Dubois and Ms Wright pressing for the interview notes. She also said:

I have had a feedback session with both Debbie and Rachel on Tuesday 7th April however I was not fully satisfied with the feedback which I feel was very subjective, and so I am keen to see the notes taken during the interviews to understand what information I was scored against.

Debbie/Rachel - I have discussed the above with my senior reporting line who have suggested I request you for another phone call to understand a bit more about the scoring and the basis on which the benchmark was set keeping in mind the job description, my experience and the responses given. I would like to understand more around how does a panel judge the adequacy of a response given in line with the subjective nature of the same.

As you can appreciate, this decision has had an impact on my career progression and as a strong BAME candidate who progressed to the second and final round, amongst the final 5, with 2 vacancies to be filled, how was this decision reached in line with BBC's stance on nurturing diversity in senior leadership roles and it's 2020 targets.

Please let me know of a convenient time for you both and I will make myself available.

183. On 8 April 2020, the claimant and Ms Mishcon had spoken as arranged. The claimant told Ms Mishcon she was thinking of bringing a grievance against BBC Sport. Ms Mishcon's account was that asked the claimant whether she had been involved in a grievance process before. She said that, based on her own experiences as a hearing manager and a mental health first aider, it could be a stressful experience for some people so the claimant should think carefully before she made her mind up. She told her it was important to listen to feedback to prepare herself for future interviews and that listening was an important attribute.
184. The claimant's account was that Ms Mishcon told her she should not put in a grievance as she should want to be seen as someone with leadership and putting a grievance in would do the opposite.
185. We concluded that Ms Mishcon's more nuanced account of the conversation was correct. It was consistent with our impression of the claimant's conduct during the hearing for her to present an impression of something which had been said (in this case that Ms Mishcon was seeking to deter her from bringing a grievance) which did not accurately reflect the content of what had been said.
186. Ms Mishcon also spoke with the claimant about possible informal mentoring and suggested to the claimant that she speak with Ms Lavender about understanding the progression from production manager to production executive. She also made suggestions that the claimant get in touch with Ms Pinn and Ms O'Donnell in BBC Studios in case there were opportunities there.
187. Also on 8 April 2020, the claimant wrote to Ms Lavender expressing an interest in a potential Newsnight vacancy and said the following:

I understand that you are currently very busy and so I would appreciate it if we can have a chat about the role when you have some capacity — I know we spoke about the role in March last year when I met you for the first time but I am not sure how much it has changed since and so a ZOOM catch up would be useful.

In the meanwhile, Anna also mentioned that I should speak to you about mentorship/shadowing opportunities as you could help me develop the already existing skills and experience I have and work on enhancing the same as needed to move into a PE role. Anna mentioned shadowing you for a while and going into virtual/zoom business review meetings and other meetings involving the portfolio you manage to get a sense of a Production Executive position at the BBC which would help with interviews going forward.

I will genuinely appreciate your time with this as I understand you are aware of my current situation with Persian and the role itself. That said, I recently progressed to the second & final round of PE interviews in Sport and was amongst the final 5 with 2 X PE vacancies to be filled which unfortunately for me ended with an unsuccessful outcome. Anna has therefore suggested the shadowing opportunity with you.

188. Ms Mishcon had been copied into this correspondence and sought to reassure Ms Lavender:

Alert!!! Talk to me before you panic. I suggested a conversation with you to understand the PM and PE role better and maybe the odd meeting but only if you felt appropriate so not commitment to anything.

And she asked who would be on the NN interview and I said not decided perhaps me but not sure

Some slight misinterpretation...

189. Ms Lavender replied:

Crikey — thank you for the warning. trying not to panic. I'm going to say that it's so busy right now that I don't have the time for mentoring remotely.

This is exactly what I was worried about with Malika - NN is about getting things done on the shop floor a v. experienced PM, not doing prepping yourself for a PE job. I've said that to her before but she is not listening.

190. It appeared that the claimant had taken Ms Mishcon as making much more of a commitment on Ms Lavender's part than Ms Mishcon had intended. Ms Lavender replied to the claimant on 9 April 2020:

Great to hear from you, I'm flattered that you would like me to help with some mentoring, although to be honest I'm completely snowed at the moment so whilst I would be very happy to offer some mentoring I think that it would be very difficult for me to do that remotely right now. Can I suggest we review in 2 -3 weeks' time when hopefully things will be starting to revert back to normality a little?

191. It seemed to the Tribunal that this exchange illustrated two themes which emerged from the evidence more generally; firstly that the claimant had a tendency to hear what she wanted to hear and secondly that she saw career opportunities only in terms of her own development and not in terms of the respondent's need for roles to be performed.

192. On 9 April 2020, the claimant emailed Ms Mishcon:

I just wanted to let you know that following our call yesterday which I genuinely appreciated, I have touched base with both Debbie and Rachel for a follow up call regarding the feedback. I will keep you posted once I have had the call.

193. Ms Ashton was copied into a number of the emails the claimant was sending about the recruitment process and could tell the claimant was unhappy. She decided to call her in April 2020 despite being on annual leave. The claimant told her that she had been unsuccessful for the PE role but had not received feedback. She said that she wanted to submit a grievance. Ms Ashton said that she would pick the matter up when she returned from annual leave with the resourcing team and try to find out what was going on in terms of providing feedback. She called Ms Mishcon to tell her the same day.

194. Between 14 and 17 April 2020, there was correspondence between the claimant and Ms Eden-Russell about the recruitment process and the issues that the claimant had raised about wanting further feedback and access to her interview notes. Ms Eden-Russell contacted the claimant on 14 April saying that the claimant's 9 April email had been referred to her. Since the claimant had had feedback from the panel already, she suggested that she and the claimant meet to discuss her remaining concerns. Ms Eden-Russell had written feedback which Ms Wright had set out in an email to Ms Walsh on 14 April 2020.

195. The claimant replied in a long email in which she said she felt the scoring was unfair for a number of reasons. She raised, amongst other concerns, that the panel had told her she could take up to 25 minutes for her presentation but had then marked her down for not sticking to the time limit. She wanted the statistics for BAME candidates in senior leadership roles in Sport. She said:

One of things that drew me to the BBC was its stance on developing individuals in their careers by offering appropriate opportunities and experiences however I am not feeling that this has been reflected in my situation. I strongly feel there was unconscious bias involved which has led to an act of discrimination.

196. The claimant and Ms Eden-Russell spoke on 15 April 2020. Ms Eden-Russell told the claimant that the BBC's diversity and inclusion team would be the route for statistics on diversity. The claimant said she wanted her day in court with a psychologist called upon as an expert witness to comment on the recruitment process. They had a discussion about bias. Ms Eden-Russell then read through the feedback summary. The claimant did not comment on any aspect of it being unfair during the discussion. Ms Eden-Russell discussed the strengths based interviewing process and offered to provide further information about CAPP.

197. The claimant's position to the Tribunal was that she wanted a second round of feedback from Ms Wright and Ms Dubois directly. She did not accept that the feedback she had received was tied to the questions and the notes of the scoring or was clear and coherent.

198. On 16 April 2020, the claimant emailed Ms Eden-Russell to say that she was still waiting for her interview notes, that she was concerned at having no response to her request for statistics and was concerned about the lack of BAME representation on

the interview panels. She said she had still not received clarification on how the strengths based questions were scored and suggested that 'soft skills' had been assessed leading, to unfair hiring practice.

199. On 17 April 2020, Ms Eden-Russell sent the claimant an email. She said that they were considering ways in which the claimant's interview notes which had been taken home by Ms Wright and Ms Dubois might be provided, perhaps using a scanner app. She provided the claimant with the written account of feedback prepared by Ms Wright and more information about the CAPP Consultancy.

200. Ms Eden-Russell also wrote to the data protection team to ask how to provide interview notes electronically.

201. The claimant replied by email on 17 April:

I do feel discriminated against and strongly feel as a highly capable individual from a BAME background, I do need to address this at an official capacity for the wider good at the organisation and therefore I will be going ahead with an official grievance with regard to the selection process in Sport, my responses in both interviews in line with my capability and experience, and the impact that unconscious bias from the panel has had on my career progression at the BBC. My intention is to seek a positive resolution to my grievance, however I also understand that time is of the essence and there is a 3 month deadline for me to file with ACAS which is something I will be considering in the event that we are unable to reach a resolution within the time frame.

202. On 21 April 2020, Ms Ashton returned from annual leave: She spoke with Ms Eden-Russell to arrange a discussion regarding the claimant's recruitment process and feedback. Ms Eden-Russell explained to Ms Ashton that the claimant had had feedback and that she had also had a session with Ms Eden-Russell to address some of her wider concerns about the interview process.

203. Ms Ashton then telephoned the claimant and explained what she had been told by Ms Eden-Russell. She told the claimant that key points she need to work on for Band E roles including working on her "active listening" skills. The claimant said that she felt she was only put through to the second round as she was the only BAME person that had applied for this role. Ms Ashton told the claimant that she herself had a good relationship with the resourcing team and from her discussion with them she did not think that the claimant had been shortlisted for the second round for these reasons or that she had been treated unfairly in the recruitment process

204. The claimant said that she felt that she had been discriminated against. Ms Ashton was surprised at that as she understood the claimant's concern to be the alleged lack of feedback. She explained to the claimant that she disagreed with her, based on the feedback she had received, that there was any element of discrimination in the recruitment process. The claimant complained about being marked down for the timing of her pitch and Ms Ashton said that the claimant would have been responsible for keeping to time.

205. The claimant said that she was planning to raise a grievance. The claimant said that she felt there was already a 'black mark' against her name as she had disagreed with the feedback she had received. Ms Ashton said that she did not herself use the term 'black mark' and it was not her experience at the respondent that those who raised grievances had black marks put against their names.
206. They went on to discuss the interview notes and Ms Ashton said that they were not often shared with candidates because they were a prompt for the interviewer and might not contain the full feedback which the interviewer could provide. She advised the claimant to actively listen to the panel's feedback to improve her next application. The claimant went on to say that she "would take them to court and see at what point the ink dried on the notes". Ms Ashton felt the claimant was misguided and said that she felt what she was saying was a bit excessive. The claimant was insistent that because Samira Ahmed had recently won her equal pay case, it was a matter of principle for her to raise a grievance and bring a claim. Ms Ashton felt the claimant just wanted to take the case to court.
207. Ms Ashton told the Tribunal that she did not seek to discourage the claimant from bringing a grievance but did urge her to think carefully about what she wanted as a resolution to the grievance process as it was unlikely that a production executive role would be created for her in BBC Sport. She told the Tribunal that as a friend, she wanted her to understand that a grievance can be a lengthy and stressful process.
208. The claimant's evidence about this discussion was that Ms Ashton made it clear that she had spoken to Ms Mishcon, who recommended that she not raise a grievance. She said that Ms Ashton said that grievances at the respondent take a very long time to resolve and raising a grievance would put a black mark against her name.
209. Ms Ashton rejected that account of events in cross examination. She said that she came to the BBC to deal with equal pay and discrimination and did not say 'black mark'.
- I was very experienced. Based on what I heard from everyone it was just a case of you not getting the role. I gave examples of how I had not got roles in the past. And that I looked at the feedback. You don't have to take my feedback or advice. Nothing I was doing was to deter you from putting in a grievance. You wanted to progress your career in the BBC and I was trying to help you.*
210. She also said to the claimant in cross examination: *I told you to work on your active listening skills. I felt in my conversation with you that you were not listening.* The claimant responded: *Why should I listen to anyone if I felt discriminated against?*
211. Ms Ashton seemed to the tribunal to be an impressive witness with no axe to grind. She was well disposed to the claimant and had looked into the concerns she had raised. She could not see anything which seemed wrong and was trying to help the claimant listen and learn and move on. We preferred her account to that of the claimant. It did not seem to us, that she would have made the 'black mark' comment. Her account was clear and consistent as to what she had said and why she said it.
212. We formed the view that in this, as in some other instances, the claimant was reporting the impression she herself had formed (that there would be a black mark

against her name if she brought a grievance) as something someone else had actually said. She was by this point firmly invested in her own version of events and determined to 'have her day in court'.

213. On 22 April 2020, Ms Eden-Russell received a response from the data protection team about how to provide interview notes electronically and there was further correspondence with the panel members about how they could go about securely scanning the interview notes the following day.
214. On 27 April 2020, the claimant emailed Ms Mishcon attaching her grievance. We set this out in detail because the claimant is critical of the response she received to the grievance so the detail of her complaints was important to our consideration of her allegations.

I, Malika Keswani wish to submit a formal grievance in respect of the recent recruitment process I have been subjected to for a Band E Production Executive (Sport) role within the BBC.

I am currently a Band D Production Manager (News & Current Affairs) and am keen to progress and develop within the organisation. I am also a BAME candidate and wish to address my concerns in respect of the recent recruitment process taking into consideration the BBC's well documented ambitions to prioritise diversity and inclusion within the workplace.

My overarching concerns are reflected in my email to Ann Eden-Russell of 17 April 2020 (see attached).

[She then set out parts of various reports in relation to diversity]

I draw your attention to the lack of progression of BAME candidates at a senior level in Sport as evidenced by my own experience. I also highlight the poor feedback framework which has lacked consistency and construction and has impeded my understanding of the outcome. I have been left believing that my ethnicity has been a barrier to my progression within the BBC.

I do not believe the BBC has adhered to its duty to ensure that equality and diversity is promoted internally and that BAME candidates (both internal and external) are not disadvantaged by way of these recruitment processes and subjective criteria.

Recruitment Process

I applied for the Band E role (x2 vacancies) and the first interview took place on 7 February 2020. I was told that I would not hear back regarding the next steps until w/c 17 February 2020 as a panel member was on holiday. Surprisingly I was told I had made it through to the next round on 13 February 2020 which made me question whether there was unanimous scoring (given the absence of one panel member) and whether I was being subjected to 'tokenism.'

I also question this in correlation with internal policy regarding the endeavor to have at least one BAME representative candidate within a BBC recruitment process. I believe I was the only BAME candidate that made it through to the second round. There were five candidates that made it through for the two vacancies. Despite the skills I demonstrated to secure my current role I seem to have performed poorly in those areas when applying for a Band E role. This is despite the overlap of the skill-

set required for both the Band D and Band E roles and that my competency in my Band D role has never been questioned.

I understand that I was ranked 4th out of the 5 second round candidates. I am unclear how I could be considered a 'strong candidate' but then be ranked 4th out of 5 people applying for the role. I am concerned that my scoring was suppressed to avoid the need for me to be considered for the vacancies. I understand that had I ranked 3rd out of the candidates, BBC would have had a duty, by way of its positive action obligation, to place me in the role. This requires further explanation and exploration.

I received an automated rejection on 5 March 2020 despite the interview having taken place on 20 February 2020. I would like clarity as to what precipitated the delay between the interview and the outcome? I was told that there would be a 'wash up' session after the interview and would have expected an outcome more quickly. I have also been rejected, I understand, before formal offers have been made to the successful candidates.

Interview panel

I draw your attention to the fact that the interview panel constituted three individuals, all of whom are white British females. This does not correlate with recommendation 3 from the Report (see above) and forces me to pose the question about the lack of BAME representation on the interview panel and consequentially the likelihood of unconscious bias in the decision making process and a lack of BAME perspective.

I question why the makeup of the panel did not encapsulate the BBC's own recommendations with the aim being to diversify its workforce at a senior level. I see that the ethnic makeup of the panel has disadvantaged my progression and that it would have been impossible for the panel to have considered the recruitment process from the perspective of a BAME candidate and without an element of unconscious bias. The viewpoint of the panel was imbalanced.

Since the outcome on 5 March I have repeatedly engaged with HR and raised my concerns about the lack of response to the questions I have posed around statistics for BAME representation at Senior Leadership level (Band E and higher) in Sport.

I sent emails on 5 and 6 March 2020 respectively to both Debbie Dubois and Rachel Wright requesting the hand written notes from the interview, but they did not reply. I found this disappointing given their seniority and the nature of my requests. I had members of the BECTU union chase this on my behalf two weeks later on three different occasions and we have yet not received these. The BBC has failed to deal with my request in accordance with the 30 day statutory timeframe. I am told that the notes will not make sense without the feedback. Irrespective, it is data within which where I am the data subject and therefore I am entitled to have a copy.

I have also been chasing the notes and scoring from my interview which have yet to be provided. I am told that one set of notes is currently inaccessible because of the 'lockdown.'

The other notes are at home with two panel members. I find this disappointing and disconcerting as:

a) I made the initial request before people were permanently asked to work from home;

b) I also have concerns as to the location of my data and whether this is being held securely and in accordance with the BBC's data protection/GDPR policy.

Feedback

By way of feedback from the interview (7 April 2020) I have been told that I lacked 'soft skills' and that my answers did not demonstrate wider strategy across the BBC. I find this bemusing given that the suggestions I gave, as part of my interview did not apply to Sport alone but across the BBC. I have also have extensive experience gained prior to joining the BBC.

I was also told that I was marked down on my presentation as it exceeded the 15 minute time limit. I find this troubling as, at the outset of the interview I asked for a 'heads up' when the time was coming to an end. I was told not to worry and that I could take up to 25 minutes. I therefore took advantage of the leeway I had been afforded which has now been used against me. Interestingly one of the interview questions was regarding my strategy for improving diversity.

During the feedback session I asked how diversity had improved by way of this recruitment process and was told it did not have any bearing on the feedback conversation. I was keen (and remain keen) to understand if the successful applicants happened to be a BAME candidate in line with the BBC's own projections to increase its internal ethnic diversification.

I therefore require further insight and clarity as to where my pan-BBC strategy was lacking especially given my current perspective derived from my Band D role. I have challenged this already and have been provided with vague, undefined and unsatisfactory responses. Of course, I want to use the feedback proactively to improve myself and progress. I cannot do this on the basis of the information I have received and I do not want to be restricted from progressing from within the BBC.

I am still unclear as to how my responses to the 'strength-based' questions were scored alongside the subjective nature of a 'soft skill.' The nature of the strength-based questions were such that I was able to engage and enrich my answers with focused examples. I would like to understand what the BBC's expectation is in respect of a response to this type of questioning and how subjectivity is avoided? I understand that the strength based questions are designed by an external agency, CAPP and are marked out of 50. What steps does the BBC take to ensure that these questions are designed without risk of infiltration of unconscious bias and in turn, that this does not form part of the recruitment process and associated outcome?

215. On 29 April 2020, the claimant submitted a Data Subject Access Request to HR:

I, Malika Keswani, Staff number 560731 would like to access all personal data the organisation holds on/against me which I am entitled to receive under data protection law, held in my personnel HR file;

Emails exchanged referencing my name, my initials, staff number, the letters ITV and Daytime regarding the recruitment and selection activity for the role of Production Executive, BBC Sport between the dates of 1st January 2020 to date.

Emails with references made to my original recruitment from ITV into the organisation between 1st March 2019- 30th June 2019 referencing my name, my initials, staff number and the letters ITV and Daytime

Emails exchanged referencing my name, my initials, staff number and the letters ITV and Daytime, during my probationary period from 24th June 2019 to 24th December 2019

216. Between 2 and 4 May 2020 there was correspondence about where within the respondent the claimant's grievance should be dealt with. Initially the view was that it should be passed to Sport but it was then decided that the Support at Work ('SAW') team would be appropriate. The Support at Work team was more specialist and tended to handle more complex matters. Ms Hunt passed it to the SAW team and it was then picked up by Ms F McLeod in that team after she returned to work on 12 May 2020 following a Bank Holiday weekend

217. On 5 May 2020, the Information Rights Team wrote to the claimant acknowledging the DSAR and asking for further information:

It would be helpful if you could name individuals who we could search for your data in regards to your following requests:

Emails exchanged referencing my name, my initials, staff number, the letters ITV and Daytime regarding the recruitment and selection activity for the role of Production Executive, BBC Sport between the dates of 1st January 2020 to date. The name of the staff member in BBC resourcing, who dealt with this role and the hiring manager?

Emails with references made to my original recruitment from ITV into the organisation between 1st March 2019— 30th June 2019 referencing my name, my Initials, staff number and the letters ITV and Daytime. The name of the staff member in BBC resourcing who dealt with this role and the hiring manager

Emails exchanged referencing my name, my initials, staff number and the letters ITV and Daytime, during my probationary period from 24th June 2019 to 24th December 2019. The name of the staff member or manager we should go to? It would be helpful if you could list your role and what team you were in.

218. The evidence of Ms Stephens about DSAR processing at this time was that a recruitment freeze had been imposed due to the pandemic which delayed planned recruitment to Information Rights Team to assist with the workload. The advisor appointed to deal with the claimant's DSAR had several voluminous DSARs prior to claimant's DSAR being assigned.

219. On 6 May 2020, Ms Wright and Ms Dubois wrote to Ms Walsh attaching the claimant's interview notes and scoring grid, which were forwarded to the claimant the same day

220. The claimant replied to the Information Rights team:

This has been my substantive role since I have started at the organisation.

My request with regard to the below has been tailored with the parameters of timeframes listed. I cannot identify specific individuals as it could have been a number of people who who may have discussed me in relation to the points highlighted in red below and processed my personal data in connection with the key

words & timeframes listed. Some of the data will be held in the form of archived, deleted, sent and received emails and word-processed documents. Presumably these can be identified through the use of search tools.

The search words in line with my request are:

- *My Name- Malika Keswani*
- *My Role - Production Manager, Persian Service, World Service, BBC*
- *My Initials- MK*
- *My Nickname- Mal*
- *My Staff Number- 560731*
- *Key words - ITV, Daytime & Loose Women (This is where I was employed before I started at the BBC and so there could have been references made about me using these words)*

In relation to the words mentioned above, I would like to understand how I was discussed and with whom?

I would also like to know if there were any emails exchanged about me with a 3rd party organisation/individual outside the BBC.

221. We note that the claimant expanded the request but did not provide further information which had been asked for to help process the request. In particular she did not name staff members or managers as requested.

222. Between 11 and 12 May 2020, there were emails between the claimant and Ms. Lavender regarding mentoring/shadowing and arranging Zoom meetings. Ms Lavender said:

I have been thinking about how I can help you with Mentoring. and was going propose we set up some structured meetings to talk about your goals in more detail, and think about some steps to get there. It looks as if wfh is going to continue for the foreseeable, so it's most likely they would be SKYPE or ZOOM meetings, so shall we have a start up call to talk about the structure of those meetings and timings. How does that sound?

223. On 13 May 2020, Ms McLeod allocated the claimant's grievance to another member of the SAW team, Ms Toor, and telephoned Mr Bowman, appointing him as the grievance manager. Ms McLeod was in charge of allocating cases. She selected Mr Bowman from a pool of hearing managers. At the time Ms Toor was working with Mr Bowman on another case which was being finalised

224. On 14 May 2020, the claimant had a telephone discussion with Ms Lavender and the two exchanged follow up emails. Ms Lavender wrote:

Our plan is to meet fortnightly starting from next Thursday 21st May for 6 weeks.

Our conversation is confidential

You are going to have a think about (a) what end goal do you want to set yourself in these sessions? and (b) what two or three specific areas that you want to focus on to develop to get there.

225. On 15 May 2020 Ms Toor contacted the claimant, saying she had been appointed HR case manager for the claimant's grievance.

226. On 19 May 2020, the claimant sent a long email to Ms Lavender. She said:
- Ahead of our first session on Thursday this week, I have had a think about our conversation and the points listed in your email in terms of what I would like to achieve through mentoring. I just wanted to confirm that my mentoring will be in line with the BBC mentoring guide on the gateway (link below) as I want to ensure I am being offered the same support as may be afforded to others across the BBC.*
227. She went on to set out what she hoped to achieve from mentoring and said:
- In order to gain a deeper understanding of mentoring at the BBC and having looked up the mentoring guide as referenced earlier in the email, I understand that mentorship usually runs for a period of 6-9 months and therefore I query the suggestion of a 6 week timeframe as this does not seem realistic in terms of us working together to achieve the goals mentioned.*
- Are we able to work towards the above on a 9 month time frame as we continue to emerge from the lockdown where during this period you could set up a practical task(s) for me to complete and review which would then mean we can make the most of the mentoring.*
228. The claimant was referring to the Mentor Connections guide.
229. The claimant's evidence to the Tribunal was that she attended the first session with Ms Lavender expecting a minimum of six months mentoring and that suddenly changed to being only six weeks. Her case was that this was a result of her bringing a grievance. She said that someone could not be developed in less than six months of mentoring.
230. The claimant and Ms Lavender had not been matched for a formal mentoring relationship via Mentor Connections and we had no evidence to suggest that Ms Lavender held herself out as a mentor on Mentor Connections.
231. Ms Mishcon told the Tribunal that she did not tell Ms Lavender about the claimant's grievance. We accepted that evidence. Ms Mishcon is a senior manager who would have been well aware of issues around confidentiality. We could see no motive for her to tell Ms Lavender about the claimant's grievance.
232. On 20 May 2020 Mr Bowman wrote to Ms Toor about the grievance they had been working on together and said in relation to the claimant's grievance:
- I will take on the next one but I don't have any time to look at it for at least a couple of weeks*
233. On 21 May 2020, Ms Lavender wrote to the claimant:
- Thank you for clarifying what you want to achieve via Mentoring - I think it is an opportune moment for us both to reflect on this.*
- As you rightly imply the kind of mentoring commitment you require to achieve your long term goals is beyond what we have discussed and that I am able to provide, so whilst I wish it were otherwise is, it is unfortunately likely to remain so. As I committed to in our first exchanges by email and in conversation I am entirely happy to continue to offer you a few conversations and insights into the role of Production Executive to give you a greater understanding of the role but it sounds as if you would be better*

suited to a formal mentor. That is of course entirely your decision to make leave it with you to decide what you would like to do.

234. On 22 May 2020 Mr Bowman wrote to Ms Toor about the claimant's grievance:
- On to the next one!*
- I haven't looked at the new paperwork — but I will have a read next week.*
235. The claimant complains about the delays in hearing her grievance. She said that the respondent should have appointed someone who had time to hear her grievance and should have had capacity to appoint someone who had time.
236. Mr Bowman's evidence was that when he accepts a grievance case, he does not know the details of the case. When he accepted the claimant's case, he would not have been aware of what she had said about her ACAS deadline.
237. He told the Tribunal about the effects of the pandemic and lockdown on his ability to progress the grievance quickly. He described it as the most intense period of his working life. His core job was as editor of Radio Merseyside. He had to look after the core output, health and safety of the building and of seventy staff, under the shadow of a massive public service remit at a time when people were turning to local radio. He had to work on the safety of the building – cleaning and temperature testing, one way signage and so forth. When the claimant's grievance landed on his desk, no one knew how long the situation would go on for. He took the grievance on because he thought he had time for it.
238. Ms Toor gave some evidence on the time taken by other grievances. She said that 3.5 weeks from allocation to a hearing date (as in the claimant's case) was fairly normal and gave examples of two white males where there were delays of eight and nearly seven weeks in reaching a hearing.
239. On 22 May 2020, Ms Mishcon received a notice from the Mentor Connections platform that the claimant had requested her as a mentor. The claimant said that she had selected Ms Mishcon as no one else with a production management background came up on her search on the platform. Ms Mishcon initially responded in error accepting the invitation on 26 May 2020, but she then declined the relationship, explaining to the claimant that she had accidentally accepted the relationship but that it would not be appropriate for her to mentor the claimant given that she was the claimant's ultimate line manager.
240. Ms Mishcon told the Tribunal that it was her experience that the mentoring relationship could include conversations about relationships with line managers and career advice which crossed boundaries of confidentiality. Having a mentor with whom the person mentored did not have an existing professional relationship allowed for greater objectivity on the part of the mentor.
241. On 26 May 2020, Ms Toor sent the claimant a grievance hearing letter inviting her to a grievance hearing on either 8 or 10 June 2020.
242. There were also emails that day from the Information Rights team to various individuals seeking information as to who should be contacted to provide information for the claimant's DSAR, for example, as to who was the resourcing advisor dealing with recruitment for BBC Sport.

243. On 27 May 2020, the claimant responded to Ms Toor's invitation to a grievance hearing:

Thank you for the invite to the hearing I confirm 8 June 2020 works best for me.

I wanted to take this opportunity to address a couple of issues:

- 1. I am not comfortable with bringing a work colleague with me to the hearing. This matter is extremely sensitive and I have not disclosed it to any one at work;*
- 2. I have not been a Union member long enough to afford their full support without financial outlay. I would like to ask the BBC to exercise its discretion and allow me to have a legal representative accompany me, in the circumstances;*
- 3. Can you confirm if the BBC will allow for the grievance hearing to be recorded to enable a full note to be taken?*
- 4. I am disappointed that it has taken the BBC so long to schedule the grievance meeting and there will have been a time elapse of 6 weeks from raising the grievance to holding the meeting;*
- 5. I will have to commence the Early Conciliation process with Acas in advance of the meeting given the time elapse.*

I also wanted address the remit of my grievance and note you have made reference to my grievance being raised against three individuals, Debbie Dubois, Rachel Wright and Mel Adams. These individuals constituted the panel that interviewed me for the Band E role that I was unsuccessful in. My grievance, in actual fact is against the BBC as a whole, not simply those named individuals. My grievance raises issues and concerns about the implementation and execution of pan-BBC policies that seek to put BAME candidates at a disadvantage. I would appreciate if this is made clear to Mr Bowman ahead of the grievance meeting.

244. On 29 May 2020, the claimant complained to the ICO about the respondent's delay in responding to her DSAR.
245. On that day, Ms Adams sent the documents she did have (emails and the claimant's application form) to HR for the purposes of the DSAR. She explained that her interview notes were inaccessible to her in a locked drawer in the office.
246. Ms Toor wrote to the claimant that same day explaining why she could not bring a legal representative to the hearing. She explained why the grievance had taken the amount of time it had and that there would be a notetaker at the hearing. She also made enquiries with her manager about the claimant's suggestion that her grievance was against the organisation as a whole and was advised that all grievances had to be against individuals. She passed on that information to the claimant and there was further correspondence with the claimant about that issue. On 4 June 2020, Ms Toor said in an email to the claimant that she was entitled to raise any concerns she had at work through the grievance.
247. On 3 June 2020, the claimant emailed Ms Gauba:

Apologies for today but I haven't been feeling too well all night and have been up since 3 am feeling nauseous with heart burns and abdominal cramps. I think its acidity so I've taken some medication this morning to get some relief but having hardly slept, I won't be on emails today as I'm feeling very sick

I will catch up with you re the below at our catch up next week after A/L

248. The claimant was due to be on annual leave until 10 June 2020.
249. We saw emails between 3 and 8 June 2020 between Ms Eden-Russell and the DSAR team in which Ms Eden-Russell was assisting the DSAR team with finding relevant data on recruitment exercises the claimant had taken part in.
250. On 5 June 2020, the claimant was advised that the respondent was treating her request as a complex DSAR and extending the time frame to two months, ie to 29 July 2020. We were told that the DSAR was classified as complex as it involved data held by a number of different departments and by a separate data controller, BBC Studios.
251. The Information Rights Adviser approached the following for data:
- Human Resources
Resourcing and Talent, including Resourcing and Talent News
Sports – Resourcing
The Resourcing team at BBC Studios.
252. On 8 June 2020, the claimant sent Ms Toor a document containing her desired resolutions from the grievance process. These were:
- a. to be placed into a Production Executive role;*
 - b. to be assigned a formal mentor;*
 - c. to receive an endorsement letter from her senior line management and be placed on an apprenticeship scheme for team leaders;*
 - d. to be put forward as a BAME panel member for interviews;*
 - e. to have a review of the policy that ensures shortlists for all jobs at Band E and above include at least one BAME person;*
 - f. a review of the feedback process;*
 - g. for PDRs to be implemented with realistic goals assigned;*
 - h. for the BBC as an organisation to answer how they will tackle unconscious bias given her opinion of the training already provided not working; and*
 - i. for the BBC to implement policies to dramatically increase representation of BAME staff.*
253. The claimant's grievance hearing was held with Ms Toor and Mr Bowman. The claimant described her 'main concern' as being the lack of BAME representation on the interview panels. The claimant said that she felt the reference in the feedback to 'soft skills' related to her body language, accent and personalit':
- They didn't say those things, but that is what is in the feedback document: "Clarity of message and adapting your style to suit different people". My style is made of my personality and body language, so it came across as if that was the problem. Is it my accent? I do have an accent, but that's what makes me authentic. That's what makes me, me.*

254. She did not allege that the panel had laughed at or mocked her accent.
255. Also on 8 June 2020, the claimant wrote to Ms Lotfi to tell her, as head of service, that she had raised a grievance about discrimination. She asked Ms Lotfi to keep it confidential and Ms Lotfi confirmed that she would. The claimant accepted that Ms Lotfi had kept the grievance confidential.
256. On 9 June 2020, the claimant wrote to Ms Gauba confirming she was signed off from work and attaching a fit note which said that the claimant was suffering from anxiety disorder:
- I am writing to confirm that I have been signed off unfit for work until 9th July 2020. I have been suffering with anxiety and associated palpitations which has increased significantly since the flawed recruitment process for the Band E Production Executive role and the associated outcome.*
- I am sure you can appreciate that it hasn't been easy for me to disclose this and while I have tried to cope on my own with meditation and various breathing exercises it is now getting even harder and the past few days in particular have been the hardest resulting in me seeking counselling at the earliest possible opportunity through the NHS.*
- I hope you will be understanding towards the situation and will keep the matter confidential with the exception of keeping Rozita informed as the Head of the Service.*
257. Ms Gauba replied encouraging the claimant to give her a call any time and suggesting that the Employee Assistance Programme was a good resource if the claimant had not received counselling from the NHS. Thereafter, Ms Gauba, as the claimant's immediate line manager, was the person from her line management chain who maintained regular contact with the claimant about her welfare. We saw further supportive messages from Ms Gauba on 3 July 2020, 7 July 2020, 19 July 2020, 3 August 2020, 11 and 12 August 2020 and 6 October 2020. The two texted and spoke on the phone in a friendly way throughout the period of the claimant's absence.
258. On 11 June 2020, Ms Toor sent the claimant the grievance hearing minutes to review.
259. Ms Toor was then on emergency leave between 13 and 29 June 2020. The claimant sent the amended notes to Ms Toor on 15 June 2020.
260. On 16 June 2020, the claimant was sent a letter about the outcome of the mapping exercise; her role was unchanged as a result of the exercise.
261. On 23 June 2020, Ms O'Sullivan in the SAW team was asked to take over the claimant's grievance due to Ms Toor's absence on emergency leave. When Ms Toor returned on 29 June 2020, Ms O'Sullivan retained the grievance as she had better capacity and Ms Toor handed over the relevant documents to transfer the case permanently. Ms O'Sullivan contacted Ms Dubois and Ms Wright for information on 30 June 2020, including interview notes and scoring sheets. She also contacted Ms Hearn so that Ms Adams could be briefed that a grievance had been brought against her. She wrote to the claimant to say that she had taken over as grievance case manager.

262. On 3 July 2020, Ms O’Sullivan requested scoring grids from Ms Adams and Ms Adams explained that they were kept locked in a drawer in the office and she had not been in the office since 12 March 2020.
263. On 6 July 2020, Ms Dubois and Ms Wright sent Ms O’Sullivan the interview notes and scoring grids for all candidates for the production executive role. The claimant wrote to Ms Gauba confirming that she remained unwell and attaching a sick note covering 6 July – 10 August 2020. The fit note again said the claimant was suffering from anxiety disorder.
- Further to my follow up appointment and assessment today, this is to inform you that I remain unwell and under treatment.*
- Please see attached an extended sick note from the GP.*
- I look forward to returning to work feeling well and better in due course.*
264. On 15 July 2020, Mr Bowman and Ms O’Sullivan held a grievance meeting with Ms Dubois. Ms O’Sullivan said that Ms Dubois’ account in the meeting was consistent with her notes and those of Ms Wright. They had been asked not to speak with Ms Adams for reasons due to her health. They decided only to speak to her if there was a point of doubt or discrepancy. They considered there was no such doubt or discrepancy so on balance they decided they did not need to speak to her. They decided they did not need to speak to Ms Wright as they had her notes and nothing Ms Dubois had said caused concern or seemed to require double checking.
265. Ms O’Sullivan spoke separately to Ms Gauba about the claimant’s probationary period and PDR, which the claimant had raised concerns about. Ms Gauba said that the claimant had not had a probationary review as there were no performance concerns and explained that she had been waiting for the claimant’s objectives to proceed with her PDR.
266. On 16 July 2020, the claimant chased Ms O’Sullivan for a grievance outcome and was told that she should receive the outcome by 24 July 2020.
267. On 17 July 2020 Mr Bowman wrote to Ms Wayland, head of creative diversity, asking if there was anything on the claimant’s resolutions list which Ms Wayland could assist with. That day Ms O’Sullivan sent Mr Bowman a template outcome letter with some factual information included to help speed up the process of completing the grievance. Ms O’Sullivan was also making enquiries as to how to contact Ms Ashton, who had left the organisation by that point.
268. On 21 July 2020, Ms O’Sullivan received the interview panel’s training records.
269. On 22 July 2020, Ms O’Sullivan told the claimant that the outcome would not be issued on 24 July as there was ‘a further point of clarification required’. Mr Bowman and Ms O’Sullivan met with Ms Hearn, HR director – Resourcing and Talent, that day and asked questions including about whether there was a requirement to have a BAME interviewer on panels and whether there was a requirement to offer a role to a BAME candidate if that candidate was placed third. Ms Hearn said that it was not mandatory to have a BAME interviewer and that it would be unlawful to appoint a BAME candidate who had placed third. She also explained why strengths based questioning had been introduced: ‘It was launched in 2018, there has been a push towards diversity and inclusion and that wider talent pool decisions are based not on what people can evidence but what they have potential to do.’

270. Ms Hearn also sent an email to Ms O'Sullivan with more detailed information about interview champions and blended interviews:

An Interview Champion is someone who is trained on Blended Interviews—so they understand the new interviewing framework and how to support Diversity & Inclusion. They are there to be part of an interview panel and add value in understanding the framework and bring diversity of thinking from a social and cultural background, representing our entire workforce - not just the hierarchal interview where it is a line manager interviewing with another colleague - they are there to bring a different perspective. It is not a BAME initiative and we don't put panels together based on protected characteristics.

The one thing we have said about interview panels is that wherever possible they will not be male only. That was a statement the DG made in 2018. Other than that the make [up] of the panel will vary depending on various requirements. We do not mandate the make-up of a panel as we are working to inclusive hiring.

271. On 29 and 30 July 2020, Ms Dubois and Ms O'Sullivan finalised the notes of Ms Dubois' meeting. Also on 30 July 2020, Ms O'Sullivan spoke with Ms Ashton about the claimant's grievance. Ms O'Sullivan made a note of the conversation:

Malika has copied Jennifer into emails to the Head of Recruitment for Sport. She could tell from the tone of the emails that Malika was upset and called her despite being on leave. Jennifer had a good relationship with Malika although wasn't aware she had applied for another position.

During the call Malika explained that she did not get the role and was asking for feedback but it hadn't been provided. Malika was frustrated and said she wanted to submit a grievance. Jennifer explained on her return from leave she would pick it up with recruitment in terms of getting feedback and understanding the situation.

On her return Jennifer spoke to a person (no name given) in recruitment for at least 30 mins and asked for the interview notes which hadn't been sent to Malika, she talked through the process and that Malika had asked for diversity stats for Sport and had complained about the diversity of the interview panel.

Recruitment explained that Malika had already had two feedback sessions. That as we were in lockdown there was no access to written notes, however Malika had asked before lockdown.

Malika felt this was just about someone's diversity and expressed to Jennifer that because there was one BAME person applying for a Band E she was only put through because of that. Jennifer explained she had a good relationship with recruitment and after the conversation did not believe Malika had been treated unfairly and communicated this to her.

Jennifer explained Malika was upset, Jennifer did not say a black mark would be put against Malika's names but said Malika needed to "think about what you want to achieve from the grievance as she wasn't going to have a role created"

She was asking questions about the diversity of Sport which Jennifer felt should have been raised before the interview.

Jennifer felt that there had been a fair process and said to Malika her view that she was a token BAME person was not a fair reflection, the panel could not have

shortlisted her but they did. If they hadn't wanted Malika they would not have put her through to the second stage.

Malika was clear she wanted to raised a grievance, Jennifer said it "has no bearing on me" they had a good relationship and got on well, Jennifer said she met with Malika and advised her she didn't feel this was the right approach, Malika had not got a job, she should take onboard the feedback and act upon. Jennifer felt that Malika was not listening to the feedback given and encouraged her to self reflect.

Jennifer acknowledges she did say grievance take time, but also asked Malika to consider the emotional impact

Jennifer explained Malika felt she had been promised she would be promoted in the BBC and Jennifer had to explain that it doesn't work like that, sometimes you can't apply for a job in the first 6 months of employment. That it wasn't automatic that you would get a higher job and that naturally the higher up you go the more competitive it is. Jennifer reiterated her advice to Malika was to work on the feedback given and move yourself forward. Malika wasn't happy with the conversation, but it was her decision what she wanted to do.

272. On 10 August 2020, the claimant emailed Ms Gauba:

Further to my follow up appointment and assessment, this is to inform you that I remain under treatment.

As a further update, the NHS have been in-touch over the weekend and have confirmed that my CBT sessions will commence within the next 2 weeks. In terms of the duration of therapy and the number of sessions proposed, I will have further details after my first session so I will keep you informed accordingly.

273. The attached fit note said: 'anxiety disorder, on medication, seeking therapy'.

274. On 13 August 2020, the claimant's solicitor wrote to Ms O'Sullivan complaining about the delay in the grievance outcome. The claimant submitted her first claim form.

275. Also that day Ms Gauba discussed with the claimant a referral to occupational health. The claimant was due to return to work on 1 October 2020 and Ms Gauba said it was best practice to have an occupational health referral given the length of the absence. She started the process of the referral although the intention was for the appointment to take place later in September, closer to the date of the claimant's anticipated return to work.

276. On 18 August 2020, Ms O'Sullivan sent the claimant the grievance outcome. She told the Tribunal that there were still a few matters outstanding in the resolution document, including the response from Ms Wayland and also the statistics about BAME staff in Sport. As the substantive grievance could be dealt with, a decision was made not to delay the outcome further.

277. We considered that this was a thoughtful and carefully reasoned document. It started:

We talked about your grievance against the recruitment process for the role of Band E Production Executive, BBC Sport and I have summarised your grounds below:

- 1. BBC wide issues regarding recruitment of BAME candidates*
- 2. The recruitment process was allegedly not followed*

3. *The recruitment panel lacked a BAME panel member*
 4. *You disagree with the feedback provided*
 5. *You allege you were advised not to raise a grievance by Jennifer Ashton, HRBP*
278. Mr Bowman then set out who was spoken to and what documents were looked at and explained very clearly and concisely why each ground of the grievance was rejected.
279. On the issue of the make up of the panel, Mr Bowman said:
- I interviewed Catherine Hearne (HR Director Resourcing & Talent) and she confirmed that neither the BBC Recruitment Policy nor the BBC Diversity and Inclusion Policy contain a specific requirement to have a BAME panel member. Whilst the BBC strives for a diverse panel and, as you correctly state in your grievance, makes this recommendation, it is not always possible. I would also remind you that diversity is not just about visible differences in people; some protected characteristics, including sexual orientation, disability and sometimes race/ethnicity may be unseen.*
280. Mr Bowman addressed the claimant's complaint that her scoring must have been suppressed as she was said to have been a strong candidate but then scored fourth out of five in the second round: 'Following a review of the recruitment paperwork I am satisfied that your scoring was not 'supressed' and would note that you were ranked fourth out of five in the first round only.'
281. He also dealt in detail with what the claimant had said about her marks for the presentation:
- In relation to the presentation, Debbie Dubois advised all candidates were required to present ideas within a 15 minute slot. At the start of your presentation you were advised you had 15 minutes. Rather than focus on key areas, you ran through the document page by page. After 20 minutes you were asked to move on and focus on key areas; however you continued to present in the same manner for a further ten minutes.*
282. In respect of the statistics issue, he said:
- You have also raised that you have asked for statistics for BAME representation at leadership level in Sport but received no response. If this still remains outstanding, please can you let Kim Thompson and Angela Hunt know (their email address is anqelahunt.kimthompson@bbc.co.uk) and they can look into this.*
283. There was a passage of the outcome letter which Mr Bowman said contained errors: 'For reference, you were not the only BAME candidate to be successful in securing a second interview and you were advised as part of the feedback received you had ranked fourth out of five candidates put through to the second round.' He said that the letter should have said that the claimant was one of two BAME candidates in the first round of interviews and reflected that the claimant was fourth out of five candidates after the first round only.
284. Despite having rejected the grievance, he set out some recommendations:
- I note the list of resolutions suggested by you and I believe there are some positive steps that you can take to support your progression. The BBC offers several mentoring schemes, this is a link to the Gateway Page so that you can find out which might be the most appropriate for you to join. In particular I'd draw your attention to:*
- *RISE is open to all black, Asian, or other ethnic minority employees in grades 4—8.*

- *Sandy Chalmers Scheme is open to all women working in radio (this includes women who work in the nations and local radio, News and World Service) in grades 4-8.*
 - *As part of the investigation, Nayantara Gauba has acknowledged a probationary review did not take place as there were no concerns around your performance in the role. I understand that you did not raise any concerns about this at the time.*
 - *She has explained an initial Performance Development Review meeting did take place in October and again in December 2019. This was due to be completed on receipt of further clarification of Nayan's role, due to her managing two teams, along with details of the objectives set from your Leadership course. It is accepted this is yet to be concluded and I would encourage you and Nayan to set up a meeting to discuss this on your return to work.*
 - *Nayan is satisfied there have been fortnightly discussions with you and opportunities to discuss your performance regularly; however she would like to apologise if you have felt unsupported since she took up the role of line manager in August 2019.*
 - *In respect of 360 feedback this has been completed and returned to your coach.*
 - *In respect of 360 feedback this has been completed and returned to your coach.*
285. The claimant was critical of Mr Bowman directing her to the RISE scheme and the Sandy Chalmers scheme. She said that the former was defunct and the latter was for women in radio when she was in television. Mr Bowman said that he did not at the time know the future of the RISE scheme and, in respect of the Sandy Chalmers scheme, employees often had both sets of skills and moved between parts of the BBC. He knew someone who had benefited from that scheme and that was why he suggested it.
286. Mr Bowman gave evidence about whom he spoke to and why. He said that decisions were influenced by the need to deliver the investigation in a timely manner and be reasonable and proportionate. He made a decision not to interview Ms Wright because he had started with Ms Dubois and found no inconsistencies. He was aware how stressful these processes are as a mental health first aider. There was no allegation of laughing / mocking to investigate.
287. He said to the Tribunal:
- Despite some of the articles shared with the Tribunal, there is an acceptance that awareness and recognition of unconscious bias are key to tackling it, so I asked if there was awareness that unconscious bias could come in . What I found was that the blended process was intended to tackle unconscious bias and make people involved aware of it.*
288. Mr Bowman explained in detail how he looked for unconscious bias in the outcome – including looking for the ‘halo/horns’ effect, ‘group think’, and the concern that a panel could be looking for someone in their own image. He gave detailed evidence about how he scrutinised and analysed the information he had gathered.
289. On 20 August 2020, Ms Wayland belatedly replied to Mr Bowman’s email about the claimant’s resolutions. Mr Bowman had decided not to delay the outcome further by waiting for this material which did not go to the substance of the grievance.
290. On 3 September 2020, the claimant appealed the grievance outcome. She also wrote to the respondent’s Data Protection Enquiries email address about the delay in response to her DSAR. She referred to her grievance and said that she considered that the delay was an act of victimisation.

291. On 9 September 2020, the claimant emailed Ms Stephens, amongst others, about her DSAR, complaining about the delay in response. The email chain forwarded her 3 September 2020 email. This was Ms Stephens' first direct involvement with the claimant's DSAR. Ms Stephens could not recall whether she read the 3 September 2020 email in the chain but thought she had not.
291. She replied to the claimant that day: *I will discuss below with the Information Rights Team and come back to you with an update as soon as possible and no later than five working days.*
292. Ms Stephens contacted the Information Rights Team. She told the Tribunal that delays and failures to respond to email were not best practice but that this was not an isolated incident at the time. There were delays for individuals of different races, simply due to the lack of operational resources and the pandemic. Ms Stephens told the Tribunal that in September 2020, a member of the Information Rights team left and a large late DSAR that individual was handling from late 2019 was passed to the advisor dealing with the claimant's DSAR
293. That day, the Information Rights Team contacted further employees who were relevant to the DSAR ,setting a date of 15 September 2020 for a response. We saw numerous emails throughout September and into October 2020 in which it was apparent that Ms Stephens was working to ensure a response was produced to the claimant's DSAR as soon as was practicable.
294. On 10 September 2020, Ms Stephens received a letter from the ICO saying the respondent had failed to comply with timescales for the claimant's DSAR and saying that the claimant should be provided with an update within the next 14 days. The ICO said that it recognised the strain on resources created by the pandemic.
295. Ms Stephens notified the Information Rights Team of the complaint and that the ICO required the respondent to update the claimant within 14 days as to the status of her DSAR.
296. Also on 10 September 2020, Ms O'Sullivan wrote to the claimant to provide her with additional information received after her grievance outcome from Ms Wayland. She also attached the racial breakdown of the Sport leadership team which the claimant had requested.
297. Ms Stephens continued to chase the DSAR response. It appeared that there were three individuals still being chased for data. In one case, the individual was on sick leave but not identified as such as their out of office was not on; in two other cases, there were technical issues: documents which were either password protected or were archived and needed to be hydrated. Those technical issues only came to light when the Information Rights adviser tried to convert emails to pdf.
298. On 15 September 2020, Ms Ford wrote to the claimant offering her two dates for a grievance appeal hearing (22 or 23 September 2020) with Mr A Baxter, director of regulatory affairs. The claimant initially said that she was available for a hearing on 22 September 2020 but, on 16 September 2020, she wrote to Ms Ford objecting to Mr Baxter as the hearing manager, given that he was a qualified solicitor and she was not permitted to be accompanied by a legal representative.
299. On 17 September 2020, Ms Ford wrote back to say that, whilst Mr Baxter was a qualified solicitor, his role at the hearing was not to give the respondent legal advice

but to hear the claimant's grievance appeal. The claimant wrote again objecting to Mr Baxter. On 21 September 2020, Ms Ford wrote to the claimant saying that she was seeking a new hearing manager but that the date would have to be moved as there was insufficient time before the hearing for a new manager to conduct the case.

300. On 22 September 2020, there was an email from the Information Rights team to Ms Stephens confirming that all DSAR information had been received and redactions were required. Also that day Ms Gauba submitted the occupational health referral document for the claimant.

301. On 23 September 2020, Ms Stephens wrote to the ICO to explain the delays in the response to the claimant's DSAR:

As previously advised, the BBC has been impacted by the current pandemic situation in terms of resources and individuals ability to work from home and access systems.

I have discussed this SAR with the Information Rights Team and it would appear there was a delay in receiving the relevant information from other internal teams within the BBC due to these teams resources being stretched in the current environment.

The Information Rights Team have now received the relevant information which has been reviewed. It is currently being redacted and the bundle will then be further reviewed internally before being released to Ms Keswani.

302. On 24 September 2020, the claimant submitted to Ms Gauba and HR a sick note covering the period 24 September to 31 October 2020.

303. On 25 September 2020, Ms Ford told the claimant that Mr Paterson had been identified as the grievance appeal hearing manager and offered her two hearing dates, 29 or 30 September 2020. The claimant emailed back to say that she would like to attend on 30 September 2022:

I understand that in accordance with the BBC's Grievance Policy and the Acas Code of Practice I am entitled to be accompanied to the meeting by a work colleague or Trade Union representative. In the circumstances and the sensitive nature of my grievances, I am not comfortable bringing a work colleague. I have not been a member of the Union to benefit from the support of a companion to the hearing without financial outlay. As the BBC is aware I have an anxiety disorder which is the reason for my current absence on sick leave. On this basis and considering my condition would fall within the definition of a disability under section 6 Equality Act 2010 I would like to be accompanied to the meeting by my former GP, Dr Lawrence Buckman. Dr Buckman is aware of my long standing condition and has previously referred me for psychotherapy.

Having reviewed the Acas guidelines I understand my request to be a reasonable adjustment to accommodate my disability. Dr Buckman can attend as my companion to act as support understanding my condition whilst also maintaining confidentiality. My anxiety has exacerbated since raising the grievance (and the handling of the same) and has led to a referral for intense CBT therapy.

I therefore consider my request to be both reasonable and proportionate in the circumstances.

304. Ms Ford replied on 29 September 2020:

Thank you for your email dated Friday 25th September and thank you for confirming your attendance for the Appeal Hearing on Wednesday 30th September. In accordance with the BBC's Grievance Policy and the ACAS Code of Practice the employee does have the right to be accompanied in order to provide neutral support, this would be a work colleague or Trade Union representative. You have indicated that due to the sensitivity of your case you'd feel uncomfortable bringing a work colleague. With regards to having union representation you stated that you've not been a member of a union long enough for the required support to be given.

I am aware that you're currently on sick leave but would not be party to the reasoning for this being anxiety. This condition may fall under the definition of a disability under section 6 Equality Act 2010 and where reasonable adjustments may need to be made.

Thank you for making me aware of the reason for your absence which may require adjustments to be made. As case manager it is my responsibility to support you through this process and ensure that the Appeal hearing is conducted fairly. In order to do this we will need an Occupational Health referral, the purpose of which will be to seek advice on whether you are fit to participate in the appeal process and confirm what adjustments and support the business needs to take. In the absence of Occupational Health advice the right to be accompanied at the Appeal will extend to a work place colleague or trade union representative only as per the procedure.

I recognise that this is an unsettling time for you however if you are advising you are only able to attend with Dr Buckman as your companion we will have to put the Appeal Hearing of Wednesday 30th September 2020 on hold until Occupational Health guidance is sought.

305. The claimant responded that she had previously disclosed her anxiety to Ms O'Sullivan on 17 July 2020 and that she considered that this should have been on her case file. She said that she had an occupational health appointment the following day and that she was content for the appeal hearing to be postponed until the occupational health report had been provided. Ms Ford told the claimant she would try to set up the appeal hearing as soon as possible after the occupational health report was received.
306. Mr Paterson told the Tribunal that the policy as to accompaniment would only be waived in special circumstances, but that an exception would be made if required as a reasonable adjustment.
307. On 30 September 2020, Ms Adams sent the claimant's interview materials to the Information Rights Team, having been into the office to collect them.
308. On 2 October 2020, the claimant was sent the response to her DSAR, a total of 222 pages.
309. On 5 October 2020, occupational health informed Ms Gauba that the claimant wished to see her report before it was disclosed to management and that it had been provided to the claimant that day. That same day Ms Ford informed the claimant that she would be on annual leave between 8 and 20 October 2020 and that if the occupational health report arrived in her absence, she would ask a colleague to arrange the appeal hearing for her return or as soon as possible after.

310. On 8 October 2020, the claimant's solicitor, Ms E McGlone, wrote to the data protection officer to say that the response to the DSAR was defective, setting out a long list of information which was allegedly missing.
311. In response, Ms Stephens arranged for an internal review of the DSAR, although she told the Tribunal there was no legal obligation on the respondent to conduct such a review. The respondent did not have a formal internal review process and dealt with them on a case by case basis, considering how the DSAR was handled and the initial response. Reviews were carried out by a solicitor in the Information Rights Team, under the oversight of Ms Stephens as data protection officer. In the case of the claimant's review, Ms Stephens allocated it to Ms I Jayaweera.
312. On 9 October 2020, occupational health sent Ms Gauba the claimant's medical report. Ms Gauba noted that there was material in the report which was unrelated to the referral she had made (the questions relating to the grievance appeal) and she sought HR advice about who had asked those questions. She also sought advice as to what next steps should be now she had the report.
313. The report was sent to Ms Ford and Ms O'Sullivan on 14 October 2020; Ms Ford was then on leave but due to return on 20 October 2020. Ms O'Sullivan concluded that as Ms Ford was dealing with the case and would be back from leave relatively soon, Ms O'Sullivan would not herself deal with the issue about accompaniment at the appeal hearing. Relevant extracts from the report:

Ms Keswani gives a history of an anxiety disorder since 2012. She says she has been treated with a combination of medication and counselling right up until 2018. Thereafter she has been treated holistically and advised to take anti anxiety agents as and when required till 2019. She informs me that she started experiencing stress which was due to work related factors. She further informs me that In February she was verbally abused by a senior manager and that in March 2020 she had further stress which resulted from a recruitment process.

...

In my opinion presently Ms Keswani is not fit to return to work. You may kindly have a dialogue with her regarding her perceived work related stresses and arrange to expedite the appeals process. Once these are mitigated she is likely to have a good recovery.

She is fit to attend the appeals process provided she is allowed a representative as she desires to bring her GP along with her to the appeals process as the GP is aware of her problems. This would go a long way in allaying her anxiety during the process.

...

Her condition is likely to be covered by the disability provisions of the Equality Act 2010 however this is ultimately a legal decision.

314. On 15 October 2020 Ms Jayaweera wrote to Ms McGlone confirming that she was conducting an internal review of the DSAR and that a response would be provided within 28 days.
315. Also on 15 October Ms Gauba commenced a period of leave until 19 October 2020. When she returned on 19 October she was advised by Ms White to email Karen Peak in the Safety, Security and Resilience team of the respondent's medical unit for

advice on how she could assist and support the claimant, given the contents of the occupational health report.

316. On 19 October 2020, Ms Ford returned from annual leave and on 20 October she emailed the claimant to say that she had received the occupational health report, was going to review it, and would get back to her by the end of the week.

317. Less than twenty minutes later, on 20 October 2020, the claimant emailed Ms Mishcon saying that she was resigning with immediate effect, she said as a result of various issues including discrimination in the Sport recruitment process, the handling of her DSAR, issues with the grievance process and with mentoring. She said:

In respect of the outstanding appeal, in light of my resignation with immediate effect and on-going ill health I would be grateful if this could be dealt with via correspondence and I await receipt of the outcome in due course (and by 3 December in accordance with the Grievance Procedure). If I can input further into the appeal to facilitate the outcome please do contact me.

318. On 22 October 2020, Ms Ford wrote to the claimant:

Your Appeal will continue to be managed by myself as per our Appeals policy and I note you have requested the Appeal is conducted via correspondence.

Whilst we are happy to accommodate this opportunity of a meeting will remain available to you. Colin Paterson will continue to consider your appeal and respond accordingly.

She asked the claimant to send her any further information she wished to be considered as part of the appeal.

319. In evidence Ms Ford said that she assumed any such hearing would include the claimant's GP and that she was happy to make that adjustment. They would have had to investigate the practicalities but it would have been allowed if practicable.

320. The claimant wrote back to say that she would provide any further information by the date requested by Ms Ford. She did not mention attending an appeal hearing or any adjustments she required for such a hearing.

321. On 4 November 2020, Ms Jayaweera notified Ms Stephens that she would need an extension of time for her review as it would need to be considered by BBC Studios Chief Privacy Officer as well. On 5 November 2020, Ms Jayaweera corresponded with Ms McGlone about the extension of time.

322. On 11 November 2020, Mr Paterson met with Mr Bowman and Ms Wright about the claimant's grievance appeal. That day Ms Ford updated the claimant on the progress of her grievance appeal after a chaser by the claimant. She indicated that further updates would be provided fortnightly.

323. On 17 November 2020, Ms Jayaweera emailed Ms McGlone attaching the outcome of the DSAR review. She concluded that 'I am satisfied that the BBC carried out reasonable and proportionate searches and obtained information that matched the scope of your client's request, on an objective and reasonable interpretation of that request' and that additional material sought did not fall within the scope of the original request. She found that some of the redactions which had originally been made had redacted information to which the claimant was entitled and four matters were unredacted.

324. The claimant maintained in evidence that enquiries as to documents for the purposes of her DSAR should (and must) have been sent to those in her line management chain but it was clear from the evidence that this was not the approach taken.
325. Ms Stephens was cross examined about this matter. Ms Stephens said that the claimant did not provide the names of her line managers in response to the request for information. It was not the practice to try to deduce from the respondent's 'People View' online resource who an individual's line managers were as the information might be incorrect or out of date. The practice was to go to central HR for documents and ask the individual who submitted the DSAR about where to look. Otherwise individuals who were not involved might inadvertently be alerted to the DSAR,
326. On 25 November 2020, Ms Ford updated the claimant on the progress of her grievance. She provided a further update on 2 December 2020; she explained to the Tribunal that the reason for the delay in providing this update was that she had been in a road traffic accident the week before.
327. On 17 December 2020, Ms Ford sent the claimant the grievance appeal outcome. Mr Paterson did not uphold the appeal. He had read all of the original grievance documents and relevant BBC policies. Ms Ford had also interviewed Ms S Lloyd-Smith, HR specialist – central workforce diversity, and discussed the conversation she had with Ms Lloyd-Smith with Mr Paterson. He also looked at articles submitted by the claimant which raised allegations about the BBC being institutionally racist but said that he did not find the articles useful in considering the claimant's specific claims.
328. Mr Paterson reviewed Mr Bowman's process but also looked at the evidence afresh and concluded that the interview process had been fair and untainted by discrimination.
329. Mr Paterson considered the further issues that the claimant had raised on appeal in relation to her scoring, in particular that some of her first round marks had been changed, and concluded:
- Having now interviewed Rachel Wright from the Interview panel she has explained that the panel scored each candidate individually, Following the individual scoring, the panel came together to discuss the scoring and calibrate the scores based on their combined view of each of the candidates. This would be a standard part of any robust interview process. As Interview Champion, Mel Adams recorded the panel's agreed scores on the grid. I'm satisfied that your scoring was not suppressed in any way and that the process of scoring, and consensus was consistent with the BBC recruitment process.*
330. Mr Paterson dealt with the issue the claimant raised about her interview notes being removed from the office by Ms Adams as follows:
- With regards to your personal data being removed from the office, individuals involved in the selection process and who are now working from home have completed their mandatory training of BBC online Data Protection and Cyber Security Training. I therefore do not uphold this point of your appeal.*
331. In response to a complaint the claimant made about not receiving a grievance report, Mr Paterson said:
- With regards to your point on an investigation report and having a copy of this, no investigation report is created for a grievance process. This process involves the*

hearing manager having your hearing, then talking to or reviewing information based on the points you raised. The outcome of your grievance details everything that Andrew Bowman reviewed and concluded from his investigation as per your Grievance outcome letter sent on 18th August 2020.

332. In terms of the time taken to conclude the grievance appeal, Mr Paterson said he was on leave between 23 October and 2 November. He said that having an appeal hearing would have speeded up and simplified his investigation. He also gave evidence that his own increased workload during the pandemic had an effect on the time taken for the grievance appeal.
333. On 26 January 2021 Ms Jayaweera wrote to Ms McGlone in response to further correspondence from Ms McGlone, saying that it was open to the claimant to seek a further review by the ICO or to submit a further DSAR.
334. On 28 January 2021, the claimant submitted her second claim form, the first having been submitted on 13 August 2020.

Law

Direct race discrimination

335. In a direct discrimination case, where the treatment of which the claimant complains is not overtly because of the protected characteristic, the key question is the “reason why” the decision or action of the respondent was taken. This involves consideration of mental processes of the individual responsible; see for example the decision of the Employment Appeal Tribunal in Amnesty International v Ahmed [2009] IRLR 884 at paragraphs 31 to 37 and the authorities there discussed. The protected characteristic need not be the main reason for the treatment, so long as it is an ‘effective cause’: O’Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor [1996] IRLR 372.
336. This exercise must be approached in accordance with the burden of proof provisions applying to Equality Act claims. This is found in section 136: “(2) if there are facts from which the Court could decide, in the absence of any other explanation, that 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. “
337. Guidelines were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258 regarding the burden of proof (in the context of cases under the then Sex Discrimination Act 1975). They are as follows:
- (1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.*
- (2) If the claimant does not prove such facts he or she will fail.*

(3) *It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.*

(4) *In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.*

(5) *It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.*

(6) *In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.*

(7) *These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.*

(8) *Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.*

(9) *Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.*

(10) *It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.*

(11) *To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.*

(12) *That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.*

(13) *Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.*

338. We bear in mind the guidance of Lord Justice Mummery in Madarassy, where he stated: '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.' The 'something more' need not be a great deal; in some instances it may be furnished by the context in which the discriminatory act has allegedly occurred: Deman v Commission for Equality and Human Rights and ors 2010 EWCA Civ 1279, CA.
339. The tribunal cannot take into account the respondent's explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)
340. The distinction between explanations and the facts adduced which may form part of those explanations is not a watertight division: Laing v Manchester City Council and anor [2006] ICR 1519, EAT. The fact that inconsistent explanations are given for conduct may be taken into account in considering whether the burden has shifted; the substance and quality of those explanations are taken into account at the second stage: Veolia Environmental Services UK v Gumbs EAT 0487/12.
341. In Chief Constable of Kent Constabulary v Bowler EAT 0214/16, Mrs Justice Simler said: 'It is critical in discrimination cases that tribunals avoid a mechanistic approach to the drawing of inferences, which is simply part of the fact-finding process. All explanations identified in the evidence that might realistically explain the reason for the treatment by the alleged discriminator should be considered. These may be explanations relied on by the alleged discriminator, if accepted as genuine by a tribunal; or they may be explanations that arise from a tribunal's own findings.'
342. Although unreasonable treatment without more will not cause the burden of proof to shift (Glasgow City Council v Zafar [1998] ICR 120, HL), unexplained unreasonable treatment may: Bahl v Law Society [2003] IRLR 640, EAT.
343. We remind ourselves that it is important not to approach the burden of proof in a mechanistic way and that our focus must be on whether we can properly and fairly infer discrimination: Laing v Manchester City Council and anor [2006] ICR 1519, EAT. If we can make clear positive findings as to an employer's motivation, we need not revert to the burden of proof at all: Martin v Devonshires Solicitors [2011] ICR 352, EAT.

Harassment

344. Under s 26 Equality Act 2010, a person harasses a claimant if he or she engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of (i) violating the claimant's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. In deciding whether conduct has such an effect, each of the following must be taken into account: (a) the claimant's perception; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect.

345. By virtue of s 212, conduct which amounts to harassment cannot also be direct discrimination under s 13.
346. In Richmond Pharmacology Ltd v Dhaliwal [2012] IRLR 336, EAT, Underhill J gave this guidance in relation to harassment in the context of a race harassment claim:
- ‘an employer should not be held liable merely because his conduct has had the effect of producing a proscribed consequence. It should be reasonable that that consequence has occurred. The claimant must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created, but the tribunal is required to consider whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so.....Not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers and tribunals are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other discriminatory grounds) it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.’
347. An ‘environment’ may be created by a single incident, provided the effects are of sufficient duration: Weeks v Newham College of Further Education EAT 0630/11.

Victimisation

348. Under s 27 Equality Act 2010 a person victimises another person if they subject that person to a detriment because that person has done a protected act or the person doing the victimising believes that person has done or may do a protected act.
349. The definition of a protected act includes the making of an allegation that the person subsequently subjecting the claimant to a detriment (or another person) has contravened the Equality Act 2010 or done ‘any other thing for the purpose or in connection with’ the Equality Act.
350. A detriment is anything which an individual might reasonably consider changed their position for the worse or put them at a disadvantage. It could include a threat which the individual takes seriously and which it is reasonable for them to take seriously. An unjustified sense of grievance alone would not be sufficient to establish detriment: EHRG Employment Code, paras 9.8 and 9.9.
351. The protected act need not be the only or even the primary cause of the detriment, provided it is a significant factor: Pathan v South London Islamic Centre EAT 0312/13.
352. A claim for victimisation will fail where there are no clear circumstances from which knowledge of the protected act on the part of the alleged discriminator can properly be inferred: Essex County Council v Jarrett EAT 0045/15

Discrimination arising from disability

353. In a claim under s 15, a tribunal must consider:
- Whether the claimant has been treated unfavourably;
 - Whether the unfavourable treatment is because of something arising in consequence of the employee's disability;
 - Whether the employer knew, or could reasonably have been expected to know, that the employee or applicant had the disability relied on.
354. There are two aspects to causation:
- Considering what caused the unfavourable treatment. This involves focussing on the reason in the mind of the alleged discriminator;
 - Determining whether that reason was something arising in consequence of the claimant's disability. That is an objective question and does not involve consideration of the mental processes of the alleged discriminator: Pnaiser v NHS England and anor 2016 IRLR 170, EAT.
355. An employer has a defence to a claim under s 15 if it can show that the unfavourable treatment was a proportionate means of achieving a legitimate aim.
356. Assessing proportionality involves an objective balancing of the discriminatory effect of the treatment and the reasonable needs of the party responsible for the treatment: Hampson v Department of Education and Science [1989] ICR 179, CA.
357. If there is a link between reasonable adjustments said to be required and the disadvantages or detriments being considered in the context of indirect discrimination and/or discrimination arising from disability, any failure to comply with the reasonable adjustments duty must be considered 'as part of the balancing exercise in considering questions of justification': Dominique v Toll Global Forwarding Ltd EAT 0308/13. The EAT commented that it was difficult to see how a disadvantage which could have been alleviated by a reasonable adjustment could be justified.

Failure to comply with a duty to make reasonable adjustments

358. Under s 20 Equality Act 2010, read with schedule 8, an employer who applies a provision, criterion or practice ('PCP') to a disabled person which puts that disabled person at a substantial disadvantage in comparison with persons who are not disabled, is under a duty to take such steps as are reasonable to avoid that disadvantage. Section 21 provides that a failure to comply with a duty to make reasonable adjustments in respect of a disabled person is discrimination against that disabled person.
359. In considering a reasonable adjustments claim, a tribunal must consider:
- The PCP applied by or on behalf of the employer or the relevant physical feature of the premises occupied by the employer;
 - The identity of non-disabled comparators (where appropriate) and

- The nature and extent of the substantial disadvantage suffered by the claimant.
Environment Agency v Rowan [2008] ICR 218, EAT.
- 360. The concept of a PCP does not apply to every act of unfair treatment of a particular employee. A one-off decision can be a practice, but it is not necessarily one; all three words connote a state of affairs indicating how similar cases are generally treated or how a similar case would be treated if it occurred again: Ishola v Transport for London [2020] EWCA Civ 112.
- 361. A claimant bears the burden of establishing a prima facie case that the duty to make reasonable adjustments has arisen and that there are facts from which it could reasonably be inferred, in the absence of an explanation, that the duty has been breached. There must be evidence of some apparently reasonable adjustment which could be made, at least in broad terms. In some cases the proposed adjustment may not be identified until after the alleged failure to implement it and this may exceptionally be as late as the tribunal hearing itself: Project Management Institute v Latif [2007] IRLR 579, EAT. There is no specific burden of proof on the claimant to do more than raise the reasonable adjustments that he or she suggests should have been made: Jennings v Barts and the London NHS Trust EAT 0056/12. The burden then passes to the respondent to show that the disadvantage would not have been eliminated or reduced by the proposed adjustment and/or that the adjustment was not a reasonable one.
- 362. By section 212(1) Equality Act 2010, 'substantial' means 'more than minor or trivial'.
- 363. When considering what adjustments are reasonable, the focus is on the practical result of the measures that can be taken. The test of what is reasonable is an objective one: Smith v Churchills Stairlifts plc [2006] ICR 524, CA. The Tribunal is not concerned with the processes by which the employer reached its decision to make or not make particular adjustments nor with the employer's reasoning: Royal Bank of Scotland v Ashton [2011] ICR 632, EAT.
- 364. Carrying out an assessment or consulting an employee as to what adjustments might be required is not of itself a reasonable adjustment: Rider v Leeds City Council EAT 0243/11, Tarbuck v Sainsbury's Supermarkets Ltd 2006 IRLR 664, EAT.
- 365. Although the Equality Act 2010 does not set out a list of factors to be taken into account when determining whether it is reasonable for an employer to take a particular step, the factors previously set out in the Disability Discrimination Act 1995 are matters to which the Tribunal should have regard:
 - The extent to which taking the step would prevent the effect in relation to which the duty was imposed
 - The extent to which it was practicable for the employer to take the step
 - The financial and other costs that would be incurred by the employer in taking the step and the extent to which it would disrupt any of its activities
 - The extent of the employer's financial and other resources
 - The availability to the employer of financial or other assistance in respect of taking the step

- The nature of the employer's activities and the size of its undertaking
- Where the step would be taken in relation to a private household, the extent to which taking it would (i) disrupt that household or (ii) disturb any person residing there

This is not an exhaustive list.

Knowledge

366. An employer is not subject to a duty to make reasonable adjustments if it did not know or could not reasonably be expected to know:
- That the employee has a disability; and
 - That the employee is likely to be placed at a disadvantage by a PCP: Schedule 8, para 20(1)(b) Equality Act 2010.
367. An employer has a defence to a claim under s 15, if it did not know or could not reasonably have been expected to know of the employee's disability: s 15(2) Equality Act 2010.
368. Lack of knowledge that a disability caused the 'something arising in consequence' of which the employee was subjected to unfavourable treatment is not a defence to a claim under s 15: City of York Council v Grosset [2018] ICR 1492, CA.
369. An employer must do all it can reasonably be expected to do to find out whether an employee has a disability: EHRC Employment Code, para 5.15.

Indirect discrimination

370. By s 19(1) EqA 2010 a respondent discriminates against a claimant if it applies a provision, criterion or practice (PCP) which is discriminatory in relation to a relevant protected characteristic of the claimant's. By s 19(2) a PCP is discriminatory if: (a) the respondent applies, or would apply, it to persons with whom the claimant does not share the characteristic, (b) it puts, or would put, persons with whom the claimant shares the characteristic at a particular disadvantage when compared with person with whom the claimant does not share it, and (c) it puts, or would put, the claimant at that disadvantage. It is a defence (under s 19(2)(d)) for the respondent to show that the PCP is justified as a proportionate means of achieving a legitimate aim.
371. The burden of proof is on the claimant initially under s 136(1) EqA 2010 to establish facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent has acted unlawfully. In an indirect discrimination case, this means that the claimant must prove the application of the PCP, the particular disadvantage in comparison to others and that the claimant was put at that disadvantage. The burden then passes to the respondent under s 136(3) to show that the treatment was justified.
372. Further guidance on the matters which the claimant has to prove was given by the Supreme Court in *Essop v Home Office* [2017] UKSC 27, [2017] 1 WLR 1343. The Supreme Court held that the EqA 2010 s 19 did not require a claimant alleging indirect discrimination to prove the reason why a PCP put the affected group at a disadvantage. The causal link that must be established is between the PCP and the disadvantage. The proportion of those with the protected characteristic who can

comply with the PCP must be significantly smaller than the proportion of those without the protected characteristic. It does not matter, in this respect, that the PCP does not disadvantage all those who share the protected characteristic.

373. As to the question of justification, a respondent must normally produce cogent evidence of justification: see *Hockenjos v Secretary of State for Social Security* [2004] EWCA Civ 1749, [2005] IRLR 471. What needs to be justified is the rule itself (*Homer v Chief Constable of West Yorkshire Police* [2012] UKSC 15, [2012] ICR 704). The Tribunal must focus on the proportionality of having a rule at all, rather than the question of reasonableness of applying the rule to the particular claimant (*The City of Oxford Bus Services Limited t/a Oxford Bus Company v Mr L Harvey* UKEAT/0171/18/JOJ).
374. In *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 38, [2014] AC 700 the Supreme Court (see Lord Reed at para 74, with whom the other members of the Court agreed on this issue: see Lord Sumption, para 20) reviewed the domestic and European case law and reformulated the justification test as follows: (1) whether the objective of the PCP (the alleged legitimate aim) is sufficiently important to justify the limitation of a protected right, (2) whether the PCP is rationally connected to the objective, (3) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective, and (4) whether the impact of the right's infringement is disproportionate to the likely benefit of the PCP. (We have adjusted the language used by the Supreme Court to fit with that used in the EqA 2010.)
375. In other cases, the question of whether a particular aim is legitimate has been expressed as being whether it 'corresponds to a real need' of the employer: see *Bilka-Kaufhaus GmbH v Weber von Hartz* (case 170/84) [1984] IRLR 317. While a tribunal must take account of the reasonable needs of a respondent's business, it is for the tribunal to assess for itself both whether or not an aim is legitimate, and whether it is proportionate. It is not a 'range of reasonable responses' test: *Hardy and Hansons plc v Lax* [2005] IRLR 726, followed in *MacCulloch v Imperial Chemical Industries plc* [2008] ICR 1334 at paragraphs 10-12.

Submissions

376. We received detailed written and oral submissions from both parties and we considered these with care. We refer to them below insofar as is necessary to explain our conclusions.

Conclusions

Credibility and reliability

377. We found the following witnesses for the respondent particularly thoughtful, careful and clear in their evidence: Ms Dubois, Ms Ashton, Mr Bowman and Ms Stephens. We considered that all of the respondent's witnesses were candid with the Tribunal.
378. With respect to the claimant, we are always conscious of how stressful and difficult Tribunal proceedings are for a litigant in person and that passion about a case can sometimes result in cross examination of witnesses which may seem aggressive.

We were very conscious also that the claimant suffers from anxiety and that will have affected her engagement with the Tribunal and witnesses.

379. Nonetheless the claimant is a highly intelligent, articulate and educated witness and the Tribunal found itself having to intervene far more than was usual in the experience of any member of the Tribunal panel to stop the claimant from repeating questions in a way that could appear hectoring of witnesses, misrepresenting oral evidence to witnesses and misrepresenting the content of documents. She raised her voice with witnesses and her manner at times was badgering. That approach did not change over the days of the hearing. We are conscious that mental health problems present in different ways for different people and we are very familiar with litigants who get carried away, upset or angry and then subsequently recognise that has happened and explain and/or apologise for their behaviour.
380. Making all allowances for the claimant, given her status as a litigant in person and a person who suffers from anxiety, we nonetheless formed the view that she was not listening to the guidance we sought to give her and at times was deliberately not following our directions. She would simply carry on asking a question we had asked her not to repeat, fail to move on from matters which we had indicated were irrelevant or continue to ask portmanteau questions which witnesses could not be expected to answer. At no stage did she seek to apologise for any of this behaviour, Mr Randle had on occasion to object that witnesses were being intimidated and badgered, and, as we have said, the Tribunal found itself intervening far more often and more firmly than it usually would both to manage the proceedings so that the evidence could be heard within a proportionate amount of time and to ensure that witnesses were treated fairly.
381. The claimant's conduct of the hearing had some effect on our impression of her as a witness; in misreporting oral evidence, she was either seeking to mislead or, more likely in our view, had failed to listen properly or simply heard what she wanted to hear. Where there were different versions of particular conversations given by the claimant and other witnesses, that was a factor we had to weigh up. The claimant's failure to listen to the Tribunal also inevitably gave support to the suggestion by a number of the respondent's witnesses that she failed to listen on particular occasions or in particular contexts.

Direct Race Discrimination

Issue. Was the Claimant subject to less favourable treatment because of her race (Indian ethnic origin) contrary to ss. 13 EqA 2010 and 39 EqA?

4. Did the Respondent subject the Claimant to the following discriminatory acts/omissions:

(i) During the Claimant's second interview panellists mocking the Claimant's accent by inappropriately laughing at her even though there was nothing funny being discussed and the Claimant was solely answering interview questions.

5. Did the Respondent treat the Claimant as alleged, less favourably than it treated or would have treated an actual or hypothetical comparator? The Claimant relies on a hypothetical comparator.

6. *If so, can the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of her race?*

7. *If so, what is the Respondent's explanation? Can it prove a wholly non-discriminatory reason for any proven treatment?*

382. This allegation fails on our findings of fact above. We found that the panellists did not laugh at or mock the claimant's accent.

383. We did not uphold this claim.

Issue: (ii) Utilising subjective and/or biased criteria during the recruitment process, specifically reliance on 'soft skills' (as set out at paragraph 2 of Claimant's response to request for further and better particulars)

384. The claimant's case initially seemed to turn on the fact that there was a reference to 'soft skills' in the feedback she received (and in the notes of her first round interview). We found that the reference to soft skills related to question 9 in the first round interview. In relation to this question, the panel wanted candidates to mention how they would deal with the situation described by making use of 'soft skills'. The panel was not assessing how the candidate demonstrated soft skills in the interview itself.

385. The same issue was raised in feedback to non BAME candidates, which we saw from the notes of that feedback. The claimant was treated in the same way as other candidates in that she was expected to make some reference to these skills in order to achieve a high mark on this question. We could not see how that was 'subjective' or 'biased' and the treatment of all candidates was the same, irrespective of race.

386. An issue which arose during evidence was whether the strengths based questioning itself involved an assessment of 'soft skills' because the training material we saw made reference to non verbal communication and body language. That sort of assessment seemed to the Tribunal to be potentially fraught with difficulty, since, for example, body language may be influenced by a person's culture or indeed by the fact that the person is neurodiverse or has a mental health condition.

387. We were very conscious however, that we did not have a full account of the strengths based methodology from someone who was an expert on the approach, and we also noted that the training material indicated that body language and similar factors were to be judged against a baseline for the individual, rather than some more general standard.

388. Furthermore, in terms of a direct discrimination analysis, all candidates, regardless of race, were treated the same in terms of the method by which the strengths based questions were assessed. There was no difference in treatment on the evidence which we heard.

389. We did not uphold this claim.

Issue: (iii) Failing to select the Claimant for the Band E Production Executive role

390. In relation to this complaint, there was a difference in race and a difference in treatment. A white woman was selected for the role and the claimant was not.
391. We therefore looked carefully at whether there were facts from which we could reasonably conclude that the claimant's race played a role in her non selection.
392. We considered all of the contextual facts including the matters raised by the claimant in her further particulars which we consider in turn:

That as a result of the interview process and the ethnic makeup of the interview panel (which constituted three white women) she, as a BAME candidate was subjected to unconscious bias and was not afforded the benefit of a fair and balanced interview process;

393. So far as the make up of the panel was concerned, the Tribunal did not consider that an all white panel must inevitably be unconsciously biased against a BAME candidate or that any unconscious biases that panel might have would inevitably affect the scoring. What is true is that there is a risk of unconscious bias in any recruitment process, which a sensible employer conscious of its responsibilities under the Equality Act 2010 will take steps to mitigate. In this case the respondent provided training, including the training Ms Adams had as an interview champion, and used a blended interview process which was itself intended to address possible structural disadvantages. As Mr Bowman said to the Tribunal, being aware of the possibility of unconscious bias is an important factor in addressing it; all of the panel would have been aware of that possibility because of the training they had. Furthermore the blended interview process itself was deliberately structured to try and tackle unconscious bias. The CAPP training specifically refers to possible types of unconscious bias that might play a role and the real world examples provided in the training slides are some evidence that the system has an effect in addressing unconscious bias.
394. It seemed to the Tribunal that it would never be possible for any real world interview panel to represent all the possible protected characteristics a candidate might have, looking at the all the possible variables in relation to race, sex, religion, disability, sexual orientation and so forth. It nonetheless makes very good sense to strive for some diversity in relation to at least some of these characteristics. Experience of being in one disadvantaged group of itself may assist an interviewer in understanding disadvantage to other groups; although we of course accept that the experiences of different groups are not the same, the experience of being disadvantaged and of facing barriers based on a protected characteristic is a common feature. Taking steps to guard against bias, conscious or unconscious, in the process is another real world step an employer can take and we found the respondent did take this step.
395. This aspect of the process, taken with the difference in race and outcome did not of itself shift the burden, we considered.

The Respondent's reliance on "soft skills" was prone to unconscious bias and constituted further disadvantage to the Claimant as a BAME candidate;

396. We have considered above what we understood to have been the role of 'soft skills' in the process. We were not able to conclude that the CAPP strengths based assessment method was 'prone to unconscious bias' in circumstances where the evidence provided by CAPP was that use of the method by clients had had positive effects on racial and other kinds of diversity.
397. So far as the assessment of body language and other features of presentation is concerned, the claimant did not point to any feature of her own body language or presentation which was culturally or racially specific save for accent. We were entirely satisfied by the evidence for the respondent, which was consistent with the material we saw on the CAPP training, that accent played no part in the assessment.

There are no BAME employees within Senior Leadership (Production Management) in Sport despite the Production Executive role having been advertised three times in the last five years since 2015. The Claimant was further disadvantaged by the Respondent's failure to ever recruit BAME candidates into senior roles within Sport;

398. The data / statistics we were provided with were that three out of 16 individuals at Band F in Sport were BAME; that is approximately 18%. The statistics overall for leadership in Sport showed that the numbers were not improving as quickly as the respondent's target. We consider what role the statistics played in our overall consideration of this complaint below.

The Respondent's failure to apply its own recruitment related policy has led the Claimant to suffer the very disadvantage that the policy seeks to avoid;

399. The claimant considered that the recruitment policy required that the panel include a BAME member. We considered that this was a misreading of the part of the policy which said: 'Recruitment panels must always have as diverse a mix of levels of seniority, gender and background as possible.' We were satisfied that the reasons given by the respondent's witnesses for the make up of the panel were reasonable and not influenced by race.

The Claimant's interview scores were suppressed as detailed in her grievance appeal and the interview panel failed to adhere to the Respondent's scoring evaluation criteria;

400. There were a number of ways in which the claimant said her scores were suppressed and we considered each of these. It was an inherent difficulty with the claimant's approach that she abjured any reliance on other candidates' interview notes to demonstrate a difference in treatment.
401. The claimant pointed to the changing of several marks in the first round. We have found on the basis of the evidence we heard and the notes of other candidates, that the process of moderation applied to all candidates and we accepted and understood the rationale for moderating the scores in this way. The claimant did not point to any specific aspect of the notes or scores which suggested that the moderation of the claimant's scores had been irrational, unfair or inconsistent with

that of other candidates. She did not refer us to or rely on the interview notes of other candidates at all.

402. The claimant said that she was unfairly marked down for taking too much time on her pitch. We concluded that the claimant had been told clearly how much time she could take and went over that time. Her failure to keep to time and demonstrate an ability to focus her pitch on key points were cogent reasons for marking her down on this section.
403. We have found above that the '32' written by Ms Adams on the interview schedule was simply an error.
404. The claimant initially said that she was not marked for two questions in the strengths based round but she accepted in evidence that none of the other candidates had been marked on the warm up and warm down questions either. The claimant suggested that she had been unfairly marked down in this round in relation to 'soft skills, strategy and leadership' when the questions did not give her the opportunity to demonstrate these qualities but the references to soft skills, strategy and leadership in the feedback the claimant received relate to questions in the first round. There was no evidence before the Tribunal that the claimant was unfairly marked on the strengths based questions.
405. The claimant suggested that where she had demonstrated a particular capability elsewhere in the process, including in the earlier interview, she should have received credit for her earlier answer in relation to a later question.
406. The respondent's witnesses said that was not how the process worked for any candidate.
407. It is not the experience of the Tribunal panel that recruiters go back over all the material received from a particular candidate in order to mark each question. It seemed to us that such a process would be unjustifiably onerous and likely to give rise to unfairness.

The Claimant is aware that both internal and internal non-BAME candidates in Sport with pre-existing relationships with the BBC were given priority.

408. The single ultimately successful candidate was a person who was working elsewhere at production executive level in sport and had previously worked in BBC Sport. It was unsurprising that such a candidate would perform well and there was no evidence that the panel had given her 'priority'.
409. Looking at the context more generally, the claimant went into the second round interviews facing a tough field, including candidates already operating at production executive level and candidates who worked in sport. The claimant throughout the hearing seemed to fail to consider the fact that it was a competitive process. Her view appeared to be that if she was appointable to the role, she should have got the role, regardless of what the rest of the field looked like. The claimant had no experience in sport and had not worked at that level. We did not accept her evidence that she was effectively working at production executive level. Unsurprisingly she

came out far from top in the interviews. We had clear and cogent evidence that she performed less well than the other candidates, including evidence that her scores were affected by her failure to follow instructions about the length of the pitch and failure to listen and take on board what the panel said about winding up her presentation. That evidence reflected the Tribunal's own experience of the claimant's performance as a litigant.

410. We felt we were able to make a positive finding that the claimant was not appointed to the role of production executive because a fair assessment of her performance in the interviews placed her well behind other candidates.
411. Alternatively, there was simply no evidence on the basis of which we could reasonably conclude that the burden of proof shifted. Although statistics may play a role in this assessment, we did not consider that the statistics which we had, which showed that there were BAME individuals at Band F in BBC Sport even if the overall level of BAME employees at leadership levels was still lagging cast any light on this particular process. We note that the other appointment made by much the same panel at the same time was of a BAME individual.
412. Finally, if the proper analysis is that we are required to leave out of account at the first stage the evidence as to why the claimant scored lower than the successful candidate (as being the respondent's 'explanation'), we still could not find contextual facts which would cause the burden of proof to shift, alternatively we were satisfied from the respondent's explanation that the claimant's failure to be appointed to the role was in no way influenced by her race.
413. We did not uphold this complaint.

Issue: (iv) Failing to provide any or any cogent feedback regarding the Claimant's non-selection for the role.

414. We found that the claimant received the feedback set out in the feedback document. She did not significantly challenge the account of Ms Dubois and Ms Wright to that effect. She then had that feedback a second time from Ms Eden-Russell and then in writing. The claimant was unhappy that she was not allowed a further round of feedback with Ms Dubois and Ms Wright but they had already said what they could say about her performance. Since the claimant was raising issues about the policy, it made sense that these were dealt with by Ms Eden-Russell.
415. So far as we could see, that feedback was clearly related to the questions asked and the notes made of the claimant's performance. It seemed perfectly cogent to us and to Ms Ashton, who also considered it when speaking with the claimant about the recruitment process. It was detailed and thoughtful.
416. Ultimately, the claimant's complaint did not seem to be about the cogency of the feedback but simply that she did not like the feedback. The remarks about her performance in interview did not chime with her sense of her own skills and experience. She does not seem to have understood that the feedback was specific to whether she demonstrated those skills and that experience in interview.

417. There was no evidence that any candidate of a different race received more or more cogent feedback., No one got two rounds of feedback with the original panel. The notes we saw of feedback for other candidates suggested that the feedback they received was similar in extent and structure to that received by the claimant. We could detect no difference in 'cogency'.
418. In those circumstances, we felt able to make a positive finding that the claimant was not treated less favourably than others because of her race in relation to the feedback she received. Alternatively, there was no evidence from which we could reasonably conclude that she had been treated less favourably and the burden did not shift.
419. We did not uphold this complaint.

Issue: (v) Failing to address and/or delaying the outcome of the Claimant's grievance/grievance appeal.

Grievance

420. The following alleged failures to address the grievance were raised by the claimant in evidence, but the respondent says were not put to witnesses:

Mr Bowman not confirming whether a BAME candidate was appointed to the role

421. The claimant did not put to the Mr Bowman that he had failed to confirm whether a BAME candidate was appointed to the role and that he did not do so because of the claimant's race.
422. Given that the claimant did not put this allegation to Mr Bowman, that of itself would have been a bar to our making a finding that Mr Bowman acted in this way because of the claimant's race. In any event, we considered that Mr Bowman's approach to the grievance was thoughtful and detailed and there were simply no facts from which we could conclude that he did not confirm the race of the candidate appointed because of race.

Grievance outcome did not address lack of consistency and clarity in scoring

423. Although this issue was not put to him, we found in any event that Mr Bowman did deal with the concerns about scoring that were raised with him at the grievance stage. Further issues were raised on appeal and these were dealt with by Mr Paterson.

BAME statistics for leadership roles in Sport were not provided, only a point of contact

424. This again was not put to Mr Bowman. We considered that he had done a thorough and careful job on the grievance and that we could see nothing unreasonable in him having referred the claimant to others with more access to statistics if she was still waiting for statistics.
425. In any event Ms O'Sullivan received the breakdown from the relevant people after the grievance outcome had been produced and provided the claimant with the statistics on 10 September 2020. We were satisfied that the grievance outcome was

provided to the claimant without this information because of a desire not to delay the outcome.

426. The claimant raised in her grievance appeal the question of whether the respondent could demonstrate that it had 15% BAME employees at production executive level in Sport and across other genres. Mr Paterson said that she had received the information as to Sport and directed her to where she could find reporting about representation across the BBC.

No response to question raised about why personal data removed from office

427. This issue was not put to witnesses. The claimant had raised in her grievance that: "I also have concerns as to the location of my data and whether this is being held securely and in accordance with the BBC's data protection/GDPR policy."
428. Although Mr Bowman had no opportunity to answer this point, it in any event seemed to the Tribunal that it appeared to be a point unrelated to the central themes of the claimant's grievance which were about race discrimination. Mr Bowman identified what seemed to him to be the key elements of the grievance and addressed those methodically.
429. At the appeal stage, the claimant said: "I have not received a response to why my personal data has been removed from the office."
430. As we have found above, Mr Paterson dealt with the question in the appeal outcome. We can see nothing unreasonable about his conclusion and it was not put to him that the conclusion was unreasonable. We could see no facts from which we could reasonably conclude that that he dealt with this matter as he did due to the claimant's race.

That there was no investigation report

431. It seemed to us that this was a question of semantics. The claimant received a detailed letter setting out the outcome of her grievance. The same narrative could have been put into a document headed 'report' and would then have been a grievance report. There was no requirement in the respondent's grievance procedure for a 'report' to be produced and there was no evidence that reports had been produced in other cases for other individuals.
432. Mr Paterson made these points to the claimant when she raised the issue on appeal.
433. Again, there was no evidence at all of a difference in treatment.
434. There were some further criticisms of the grievance outcome which were put by the claimant:

That Mr Bowman only approached one panel member during the investigation instead of all three

435. Mr Bowman gave a careful explanation in evidence as to why he only approached one panel member. What he said made good sense to the Tribunal; in the absence of inconsistencies, the need to deal with the matters proportionately, with speed and without creating unnecessary stress for individuals seemed to us a good and complete reason for not interviewing the other panel members.

That Mr Bowman failed to engage with the claimant's resolutions document in his grievance outcome

436. The resolutions document was of course a proposal to resolve the grievances if they were upheld. They were not upheld. In nonetheless looking at the resolutions document and considering whether there was anything he could do to assist the claimant, it seemed to the Tribunal that Mr Bowman in fact went beyond what he was required to do by the respondent's procedure and beyond what the Tribunal is accustomed to see in response to grievances.

Delay in grievance process

437. The grievance policy provides for grievances to be heard within 90 days unless there are 'exceptional circumstances'. Although the claimant did not accept in questioning of witnesses that the pandemic would or should have had an impact on the timescales, we heard vivid evidence from various witnesses as to the impact on their workload and home circumstances. The pandemic clearly constituted exceptional circumstances.
438. In any event, there were detailed explanations for various period of delay. Initially Mr Bowman was working on another grievance. Once he turned to the grievance, he was also balancing it up against the 'most intense period of his working life'. There was some delay caused by the fact that Ms Toor went on emergency leave and handed over to Ms O'Sullivan. There were additional difficulties caused by the fact that people were working from home; difficulties in copying and sending the interview documents and to be resolved. The claimant did not point us to and we could not see any period of unexplained or unreasonable delay. We entirely accept that it was a protracted period and that it would have caused the claimant anxiety to have an unresolved grievance. She seemed unable to accept even in retrospect that the evidence showed that others were doing their best in very difficult circumstances to properly investigate and complete her grievance.

Delay in grievance appeal

439. Again the appeal was conducted in the exceptional circumstances of the pandemic and we considered that the delays had been accounted for. There was an initial delay when the claimant objected to the first proposed appeal manager and then further delay whilst the respondent awaited the occupational health report to determine whether reasonable adjustments were required. After that we accepted that the further delay was created by Mr Paterson's desire to do a thorough job with a significant quantity of material against a background of significant challenges caused by the pandemic to his day job.

Failure to provide updates in respect of the grievance appeal

440. The claimant told the Tribunal that she was complaining about the period between the first week of November 2020 and the production of the grievance appeal outcome on 17 December 2020. Given our findings of fact above, we concluded that the respondent had set out a fortnightly update schedule, which appeared reasonable, and had missed that schedule on an occasion when Ms Ford had a road traffic accident. We could see nothing unreasonable about this process and we could see no evidence that a person of a different race in similar circumstances would have been treated differently,
441. Looking at all of the evidence in relation to these issues, we were unable to find any material failures in the respondent's handling of the grievance and any inexplicable or unreasonable delay. We could see no facts from which we could reasonably conclude that the findings or the time periods would have been different if the claimant had been of a different race.
442. We did not uphold this complaint.

Issue: (vi) Failing to disclose and/or delaying the Claimant's DSAR request

422. The claimant identified in evidence that this complaint was about:
- her line management: Ms Mishcon, Ms White, Ms Gauba;
 - The recruitment panel: Ms Dubois, Ms Adams, Ms Wright;
 - Ms Ashton.
433. The unchallenged evidence was that, of these, only Ms Adams was approached by the data protection team to provide documents in response to the claimant's DSAR. The others cannot therefore have failed to disclose documents, whether because of the claimant's race or for any other reason.
434. We heard evidence as set out above from Ms Stephens about who was approached to provide documents and why. We were unable to find fault with the respondent's approach given the claimant's failure to respond to a request for more detail. It was proportionate for the respondent to have searched with the individuals identified.
435. We had evidence in Ms Adams' witness statement and from other witnesses and reported in contemporaneous documents that her interview notes had been left in the office when she began working from home and that she did not return to the office until September 2020. She had provided other documents she did have access to on 29 May 2020 but there was a problem later with these documents being rehydrated. We had no reason to reject that evidence.
436. We could identify no unexplained delay by Ms Adams in providing documents. We bore in mind the general evidence given by Ms Stephens about delays to DSAR responses and the reasons for those. We note that the ICO itself recognised that there were likely to be delays during the pandemic.
437. So far as the delay was concerned, we could see no facts from which we could reasonably conclude that the claimant was treated differently from a hypothetical comparator because of her race.

438. In terms of the content of the response to the DSAR, we note that the response was coordinated by the Information Rights Team. An internal review carried out by the respondent did not reveal faults in the response. More significantly, the claimant did not identify in evidence or put to any witness any document or type of document which she said should have been disclosed but was not disclosed.
439. In the circumstances, there were no facts on the basis of which we could reasonably conclude that the response to the claimant's DSAR involved different treatment of the claimant from that of a hypothetical comparator because of the claimant's' race.
440. We did not uphold this complaint.

(II) Race Harassment

Issue: Did the Respondent engage in unwanted conduct related to race by any of the following conduct as set out at paragraph 5(i) to (viii) above?

441. We have found that none of the conduct complained of was because of the claimant's race. Equally, and bearing in mind the difference in statutory wording, we find that there was no relationship with race.

Issue 10. Did any of the matters set out above at paragraphs 5(i)-(vi) have the purpose or effect of either:

(i) Violating the Claimant's dignity or

(ii) Of creating an intimidating hostile degrading humiliating or offensive environment for her?

442. We did not find that there was anything which occurred which could reasonably have had the proscribed effect. There was no evidence at all that any of those involved had the proscribed purpose.
443. We did not uphold these complaints.

Issue: 11. Did the Respondent take reasonable steps to prevent such unwanted conduct?

444. It was unnecessary for us to consider this issue given our other findings.

(III) Indirect Race Discrimination

Issue:12. Did the Respondent apply the following PCP to the Claimant?

Use of subjective assessment criteria such as "soft skills" which included an assessment of accent and/or body language and/or personality in the selection process for the Band E Production Executive role.

445. We found that the respondent did not use accent or personality as part of its assessment criteria; however the training materials we saw showed that some assessment of body language and non-verbal communication formed part of the assessment for "engagement" in the strengths based assessment.
446. To that extent only, the respondent had a PCP of assessing body language.

447. As we have commented above, we did not have sufficient evidence to be clear exactly how the assessment method avoided potential disadvantage to those who might not exhibit engagement in the ways the training materials described, eg leaning forward and becoming animated, whether for cultural reasons or because of their personality, or indeed because of a disability, although it may be that establishing a baseline for an individual candidate addressed that concern. We had the evidence we have referred to above that others had who had used the system had increased the diversity of outcomes.

Issue: 13. If so, did the Respondent apply the said PCP to persons with whom the Claimant did not share the protected characteristic of her race?

448. Clearly the same system of assessment was used with all of the candidates for the production executive role.

Issue: 14. If so, did the said PCP put persons with whom the Claimant shared the protected characteristic of her race at a particular disadvantage when compared with persons with whom the Claimant did not share the protected characteristic of race?

449. We had no evidence that the system of strengths based assessment used by the respondent put people of Indian racial origin or non-white people more generally at a disadvantage. The only evidence we had, from the provider of the system, was that it had increased racial diversity for some of its clients.
450. Not only was there no statistical or other evidence of disadvantage, nor, in the absence of such evidence, was there any case put forward by the claimant as to why the system might have disadvantaged people of her race. We recognise that there is no requirement for the claimant to show why a particular PCP leads to disadvantage but in the absence of hard evidence of disadvantage, it would have been open to her to explain why the PCP would necessarily have disadvantaged people with her particular protected characteristic. For example a female claimant who lost a job due to a PCP that candidates must be over a particular height would be able to point to the fact that women on average are shorter than men even in the absence of statistics as to who was appointed to the role in question.

Issue: 15. If so, was the Claimant put at that particular disadvantage?

451. Further, there was no evidence from the interview notes, feedback, or evidence of Ms Dubois and Ms Wright to suggest that the claimant's own scores had been negatively impacted by her body language, nor did the claimant put to these witnesses ways in which she suggested her scores might have been so affected.
452. Although we had some concerns that the system could, without careful adjustment, disadvantage a candidate with a more introverted style of presentation, that was not the claimant's style of presentation, judging by her presentation to the Tribunal. She always appeared engaged and animated.

Issue: 16. If so, was the said PCP a proportionate means of achieving a legitimate aim? The Respondent relies upon the following legitimate aim: the use of consistent and relevant criteria which are required to successfully carry out the role.

453. We were not required to decide this issue, given our findings and concluded we could not sensibly do so, since part of the exercise is weighing up the discriminatory effect and we found none.
454. We did not uphold this complaint.

(IV) Race Victimisation

Issue 17. Did the Claimant make protected acts by:

- (i) E-mail to Anne Eden-Russell dated 14 April 2020*
- (ii) E-mail to Anne Eden-Russell dated 16 April 2020*
- (iii) E-mail to Anne Eden-Russell dated 17 April 2020*
- (iv) Formal grievance submitted 27 April 2020*

455. The respondent accepted that these were protected acts.

(v) E-mail to the Head of Service Rozita Lotfi on 4 June 2020

456. Although this was a protected act, the claimant accepted in evidence that it had no effect as Ms Lotfi had not shared the communication with anyone and Ms Lotfi was not herself alleged to have subjected the claimant to any detriment.

Issue: 18. Was the Claimant subjected to a detriment/s because of having done a protected act or acts in relation to:

(i) Being steered against submitting a grievance by Jennifer Ashton as this would allegedly put a 'black mark' on her name and grievances taking a long time to resolve in the BBC;

457. We found as a fact that Ms Ashton did not say that bringing a grievance would put a black mark against the claimant's name. She did tell the claimant the grievance would take a long time, but her reason for doing so was not that the claimant had made a race complaint but because she was seeking to give the claimant friendly advice in circumstances where she knew that grievances could take a long time and were very stressful. She was leaving the respondent's employment and had no vested interest in whether the claimant pursued her grievance or not.
458. We do not consider that Ms Ashton giving the claimant friendly advice about bringing grievances can properly be regarded as a detriment. Nor are there any facts from which we could reasonably conclude that the reason she gave such advice is because the grievance included a claim of race discrimination.
459. We did not uphold this complaint.

Issue: (ii) Failing to address and/or delaying the outcome of the Claimant's grievance

460. We have not found that the respondent failed to address or unreasonably delayed the outcome of the claimant's grievance. We found no facts from which we could reasonably conclude that the delay was caused by the fact that the claimant had done protected acts.

Issue: (iii) Failing to provide mentoring in accordance with the Respondent's policy.

461. The claimant confirmed in evidence that this was a complaint about two matters, which we consider in turn.

Ms Lavender confirming that she could not provide mentoring in accordance with the Mentor Connection scheme on 21 May 2020

462. The claimant's complaint here seemed to the Tribunal to be that Ms Lavender did not agree to provide something which she had never offered in the first place. Having offered to assist the claimant with what seemed to the Tribunal to be a reasonable amount of informal mentoring, she was then faced with a request for 6 – 9 months of mentoring under the Mentoring Connections scheme. The two had not been connected with one another via that scheme and understandably Ms Lavender was taken aback.

463. Given that Ms Lavender had never offered what the claimant ultimately asked for, we could see no detriment to the claimant. She offered a reasonable amount of informal mentoring and continued to be willing to provide that.

464. In terms of causation, in any event, we accepted Ms Mishcon's evidence that she had kept the grievance confidential and so there was no evidence at all that Ms Lavender was aware of the protected act. Furthermore there was no change in attitude evidenced by the correspondence. She had never offered the more intensive mentoring the claimant wanted.

465. We did not uphold this part of the victimisation complaint about mentoring.

Ms Mishcon confirming that she was unable to provide mentoring on 26 May 2020

466. The claimant clearly considered she was disadvantaged by Ms Mishcon declining to mentor her. The Tribunal was not persuaded that that was a reasonable view. It was the experience of the Tribunal that, for fairly obvious reasons, mentoring relationships do not take place within a person's line management chain, so it is not reasonable for an employee to feel aggrieved that no such relationship is offered.

467. Even if we had found that there was a detriment in this respect, we were satisfied with Ms Mishcon's explanation for the treatment which was entirely in line with the Tribunal's experience and common sense. We did not consider that there was an inconsistency between Ms Mishcon not accepting this formal mentoring relationship and May 2020 and her earlier willingness to provide some informal mentoring to the claimant, as she did for many others. Some ad hoc informal mentoring can avoid the conversations and conflicts which might arise in a formal mentoring relationship if that relationship is to be useful.

468. For these reasons, we did not uphold this aspect of the complaint about mentoring either.

Issue: (iv) Failing to disclose and/or delaying the Claimant's DSAR request.

469. We have found that there was delay for reasons we have set out above but we have found no evidence of a failure to disclose documents. The claimant never identified the documents which she said were missing. Although the letter from her solicitor of 8 October 2020 identified classes of documents said to be missing, the respondent

(through Ms Jayaweera), correctly in our view, concluded that these went beyond the original request.

470. Given the quantity of material which was provide, it did not appear to us that there were any reasonable inference to be drawn from the fact that the individual originally dealing with the DSAR had over-redacted to a limited extent in the first instance. There was simply no evidence at all from which we could properly conclude that the redactions, which the claimant did not take us to or comment on, were in any way connected with the claimant's protected acts.

471. In terms of the involvement of Ms Jayaweera in holding the line about the extent of the DSAR response, we did not have any evidence that Ms Jayaweera was aware of the claimant's grievance or other protected acts and could see no reason why she would either have known of those matters or have been influenced by them.

472. We did not uphold this complaint.

Issue 19. Did the Respondent take reasonable steps to prevent such unwanted conduct?

473. Because of our findings above, we did not need to consider this issue.

(V) Race Victimisation – Continued Acts

Issue: 20. The claimant wishes to rely on this claim (No 2204894/2020) as a new protected act:

474. There was no dispute that this was a protected act.

Issue: Dismissing the Claimant's grievance on 18 August.

475. Just as we found that there was no material from which we could reasonably conclude that Mr Bowman was influenced in his findings by the claimant's race, we could find no material from which we could reasonably conclude that he was influenced by the fact that she had done protected acts.

476. We did not uphold this complaint.

Issue: Failing to progress the Claimant's grievance appeal in a timely manner. Breach of the Respondent's procedure in relation to the delay in dealing with the Claimant's grievance appeal.

477. As set out above, we were satisfied that the explanations given for the delay in the grievance outcome were genuine and complete. We were able to make a positive finding that they delay was not caused by the fact that the claimant did protected acts. In the alternative, there were simply no facts from which we could properly conclude that the protected acts played a role in the delay.

478. We did not uphold this complaint.

Issue: Continued failure to provide an adequate, tailored explanation in respect of the use and dissemination of the Claimant's data both internally and externally, as requested on 8 October 2020 and originally submitted by DSAR on 29 April 2020.

477. The claimant confirmed in evidence that this was a complaint about Ms Jayaweera.
478. The only clear criticism of Ms Jayaweera's review made by the claimant during the hearing was that it was delayed. The reasons given to the claimant in correspondence by Ms Jayaweera for the time taken related to the complexity of the review given that there were documents from two different data controllers. That explanation for the delay made sense on its face and the claimant pointed to no evidence which would cause us to doubt it.
479. In the absence of any evidence that Ms Jayaweera was aware of the claimant's protected acts, the claimant suggested to the Tribunal that the solicitor who was handling the claimant's Tribunal claim for the respondent must have told Ms Jayaweera. That did not seem to us to be an inevitable or even a likely conclusion. We could see no reason why solicitors handling different matters for the respondent would have had such a conversation unless there was a need to do so and there was none we could discern.
480. Insofar as the claimant suggested that the further documents outlined in the 8 October 2020 letter should have been treated as a new DSAR, we accepted that that was not the purpose of the review and that there was nothing untoward or unexpected in Ms Jayaweera suggesting that the claimant submit a further DSAR.
481. We did not uphold this complaint.

Issue (iv) Obscuring that only four candidates had been interviewed for the Production Executive role, whilst representing that five had been.

482. This complaint was withdrawn.

Issue: Andrew Bowman asserting in the Claimant's grievance outcome, dated 18 August 2020, that the Claimant was not the only BAME candidate who progressed to the second round and/or continually failing to disclose the ethnic make-up of the successful candidate(s) (confirmed at paragraph 4 of Claimant's response to request for further and better particulars)

483. The issue about Mr Bowman not disclosing the ethnicity of the successful candidate was not put to Mr Bowman and we found no evidence from which we could reasonably conclude that he was motivated by the claimant's protected acts in this respect. We note that the claimant had said in her grievance that she was keen to know the ethnicity of the appointee but it was not clear that the fact that she had not been provided with that information was a complaint or grievance in itself.
484. When the matter was raised on appeal, Mr Paterson pointed out that the recruitment policy did not require disclosure of the successful candidate or details about that candidate and it did not seem to us that dealing properly with the claimant's grievance complaints required the respondent to provide this information.
485. We did not consider that either Mr Bowman or Mr Paterson behaved unreasonably and we could see no other evidence from which we could properly conclude that they behaved as they did because of the claimant's protected acts. We did not uphold this complaint.

Issue (vi) Continued breaches of the Respondent's Equality and Diversity policies (as set out at paragraph 5 of Claimant's response to request for further and better particulars)

Issue: D and I Policy: failure to adhere to section 2 'Principles' throughout the recruitment process and the remainder of Claimant's employment to 20 October 2020

486. The claimant did not point to particular acts or omissions which she said constituted a breach of this part of the D and I Policy and the general allegation starts before any protected act.
487. In the absence of any clear indication of what the claimant was complaining about in this respect, we could not make any sensible findings and we did not uphold this complaint.

Issue: D and I Policy: failure to adhere to section 3: Resourcing and Recruitment throughout the recruitment process which commenced on 7 February 2020

488. This complaint predates any protected acts and relies on an interpretation of the Policy in relation to diversity of panels which we have rejected. We did not uphold this complaint.

Issue: D and I Policy: Failure to adhere to section 4 'Learning and Development': C requested internal mentoring from June 2020 but this was not provided in accordance with the Mentoring Policy as the mentor was 'too busy'

489. This is a repetition of the complaint that Ms Lavender did not provide mentoring in accordance with the Mentor Connections scheme. We have already found that this was not because of the claimant's protected acts. There was no breach of any policy that we could discern.
490. We did not uphold this complaint.

Grievance policy: failing to provide written outcome within the 90 days in the policy

491. We did not conclude that any delays were because of the protected acts for the reasons we have set out above. We also did not consider there was a breach of the Policy given the exceptional circumstances. We did not uphold this complaint.

The Report on career progression and culture for BAME staff: failing to implement recommendations in the report throughout the recruitment process

492. The recruitment process predated the protected acts. We did not uphold this complaint, which in any event remained unparticularised.

Data policy: allowing C's handwritten notes to be removed from the BBC's premises during the recruitment process

493. Ms Wright and Ms Dubois took the notes home prior to the claimant's protected acts. This seemed to us to be an innocuous act by the two and we were not told how it was a breach of policy. We did not uphold this complaint.

Data policy: failing to respond adequately to C's DSAR in a timely manner or provide the relevant, unredacted data from April 2020 to date

494. This is largely a repetition of a complaint we have already not upheld.
495. So far as the redactions are concerned, the claimant did not identify any improper redactions. Ms Jayaweera in her review identified four. This seemed to us to be relatively low error rate given the size of the response and we had no evidence that the individual who dealt with the claimant's DSAR was aware of her protected acts. There was simply no evidence on the basis of which we could properly conclude that four instances of overzealous redaction were caused by the claimant's protected acts.
496. We did not uphold this complaint.

Internal Performance Management Policy / contracts Management Policy: failing to provide C with either a probationary review or a performance appraisal throughout C's employment.

497. The claimant withdrew the complaint about not receiving a probationary review. So far as the performance appraisal was concerned, we accepted the evidence of Ms Gauba and Ms Mishcon as to why performance appraisals were being delayed during the relevant period for many employees, and in particular were not carried out for any production managers or unit managers in Ms Gauba's team. The claimant was treated in the same way as others who had not done protected acts.
498. The claimant raised in cross examination with Ms Gauba alleged failures to carry out the appraisal during 2019 but not for the period after the protected acts.
499. In these circumstances, we did not uphold this complaint.

Issue (vii) Constructively dismissing the Claimant on 20 October 2020.

500. Since we did not find that there were any acts of victimisation which individually or cumulatively amounted to a breach of the claimant's contract of employment, we did not uphold this complaint.

Issue: Did the Respondent take reasonable steps to prevent such unwanted conduct?

501. Given our findings above, it was unnecessary for us to go on to consider this issue.

(VI) Disability Discrimination

(i) Reasonable Adjustments

24. Did the Respondent know or ought to have known that the Claimant had a disability, General Anxiety Disorder?

25. If so, when was the Respondent on notice of the Claimant's disability regarding her General Anxiety Disorder?

The Respondent accepts that the Claimant's General Anxiety Disorder was a disability within s.6 EqA.

The Respondent accepts that it had the requisite knowledge of this disability from 9 October 2020 (upon receipt of the Occupational Health report by the Claimant's line manager)

502. The outstanding issue was whether the respondent knew or ought reasonably to have known that the claimant had a disability at date earlier than 9 October 2020.
503. The background is that prior to the claimant's sickness absence commencing in June 2020, there was nothing to put the respondent on notice of the claimant's condition.
504. At what point after that, should the respondent reasonably have known? What enquiries should they have made and at what stage?
505. As of 9 June 2020, Ms Gauba knew the claimant was suffering from an anxiety disorder which was clearly having a significant impact on her functioning but there was nothing to indicate to her that it was long term in the required sense. The Tribunal was of the view that it would have been inappropriate and heavy handed for Ms Gauba to have made enquiries about the claimant's medical history or suggested an occupational health referral at this point. It seemed to us that many employees might complain if such steps were taken at the outset of a first absence with a condition.
506. It seemed to the Tribunal that that remained the case over the next two months, particularly in circumstances where the claimant was relating her condition to specific events and made no mention of having any history of anxiety. We considered it would have been insensitive and intrusive for Ms Gauba to have asked the claimant if she had a long term condition at this stage in circumstances where the claimant had not volunteered any such information. Given the information which the claimant had provided, it was reasonable for Ms Gauba, who as line manager was the claimant's point of contact on the matter, to take at face value what was said about the anxiety having been caused by the recruitment process. The claimant was signed off for a month at a time and it was not apparent in the early stages of her absence that it would continue for as long as it did.
507. Neither party referred us to the respondents' sickness absence policies or procedures but the general experience of the Tribunal was that such policies would not provide for a referral to occupational health until a sickness absence was ongoing for a reasonably sustained period (months rather than weeks) or looked like it would continue for a sustained period.
508. We considered that the point at which Ms Gauba decided to make an occupational health referral was the point at which it was reasonable to make such a referral and the respondent could not reasonably have been aware that the claimant's condition was long term until after the report had been received.

Issue: 26. Did the Respondent apply the PCP of a requirement that if there was an appeal hearing, the Claimant would attend the appeal hearing in accordance with the Respondent's appeal policy?

508. The complaint about the respondent's policy relates to the provision that the person bringing the grievance may only be accompanied by a trade union representative or colleague.
509. It seemed to us that this PCP was applied by the respondent at least so far as the originally scheduled appeal hearing was concerned and pending an occupational

health report. Application of the PCP had the effect that the originally scheduled date for the appeal hearing could not proceed.

Issue: 27. Did the PCP put the Claimant at a substantial disadvantage compared to others who were not disabled? The Claimant relies on the substantial disadvantage of placing the Claimant at increased risk of additional stress and anxiety without having her former GP present at the appeal meeting.

510. It seemed to us that the proper comparison when considering disadvantage was with a person who was similarly unable to avail themselves of accompaniment by a trade union representative or colleague. It is not particularly uncommon in the Tribunal's experience for someone who does not have trade union representation also to lack a colleague they would feel comfortable attending a sensitive meeting with.
511. Compared with such a person, it was clear that the claimant would be disadvantaged because such a person would no doubt feel anxious but would not be suffering from clinical levels of anxiety about the hearing and would therefore be less disadvantaged by a lack of support in the meeting, whether that was moral support or assistance in presenting the appeal.

28. Did the Respondent fail to comply with a duty to make any reasonable adjustments to the PCPs identified? The Claimant seeks to rely on the following alleged failures:

(i) Refusing to allow the Claimant's former GP to attend the appeal hearing.

(ii) Failing to offer the Claimant support and assistance from HR in order to attend the appeal hearing.

512. In order for the respondent to be liable for a failure to make reasonable adjustments, it had to have knowledge that the PCP put the claimant at the relevant disadvantage. The course of events was that the respondent was asked by the claimant whether she could bring her GP to the hearing very shortly before the hearing was scheduled. The response of Ms Ford was not to say no but to say that occupational health advice would be required. The claimant indicated that she was content to wait for that advice. Notably the claimant was attending occupational health that very week so the delay was not likely to be significant.
513. Once the occupational health advice had been given, the respondent would have been aware of the disadvantage caused by the PCP. At that point it seemed to us that given that the attendance of the GP would allay the claimant's anxiety and there was no cost or other material factor why the GP should not attend, it would have been a reasonable adjustment to make.
514. Ms Ford's evidence which we accepted, is that she was happy to make that adjustment once she had received the occupational health report. Is there a failure to make reasonable adjustments because there was delay between 9 October 2020 when Ms Gauba had the report and hence knowledge and 20 October 2020, when the claimant resigned? We did not consider that there was - the concept of reasonableness must contain within it allowance of a reasonable time once there is knowledge that a PCP puts a person at a disadvantage for decisions and arrangements to be made, allowing for the fact that an employer acts through employees who themselves have other demands on them and periods of leave.
515. We concluded that there was no breach of the duty at the point when the claimant resigned because the position was that the respondent was considering whether to

make the adjustment and had not yet had a reasonable period of time to consider the report and make arrangements.

516. The claimant then ceased to require the adjustment because she asked for her appeal to be determined on paper. We did not consider that the Ms Ford's failure to mention that the claimant could have the adjustment if she did attend a hearing constituted a refusal to make the adjustment. The claimant had made no further reference to requiring the adjustment. Had she done so, Ms Ford would have told her that she could bring her former GP.
517. For these reasons we did not consider there was a failure to make reasonable adjustments in this respect.

Issue: (ii) Failing to offer the Claimant support and assistance from HR in order to attend the appeal hearing

518. This was the other adjustment contended for by the claimant but it was not clear from her evidence or submissions what kind of support from HR she contended would have alleviated the disadvantage to her caused by the application of this PCP.
519. The Tribunal could see no relevant failure of support and assistance by HR and we did not consider there was a failure to make reasonable adjustments in this respect.
520. For these reasons, we did not uphold the complaint of failure to comply with a duty to make reasonable adjustments.

(ii) Discrimination Arising from Disability

29. Did the Respondent treat the Claimant unfavourably because of something arising in consequence of her disability?

Issue: 30. The 'something arising in consequence of the Claimant's disability' was:-

- (i) The Claimant's inability to attend work every day;*
- (ii) The Claimant's requirement for more support and assistance from HR;*
- (iii) The Claimant's requirement for support from her former GP at the appeal hearing.*

521. It was clear that the claimant was unable to attend work every day and would benefit from the support of her former GP at her appeal hearing as a result of her disability. The difficulty with the second 'something arising' is that it was never clear from the claimant's evidence or submissions exactly what 'more support' from HR involved, however we accepted that a person with the claimant's impairment might well require additional involvement from HR generally.

31. The Claimant relies on the following alleged unfavourable treatment:

Issue (i) Failing to allow the Claimant to attend the appeal hearing with her former GP. The unfavourable treatment was failing to afford the Claimant the support of her former GP.

26. If the Respondent did treat the Claimant unfavourably;

- (i) Was the treatment because of something arising in consequence of her disability?*

522. We have considered the issue about allowing attendance of the GP in relation to the reasonable adjustments claim. We have found that there was a delay in allowing the former GP to attend pending the receipt of an occupational health report.
523. In respect of causation, we discussed with the claimant on more than one occasion how a section 15 claim works: that the allegation is that the unfavourable treatment happened because of the 'somethings' arising in consequence of disability and that that causation element needs to be put fairly and squarely to relevant witnesses.
524. The claimant did not put the case to witnesses and we had some sympathy with her position. The case had been pleaded in this way by solicitors then acting for her and we were unconvinced that the claimant ever really understood the case as pleaded or that it reflected her beliefs about what had gone on.
525. In any event, there was simply no evidence at all that a delay in allowing the GP to attend the appeal hearing was in any way related to any of the 'somethings' arising. It was related to the fact that the respondent had a policy which it applied except in special circumstances and therefore required medical evidence in support of the proposed adjustment.
526. We did not uphold this claim.

(ii) Failing to progress the Claimant's hearing in a timely manner and/or delaying grievance appeal hearing. The unfavourable treatment was subjecting the Claimant to unnecessary delay despite the Respondent being made aware of the adverse impact the delay was having on the Claimant.

527. Again it seemed to us that this was not a claim the claimant either understood in the way it was pleaded or had intended to bring. It appeared in fact to be a mispleaded and conceptually garbled reasonable adjustments claim.
528. We have made findings above as to the reasons for delay to the grievance appeal hearing. The only one of the 'somethings' which contributed to the delay was the claimant's requirement to have her former GP attend the hearing. That occasioned a period of delay whilst the claimant's occupational health report was obtained.
529. Although the element of causation was established in respect of this period of delay, it did not seem to us that this could properly be described as 'unfavourable' treatment. The claimant required to be treated differently from a non-disabled employee, who would have been required to attend the appeal hearing with a companion from one of the categories specified in the policy. In order to determine whether an exception should be made and an adjustment allowed, the respondent obtained occupational health advice which caused some delay. But the delay was with a view to treating the claimant 'favourably' if the adjustment was required.
530. For those reasons, we did not uphold this claim.

Issue (iii) Failing to enquire regarding the Claimant's welfare upon sight of the Occupational Health Report. The unfavourable treatment was the lack of care from the Respondent despite being aware of the content of the Report.

530. In oral evidence the claimant indicated that the people who had failed to enquire about her welfare were Ms Mishcon, Ms White, Ms Gauba, Ms O'Sullivan and Ms Ford. Only the latter three had seen the report at the relevant time.

531. So far as Ms Gauba was concerned, there was ample evidence that she had been kind and supportive to the claimant throughout the latter's absence. Once she received the claimant's occupational health report, she began making enquiries about how to support the claimant in light of the report. We could see no failure by Ms Gauba to take action in relation to the claimant's welfare. She was simply making appropriate enquiries before she spoke with the claimant. We could see no evidence at all that her delay in speaking to the claimant directly was a result of the 'somethings' arising.
532. So far as Ms O'Sullivan and Ms Ford are concerned, Ms O'Sullivan was aware that Ms Gauba had received the report already and she, Ms O'Sullivan, was not dealing with the appeal case so she left the matter for Ms Ford to deal with. Ms Ford saw the report when she came back from leave and contacted the claimant on 20 October 2020 but had not yet read the report at the point when the claimant resigned. Ms Ford and Ms O'Sullivan were dealing with the report for the purposes of the claimant's grievance appeal – the welfare element was the province of Ms Gauba
533. We did not consider that anyone had been remiss in enquiring about the claimant's welfare but in any event there were no facts from which we could reasonably conclude that the three individuals were influenced in their handling of the report by the 'somethings' arising.
534. We therefore dismissed this claim.

Issue: Constructively dismissing the Claimant. The unfavourable treatment was the Claimant's constructive dismissal.

535. Because we did not find that the claimant's section 15 claims were made out, it follows that we did not find there was any unfavourable treatment which constituted a repudiatory breach of contract entitling the claimant to resign and this claim also fails.

Issues: (ii) Was any treatment a proportionate means of achieving any legitimate aim?

(iii) If yes, what was the legitimate aim?

(iv) Did the Respondent know of the disability at the relevant time or times, or ought it reasonably have been expected to know?

536. We did not have to go on to consider the issue of justification because of our findings on the issues above. We have already set out our conclusions on knowledge.
537. For all of the above reasons, the claimant's claims are dismissed.

Employment Judge Joffe
22/02/2022

JUDGMENT SENT TO THE PARTIES ON
22/02/2022.

FOR THE TRIBUNAL OFFICE