**Case Number: 2201929/2018**

# THE EMPLOYMENT TRIBUNAL

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

**BETWEEN:**

**Ms S Palihakkara**

**Claimant**

**AND**

**The English Sports Council**

**Respondent**

**ON: 22, 23, 24, 25, 28 February, 1 March, 23, 24, 25, 26 and 27 May 2022.**
**(IN CHAMBERS on 26 and 27 May 2022)**
**Appearances:**
**For the Claimant:** **In person (no appearance on 1 March 2022)**
**For the Respondent:** **Ms K Gallafent, one of Her Majesty's counsel**

## RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that the claim fails and is dismissed.

## REASONS

1. By a claim form presented on 7 April 2018 the claimant Ms Samantha Palihakkara brings claims of unfair dismissal and race discrimination including victimisation. The unfair dismissal claim was dismissed on withdrawal.

2. The claimant worked for the respondent as an Agency Worker in a finance role. She was assigned by the Agency to the respondent from 9 October 2017 to 10 November 2017. The respondent is an executive non-departmental public body, established by Royal Charter in 1996, responsible for growing and developing sport in England.

3. This case has been the subject of seven preliminary hearings and three

appeals to the EAT.

## This remote hearing

4. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The parties agreed to the hearing being conducted in this way.

5. In accordance with Rule 46, the tribunal ensured that members of the public could attended and observe the hearing. This was done via a notice published on Courtserve.net. Members of the public attended the hearing accordingly.

6. The parties and members of the public were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were no difficulties of any substance that were not easily resolved.

7. No requests were made by any members of the public to inspect any witness statements or for any other written materials before the tribunal.

8. The participants were told that is was an offence to record the proceedings.

9. The tribunal ensured that each of the witnesses, who were in different locations, had access to the relevant written materials which were unmarked. We were satisfied that none of the witnesses was being coached or assisted by any unseen third party while giving their evidence.

## The claimant's application to amend

10. On the morning of day 1 of this hearing the claimant introduced a document which she titled "*Skeleton Argument*". This was an extensive application to amend the claim and the list of issues. This application was refused and is dealt with in a separate Case Management Order of 22 February 2022.

## The issues

11. The issues were identified at a preliminary hearing before Employment Judge Glennie on 2 August 2018, when the claimant had legal representation from ELIPS and confirmed at a preliminary hearing before Employment Judge Wisby on 2 November 2018 as follows:

<u>Direct race discrimination</u>

12. The claimant describes her racial group as Asian/other of Sri Lankan origin.

13. Did the respondent treat the claimant less favourably because of her race

by the following:

a. On 9 November 2017 calling her into a meeting with Serena Jacobs and Rachelle Morton and being told that her contract was at an end.
b. On 10 November 2017 being called into a meeting with Serena Jacobs and a member of HR and being told that she had to leave immediately.
c. Dealing with her grievance as if it had been raised by a member of the public rather than a worker/employee. In particular there was no grievance hearing. The individual involved is whoever decided that the grievance should be dealt with in that way.

14. The claimant relied upon a hypothetical white comparator whom she says would not have had their contract terminated, would not have been required to leave immediately and would have had their grievance dealt with as if raised by a worker/employee.

15. The claimant relies on the following as background evidence:

a. Those who lost their jobs in the respondent's restructuring were all members of ethnic minorities.
b. She was replaced by a white employee Mr Andrew Wilde.
c. At various points in the restructuring exercise she was told not to talk to colleagues about it.
d. She was not given any reason for the termination of her contract.

16. At a telephone preliminary hearing on 9 September 2021 before Employment Judge Spencer, the claimant was given leave to file a supplementary witness statement because she said she had not been well enough to set out all her relevant evidence when statements were exchanged. The claimant served this supplementary statement a week before this hearing, on 15 February 2022. In that statement at paragraph 13 she added a new issue of associative discrimination. The respondent said that the only issues for determination were those set out above and we agreed that this was not a claim for associative discrimination. We refer to our separate Case Management Order of 22 February 2022.

17. The claimant also added a section to her supplementary witness statement titled "*Additional note: Re Misdirection's of the Judge by the Respondents at the PH of 1st April 2019"* referring to a decision of Employment Judge Hodgson on that date. This was dealt with by the EAT by Griffiths J in case number 2021/000471 in a decision handed down on 29 December 2021. It was not a matter in issue for us.

Victimisation

18. The third allegation of direct discrimination above is also relied upon as an act of victimisation, namely dealing with the claimant's grievance as if it had been raised by a member of the public rather than a worker/employee. In particular there was no grievance hearing. The individual involved is whoever decided that the grievance should be dealt with in that way.

19. The protected acts relied upon are the claimant's emails of 13 November 2017 and 15 or 16 January 2018 and a contact via the respondent's website between those dates. In submissions the claimant said that the 16 January date was "*a typo"* and it was 15 January 2018. Ms Gallafent for the respondent thought that nothing turned on this.

20. The respondent did not accept that the email of 13 November 2017 was a protected act, but accepted that the email of 15 or 16 January 2018 and the contact via the respondent's website were protected acts.

**Witnesses and documents**

21. The tribunal heard from the claimant. The claimant had obtained a Witness Order for a former colleague Mr Hamer, a union representative. On day 1 she applied for the Witness Order to be rescinded and this was granted.

22. For the respondent the tribunal heard from 6 witnesses: (i) Mr Nick Bitel, who the time was the non-Executive Chair of the respondent; (ii) Ms Serena Jacobs, at the relevant time Strategic Lead Finance (iii) Ms Victoria White, Strategic Lead, HR; (iv) Ms Rona Chester, who at the relevant time was the Chief Operating Officer, (v) Ms Marie Robinson, at the time an unqualified HR officer and (vi) Ms Erin Stephens, who was at the relevant time the Principal In-House Solicitor.

23. We had a statement from Ms Denise Barrett-Baxendale, a former Board Member, who investigated the claimant's second complaint. On day 2 we were shown an email from Ms Barrett-Baxendale, setting out her personal circumstances as to why she did not wish to give evidence. We read the statement and could only give this limited weight as the witness was not available for cross-examination.

24. We had a statement from Ms Sarah Forster, Head of Management Reporting and the claimant's initial line manager. It was the respondent's intention to call Ms Forster. When the hearing went part-heard at the beginning of March 2022 and came back on in May 2022, Ms Forster had personal circumstances which meant that she was no longer available to give evidence. Again we read the statement and could only give this limited weight as the witness was not available for cross-examination.

25. The tribunal had the following documents:

    a. A Pleadings and Orders bundle of 70 pages.
    b. A documents bundle in two parts of 655 and 155 pages (total 810). The second part contained documents introduced by the claimant.
    c. A correspondence bundle of correspondence between the claimant, the respondent's solicitors and the tribunal of 944 pages. This exceeded the documentation in the trial bundle.
    d. A witness statement bundle of 9 witness statements running to 88

pages.

e. An "Additional Disclosure" bundle of policies introduced by the claimant of 23 pages.

26. From the respondent we had a cast list, a chronology, a note on case management issues and a proposed timetable.

**Closing submissions**

27. We had written submissions from both parties and heard from them orally. All submissions were fully considered together with any authorities referred to, whether or not expressly referred to below.

28. The claimant also re-submitted for submissions, her document of 22 February 2022 titled "*Skeleton Argument",* referred to above. We did not consider or determine any issues outside the scope of the issues set out above.

29. At the end of the respondent's oral submission the claimant said she had not had enough time to read the respondent's written submission so we gave her a further 45 minutes of reading time. We also informed the claimant that if she submitted further submissions after the close of submissions, we would not take them into consideration.

**This hearing**

30. At the start of day 5, Monday 28 February 2022, the claimant told the tribunal that she had been to A&E over the weekend and had been told that morning by a medical professional that she should attend A&E this morning. We told the claimant that we were not prepared to continue with the hearing unless she had medical evidence that she was fit to continue. The respondent agreed with the position that we should not continue unless there was evidence that the claimant was fit to proceed. The claimant wished to have time to consult her GP and we gave her this opportunity. By lunchtime the claimant was able to provide the tribunal with a letter from her GP that satisfied us that she was able to continue.

**Adjourning part heard**

31. On day 6, fifteen minutes before the start of the hearing the claimant sent an email to the respondent and the tribunal saying that she was "*going to have to abandon today*" because she was going to A&E. We adjourned the hearing part heard and this is the subject of a separate Case Management Order dated 1 March 2022.

32. On 8 March 2022 this tribunal heard the respondent's application to strike out the claim. This application was unsuccessful and written reasons were provided separately.

33. On 17 March 2022 the respondent made an application to vary the

timetable set for the part-heard hearing when it resumed on 23 May 2022. The application was strongly opposed by the claimant. Given the considerable difficulties involved with the listing and hearing of this case and the fact that the respondent agreed the timetabling when it was set on 8 March 2022, confirming witness availability, that application was refused.

## Findings of fact

The claimant's engagement to work at the respondent

34. The claimant was engaged to work for the respondent through an Agency, Robertson Bell. She was engaged to provide maternity cover for the role of Senior Management Accountant in the Finance Department.

35. The claimant was informed about the vacancy by the Agency, Robertson Bell, on 29 September 2017. She was told that the contract was for 3 to 4 months with an opportunity for extension (email page 166B). It was a maternity leave cover. The claimant was told that it was critical to the role to be able to oversee and review management accounting information. Mr Peasnell at the Agency sent details of the role of Interim Senior Management Accountant, bundle page 166A. The claimant said she was interested and attached her CV.

36. The claimant was sent the full role profile which we saw at page 175B. It included among the duties being able to lead on the production of accurate and timely monthly management accounts. The management accounting duties amounted to 50% of the post.

37. We saw the claimant's CV as submitted to the respondent by the agency (page 168). Ms Sarah Forster, Head of Management Reporting, reviewed the CV and was impressed by the claimant's experience, for example at the Cabinet Office and Action for Children. Ms Forster thought the claimant had relevant experience at similar organisations and noted that she had experience of monthly reporting and business accounting. The claimant was interviewed plus one other candidate, a white male.

38. The claimant was interviewed on 3 October 2017 by Ms Forster and Ms Serena Jacobs, the then Strategic Lead for Finance. The claimant interviewed well and they decided to appoint her. Ms Jacobs agreed the terms of the claimant's engagement with the Agency.

39. Ms Victoria White, the Strategic Lead for HR, said that at the time of the claimant's engagement in October 2017, 4 out of 10 employees in the Finance Team identified as "Black, Asian or Minority Ethnic (BAME)". She said that following the restructure in 2017/2018 referred to below, 3 out of 10 identified as "BAME". The respondent also engaged a number of agency workers from a number of employment agencies, including the claimant. The respondent does not collect ethnicity data in respect of their agency workers whom they do not employ.

The contractual background

40. On 5 October 2017 (page 191) Mr Peasnell sent the claimant the placement confirmation. This said that the contract was for 3 months. The claimant said she had an expectation of it being a 9 month contract as it was maternity cover. Nevertheless the initial term of appointment was for 3 months. The claimant agreed that this was "*technically correct*" and there was no obligation on any party to extend the contract. Ms Jacobs said that they told the Agency it was for 3 months because they were going through a restructure and they did not know what was going to happen as a result of that. We find that there was no guarantee that the contract would be extended beyond 3 months.

41. The claimant was engaged through an umbrella company called Greenwich Contracts Ltd. She said this was a company used by Robertson Bell to deal with their accounts and administration. We saw the agreement between Robertson Bell and Greenwich Contracts Ltd. In that agreement the claimant is referred to as "*the representative*". Her services were provided to the client, being the respondent and at clause 8.2 (page 104F) there was a right to terminate the agreement, without cause, by giving not less than one week's notice in writing. This meant that Robertson Bell or Greenwich Contracts could terminate the agreement on a week's notice without the need to provide a reason. The claimant accepted that she was on one week's notice.

42. At clause 8.4 the agreement gave the right for Robertson Bell to terminate the agreement or any specific assignment immediately or on short notice at any time in a number of circumstances. At clause 8.4.2 one such circumstance was where the representative was incompetent or had been negligent in the performance of the services.

43. At clause 8.5 the agreement was conditional upon the continuance of the agreement between the respondent and Robertson Bell. If the respondent, as the client, decided to terminate its relationship with Robertson Bell, the relationship between Robertson Bell and Greenwich Contracts also came to an end.

44. On 29 September 2017 Mr Peasnell at the Agency told the claimant that the role involved "*Producing the Management account packs for the organisation's main directorates, specific responsibilities include but not limited to: Lead on the production and review of the consolidated Monthly Management Accounts"* and *"Critical to this role is being able to oversee and review Management Accounting information."*

45. There was an Assignment Schedule to the contract which we saw at page 104L. This gave the start date as 9 October 2017 and the end date of 8 January 2018 and confirmed one week's notice. It was signed on behalf of Greenwich Contracts Ltd on 7 November 2017.

Week one – week commencing Monday 9 October 2017
Did the claimant have an adequate handover?

46. The claimant started work on 9 October 2017. She was engaged to cover the maternity leave of Ms Clare Darling who did not commence maternity leave until 17 October 2017 which was her last day in the office. She and the claimant worked together for just over a week during which time Ms Darling provided handover to the claimant.

47. The claimant agreed that before Ms Darling left, she created a folder on the system about handover titled "*Clare handover".* The claimant's concern was that the folder showed that it had been modified from time to time so she was not able to accept that the content of the folder was as provided to her.

48. Ms Darling created a document showing the days of the week commencing on Monday 9 October 2017 and setting out where the claimant would sit, at a vacant desk, what meetings were taking place and what topics of handover they would cover including topics such as "*review of monthly reports"* and *"payroll*". Although the claimant did not accept that the documents were as shown to her, she did accept that she had access to the handover folder and that Ms Darling handed over tasks to her. The claimant said it was "*not all of them*" but she could not recall which topics were not covered with her.

49. The claimant did accept that she could access documents along the lines of those put to her in evidence. At page 445 we saw a document setting out a list of tasks, the owner of those tasks, the delivery date and some notes. The second task for pre-month-end was to check the monthly payroll journal and that was a task shared between Ms Darling and her colleague Mr Warden.

50. There were 13 files of information on topics such as payroll codes, journal processing and the remuneration report process.

51. At page 527 we saw a Master List of all the different processes and procedures that appeared in the Finance Manual. The claimant could not remember this document. We find on the respondent's evidence and on a balance of probabilities that all the information referred to above was available to her.

52. On 11 October 2017 (page 400) Ms Darling sent an email to the claimant sending her information about balance sheet reconciliations which gave links to other documents. The email also told the claimant how to do jet reports.

53. On 16 October 2017 Ms Darling sent the claimant an email titled "*payroll checking*" (page 417). This was a two-page email including links to other documents. The email also told the claimant which members of staff were split 50-50 between two departments. Ms Darling prepared an induction

pack for the claimant and set up meetings for her to meet the relevant contacts with whom she would be working.

54. On 16 October 2017 Ms Darling sent the claimant an email about items to include in the budget (page 196K) and on 17 October she sent the claimant email explaining how to update a forecast (page 196L).

55. The claimant was not prepared to accept that she received these emails of 16 and 17 October 2017 because of the appearance of the header of each email. We find that it can be difficult to remember after 4.5 years exactly what you were sent. We find that this was simply a question of formatting and we find on a balance of probabilities these emails were sent to her.

56. It was acknowledged by Ms Jacobs that the handover was "*short*" but Ms Darling had prepared extensive handover notes with links to the relevant documents and procedures. We note that the handover period was not at month-end which would have been the most helpful time to do it. Nevertheless, the claimant was given a considerable amount of documentation to assist her, she had a full week of handover with Ms Darling and she was in a Senior Management Accounting role where she could be expected to bring her experience to bear. We find that the claimant was given an adequate handover.

57. The claimant was initially supervised by Ms Sarah Forster, Head of Management Reporting, who was also engaged to provide maternity cover at the respondent. Ms Forster left on 1 November 2017 and Ms Rachelle Morton, who joined on 26 October, became the claimant's line manager and Head of Management Reporting. Ms Morton and Ms Forster both worked as maternity cover. They reported to Ms Jacobs.

58. During the claimant's first week, Ms Jacobs, who sat in close proximity to the claimant, observed her sitting with Ms Darling during the induction and thought she seemed disengaged. The claimant did not take notes or annotate the notes she had been given and was regularly using her phone. Both Ms Darling and Ms Forster told Ms Jacobs that they had the same concerns. Ms Forster had a word with the claimant at the end of the first week to say that she had some good experience and wanted her to gather from Ms Darling as much information as possible before Ms Darling went on maternity leave.

59. The claimant said she was given praise for her work on day 2 of her engagement, 10 October 2017. This was in respect of a Management Account Summary for 30 September 2017 which we saw at page 270. The authors were shown as Ms Darling and the claimant. The claimant had added to the spreadsheet, in a column marked "*Risk Level*", some smiley faces to indicate the level of risk. The claimant was asked what else she did on this and she said she presented it to Operational Managers and this was well received. This was only the claimant's second day in the job and this related to the presentation of information substantially

prepared by another member of the team, rather than the claimant's production of the accounts. We find it was too early for this to indicate the respondent's overall satisfaction with the claimant's work.

60. On 13 October 2017 at 09:18 the claimant sent an email to Ms Darling saying that she had forgotten to mention that she had a doctor's appointment and would be in a bit late (page 196J).

Week 2 – commencing Monday 16 October 2017

61. In her second week the claimant expressed interest in applying for the permanent and more senior role of Head of Management Reporting (page 196P). The claimant said to Mr Peasnell on 16 October 2017 "*My role is a bit more basic than I thought"*. She did not suggest it was more complicated or difficult than she expected. She was keen to apply for the role above her own; the role held by her line manager.

62. On 17 October 2017 the claimant asked Mr Peasnell a bit more about the more senior role and said that her manager Ms Forster was *"lovely like you said".* The claimant said that this was her view of Ms Forster at that point, on 17 October. On the evening of 17 October (page 196N) the claimant told Mr Peasnell that she was not sure if the role she was in was one she wanted to do. She said it was "*pretty basic"* and seemed *"heavily transactional"*.

63. On 19 October 2017 the claimant was told by Ms Jacobs that they could interview her for the Head of Management Reporting the following morning at 9am. She told the claimant that they already had 2 strong candidates and needed to make a decision the following day (page 200).

64. The claimant's case was that Ms Jacobs encouraged her to apply. In evidence the claimant indicated that Ms Jacobs gave her no discouragement from applying, which is a different matter. Ms Jacobs' evidence was that she told the claimant that she could apply, but she did not encourage her. The vacancy arose early on in the claimant's engagement and although Ms Jacobs had heard from Ms Forster that there were concerns about her work and she had observed some issues of concern for herself, she was prepared to interview her. It was early days and she could see no reason to deny the claimant the opportunity to apply if she wished. We find that Ms Jacobs did not actively encourage the claimant to apply. She saw no reason why the claimant should not be allowed to apply. It was not an indication of Ms Jacobs' view of the claimant's performance in the role to date.

65. The claimant's evidence was that at no point prior to applying for this more senior role did anyone raise any concerns about her work. The claimant had only been working independently of Ms Darling for two days at this point and had only been there for 2 weeks. It was a settling-in period and we find it unsurprising that concerns had not yet been raised with her.

66. The interview took place on 20 October 2017, the interviewers were Ms Jacobs, Ms Forster and Mr Harper, a Finance Business Partner. A total of 5 candidates were interviewed. The claimant did not interview well and was unsuccessful. Ms Jacobs said it was because she did not show she had the necessary skills and experience to undertake the role. They appointed Ms Rachelle Morton whom they said had more relevant and senior experience. Ms Morton became the claimant's line manager when Ms Forster left.

67. The claimant confirmed in evidence that she does not complain about not securing this post.

Week 3 – commencing Monday 23 October 2017

68. Concerns about the claimant not paying attention were heightened in the third week of her engagement. Ms Jacobs and Ms Forster spoke to Mr Peasnell to say that they felt there was a general lack of engagement and they felt that the claimant had not taken on board much of the information provided by Ms Darling during the handover.

69. The Agency suggested that the claimant be provided with a list of weekly "*deliverables*" so that she knew the standard to which she was expected to work.

70. At 08:48 on 23 October 2017 the claimant emailed Ms Forster to say that she was not feeling very good and asked if she could work from home that day (page 202). Ms Forster agreed to this, but had some concerns that the claimant would not be able to complete her tasks because she would not have access to all the systems from home. Ms Forster followed up with an email to say it would be helpful if the claimant could let her know what she would be doing and the claimant replied that she would be "*running through the working files of Clare's and the excels and management accounts folder"* (page 204). Ms Forster found this "*quite vague"* but did not push the point because the claimant was due back in the following day. A minute later the claimant emailed to say "*just as an example now I am running through her September journals…."*.

71. On 23 October 2017 Ms Jacobs and Ms Forster both spoke to Mr Peasnell about their concerns as to the claimant's performance, her motivation and lack of engagement. Mr Peasnell said he would speak to her about it. The claimant accepts that Mr Peasnell did call her that day but she said that the reason for his call was to enquire about her back condition.

72. On 24 October 2017 Ms Forster met with the claimant and said the purpose of the meeting was to speak about their concerns about her performance. The claimant did not accept that any concerns were raised about her work but she accepted that they discussed her tasks. We have found above that on 23 October Ms Jacobs and Ms Forster spoke to Mr Peasnell and we have found that they did have concerns about her work. The meeting to discuss those concerns took place the following day. Much

of the list of deliverables, set out below, related to the need to "*understand", "familiarise"* and *"check"* matters that the claimant was already required to do. We find that there would be little need to send such a list to the claimant if they considered that she was already meeting those requirements and we find on a balance of probabilities that Ms Forster did raise some performance concerns at that meeting. This was not in the nature of a formal performance management meeting.

73. Ms Forster followed this up with an email at 14:09 on 24 October (page 208) with a link to Ms Darling's task list and a list of 8 "*deliverables*" (page 208) that the claimant had to achieve that week. These were:

> *"1. Understand Clare's monthly Journals and balance sheet recs*
> *2. Familiarise yourself with the month and pack and how it works*
> *3. interrogate and drill into September's management accounts pack numbers and variances*
> *4. Work through Septembers budget holder info distributed to understand how it's pulled together and what info is provided in prep for October month end*
> *5. Check the payroll file for your areas*
> *6. Andrew will handover the salary tracking and forecast file which will need reconciling to the accounts and updated for the latest forecast (specifically for temp staff which all need reviewing with the managers)*
> *7. Find the in principle award reconciliation file*
> *8. Understand Clare's task of Directors expenses, monthly review, corrections and summary; and what you will need to complete"*

74. The claimant was also sent a link to the Master List of Finance procedures so she could find the correct procedure for particular tasks.

75. It was put to the claimant that she did not seem engaged during the meeting on 24 October and took no notes. The claimant said that she would normally take notes in a meeting but her memory was not clear on whether she actually took notes in that meeting. No such notes were produced. We find that the claimant did not take notes in that meeting.

76. Because they sat in an open plan office Ms Jacobs was aware that the claimant was relying heavily on other members of the team who were not part of the Management Reporting function, such as Mr Harper and Ms Healey. Ms Jacobs considered this disruptive to their duties. We find it unsurprising that the claimant needed to ask questions of other team members, but Ms Jacobs' view was that the claimant was relying on them too heavily.

77. By the end of the third week, on Friday 27 October 2017 Ms Forster formed the view that the claimant was not meeting the deliverables and that she was not suited for the position. Ms Forster recommended to Ms Jacobs and Ms Morton, who had joined on 26 October, that they terminate the claimant's engagement.

78. Ms Forster held a meeting with the claimant on 27 October to ask about the list of deliverables and what she had been doing during the week. The claimant did not give Ms Forster a clear reply. It was put to the claimant, based on the witness statement of Ms Forster, that she had not read the email of 24 October with the list of deliverables. The claimant said in oral evidence that she "*would have read it"* but was unable specifically to confirm that she did. Ms Forster made a recommendation to Ms Jacobs and Ms Morton that they should "*let the claimant go*" given her poor performance in the role. Ms Morton as the incoming new line manager recommended that they give her more time to improve and Ms Jacobs agreed to this.

The restructure

79. During the claimant's engagement a restructure was ongoing in the Finance Department as part of a wider reorganisation across the organisation. 55 employees were put at risk of redundancy of whom 5 were described as "BAME" employees. We were told that 3 out of 5 who identified as "BAME" were in the Finance Department.

80. There was a briefing meeting with the Finance staff on Thursday 26 October 2017 to inform them about the proposed restructuring in the department. Ms Jacobs led that meeting. The claimant attended even though she was not an employee of the respondent. Ms Jacobs said that the claimant was invited to that meeting as a matter of courtesy, so that she would know what was happening within the team.

81. On 26 October 2017 at 15:27 the claimant sent an email to Ms Jacobs with questions on the restructure, including how it would affect her as maternity cover (page 210) and what other roles might become available. Ms Jacobs replied on 27 October 2017 to say that they would discuss it when the consultation period was over at which point they would know how the restructure would affect her.

82. On 27 October 2017 Ms Jacobs spoke to the claimant about the consultation process and asked her to keep in mind the sensitivity of the consultation for team members. Ms Lamb, a Financial Controller, had reported to Ms Jacobs that the claimant had been proactive in asking members of the team about their positions and the impact of the restructure upon them. Ms Lamb told Ms Jacobs that colleagues were not happy about the claimant's lack of sensitivity.

83. The claimant's case was that she was called in to a meeting with Ms Jacobs to say she had information that she had been speaking to Mr Harper, a Senior Finance Business Partner and reprimanded her, instructing her not to talk about the restructure. The claimant accepted that Ms Jacobs told her about the sensitivity of the matter for team members who might be affected The claimant also accepted that it was a sensitive time. The claimant did not accept that Ms Jacobs told her that as a temporary worker the restructure did not have any impact on her.

84. The claimant's position was that it was others who were approaching her to discuss the restructure and not the other way round. We find that whoever made the first approach, it was reasonable for Ms Jacobs to ask the claimant to refrain from discussing the sensitive restructuring exercise with colleagues who were directly affected, in a way which she was not.

85. We find that as a temporary worker the restructure did not affect the claimant in the same way as the respondent's employees. She was employed by the Agency on a 3 month contract. She did not have a right to be consulted over the restructure, either collectively or individually. She did not occupy "*head-count*" as such, she was covering the substantive role held by Ms Darling and her engagement could be terminated at a week's notice.

Week 4 – commencing Monday 30 October 2017

86. On Monday 30 October 2017 Ms Forster received a complaint about the claimant from Ms Lamb. It was about a payroll task that the claimant had not completed, which Ms Lamb said had a negative effect on other members of the team. Ms Lamb said she completed the task in addition to her normal duties.

87. We saw the September task list at page 445, which Ms Darling had discussed with the claimant and the October task list at page 210A. The delivery date for the monthly payroll journal was 5 days before month-end. The delivery date for October was 25 October 2017. The claimant was asked what she had done and she said she had checked the payroll journal for her area. She said in evidence that she could not remember the "*minute details".* The payroll journal was finalised late for the month and the claimant accepted that some of the data was placed in the wrong column. She said: "*I was not aware the formulae in the right hand side column were valued and its those that Ica's journal seems to have used. I had made the adjustments on the left hand side of the payroll file"* – email 6 November 2017 page 223.

88. Ms Forster's last day in the office was Wednesday 1 November 2017.

Week 5 – final week - commencing Monday 6 November 2017

89. On Tuesday 7 November 2017 Ms Jacobs and Ms Morton had a meeting to discuss their concerns about the claimant's performance. They decided there had been no improvement in the claimant's work and she was having a negative impact on the team. They took the view that her performance was unsatisfactory and that she could not meet the needs of the role to a satisfactory standard despite what they considered to be an appropriate level of guidance and support.

90. We find that the concerns held by Ms Jacobs and Ms Morton were as follows:

- The claimant had not completed the payroll file for October 2017 as expected or on time. Ms Jacobs was made aware of this by Ms Lamb and her team members Ms Powell and Ms Healy.
- The claimant was responsible for preparing a consolidated accounts pack, the Management Accounts, and she had not updated the report or corrected the imbalances, emailing a more junior member of the team, Mr Warden, to ask him to fix it (email page 229 dated 7 November 2017). This led to a regular review meeting being cancelled. Ms Jacobs' view was that at the claimant's level of seniority as a Senior Management Accountant it was her job to put the pack together for review by the Head of Management Reporting, not the job of Mr Warden, although he had some input into it. Ms Jacobs expected someone at the claimant's level to be able to look at a file without assistance, follow the formulas through and work it out. The claimant's argument was that her manager Ms Forster did not know how to do it but we find that it was not Ms Forster's job to do it – it was the role of the Senior Management Accountant.
- The claimant's lack of engagement, spending time on her phone and talking to staff.
- The concerns about claimant unsettling staff by discussing sensitive issues around the restructure.

91. We find that the reasons were as given by the respondent based on what had taken place during the course of her engagement up to 7 November 2017. The claimant did not present facts to us from which we could conclude in the absence of any other explanation, that the termination of her engagement was because of her race. We find that it was not.

The "away day"

92. On 8 November 2017 all members of the team were out of the office at a corporate event in Leicester, called an "*All Colleagues Day*" (referred to below as an "*away day*"). This was the first time the claimant met Mr Bitel, the Chair of the respondent, with whom she later raised complaints. Mr Bitel said in evidence that he thought they should have taken a more robust approach with the claimant and dispensed with her services at an earlier stage and they should not have allowed her to attend the away day.

9 November 2017 - the termination of the claimant's engagement

93. On 9 November 2017 the claimant was called to a meeting with Ms Jacobs and Ms Morton. We find that she was told in that meeting that her performance was unsatisfactory and she had not delivered a number of tasks as expected as this was the purpose of the meeting. The claimant was told by Ms Jacobs that they would terminate her engagement via the Agency. Ms Jacobs told the claimant that she had not delivered a number of tasks and she had been trying to involve other members of the team in tasks for which she was responsible, including Mr Harper. Ms Jacobs said this was disruptive to their work programmes. Ms Jacobs also told the

claimant that at her level of seniority they expected her to seek support from her line manager or work through the problem herself. The claimant said it was agreed in that meeting that she would be given one week's notice.

94. The claimant said that because the conversation was leading towards her termination she decided to resign because of how she had been treated. We saw the claimant's email to Ms Jacobs shortly after the meeting, sent at 16:06 and copied to Mr Peasnell (page 232). The claimant said:

> *"Thank you for your time just now, and I am disappointed to hear that you would like to end my contract after just 5 weeks, following Rachelle's appointment, as mentioned I will give my notice which as you mentioned is one weeks effective today.*
>
> *Just on that note, the processes here are very organisation specific which do take time to get to know and be familiar with, and the systems are quite disjointed, as well as this being my first month end cycle. The role is actually a lot more of a basic management accounts one to the senior role that was discussed at interview too, e.g. there was no mention of having to manually do a payroll report which is a manual matching process of hundreds of lines, etc, but as mentioned that was sent to me in the wrong format, twice by Emma. As well as having very little handover from Clare before she left, and Sarah (second line manager) following her resignation."*

95. In that email the claimant comments upon information she was given at the meeting which supports our finding that she was given performance reasons at the meeting on 9 November 2017.

96. The claimant asserted that she resigned, but this is not supported by her own email of 9 November at 16:06. She expressly stated that she was "*disappointed to hear that you would like to end my contract".* It was in response to hearing of the decision to end her contract, that the claimant attempted to offer her resignation. We understand that this would be more palatable to her, but we find that the termination by the respondent was the prior event.

97. At 16:22 the claimant forwarded this email to Mr Hamer in his "*union capacity"* (page 237). The claimant said in that email she doubted whether "*this would have occurred*" if Ms Forster had remained her manager. She said: "*I'm shocked, but also not".* The claimant told Mr Hamer that the role was "*quite basic*" for her skill set which "*wasn't how they sold the job to me*".

98. At 16:54 on 9 November 2017 (page 586) the claimant sent an email to Mr Mike Diaper, a Director at the respondent. The claimant told Mr Diaper that she had resigned because the role was not what she was "*led to believe*" when interviewed. Mr Diaper forwarded the email to Ms Jacobs saying he was "*a bit confused*". Ms Jacobs replied that the claimant did

not resign and that she had given the claimant a week's notice as "*she is not working out at all"*.

99. Ms Jacobs informed the Agency and Ms White in HR of this decision.

100. We have considered the reason for the termination of the claimant's engagement. We find that the reason Ms Jacobs and Ms Morton called the claimant into a meeting on 9 November 2017 to terminate her engagement, was for the reasons set out above as to the concerns they held on 7 November 2017. We find that these were the views they held. The reason was not because of her race. There were concerns with her performance, we find that she was disengaged – she told both Mr Peasnell and Mr Hamer that the job was a bit basic for her and not what had been "*sold*" to her at interview. We find that Ms Jacobs and Ms Morton were also concerned about the claimant unsettling the team by discussing the impact of the restructure upon them.

101. We find it implausible that Ms Jacobs would engage the claimant at interview, in the knowledge of her racial group and in the space of only one month make a decision to remove her because of her race. Similarly at a meeting on 27 October 2017 when Ms Forster made a recommendation to Ms Jacobs and Ms Morton that they should "*let the claimant go*", Ms Morton wanted to give the claimant more time. If Ms Morton had wished the claimant to be removed because of her race, this was the perfect opportunity. She did not take this opportunity. In addition, the claimant's argument was that Ms Morton wanted to "*get rid of her*" in order to bring in her own people and build her own team. This was not the reason of race.

<u>The meeting on 10 November 2017</u>

102. The next day on 10 November 2017, when Ms Jacobs arrived for work we find that the claimant went to speak to her at about 9am, although during cross-examination the claimant did not recall this. The claimant did not deny that the meeting took place, but could not recall it. We find that this meeting took place. The claimant told Ms Jacobs that she thought Ms Morton wanted to "*get rid of her"* because she wanted to "*build her own team*". Ms Jacobs considered this an "*unfounded accusation"* against Ms Morton and said that the decision to terminate the claimant's engagement was due to her performance.

103. The claimant put to Ms Jacobs that what she had actually said was that Ms Morton had been aggressive towards her, but Ms Jacobs had no recollection of the claimant saying this. The claimant accepted that she may not have used the word "*aggressive*". We find that the claimant did not tell Ms Jacobs that Ms Morton had been aggressive towards her.

104. At 09:29 Mr Peasnell emailed the claimant who replied at 09:36 saying: "*The new lady who took over has a different agenda".* The "*new lady*" was a reference to Ms Morton.

105. At 09:32 (pages 236-237) the claimant emailed the union representative Mr Hamer. She said she was told her role was ending and that she had very little handover. She said she had been told that she talked to others and should have been more proactive and not have needed to. She also complained that she had no training on the systems and she presumed that Ms Morton wanted to hire in her own people.

106. At 10am on 10 November 2017 (page 233) the claimant emailed Ms Jacobs forwarding an email of 6 November to Mr Wilde on the subject of the payroll corrections from October. In her email to Ms Jacobs she placed the blame at the door of Ms Lamb saying that she had provided "*the wrong formulae*". She also said that Mr Wilde was wrong in saying she had not done it correctly.

107. A Finance Team meeting took place at 10am on 10 November 2017 - the minutes were at page 23. The claimant attended this meeting. After the meeting at 11:24 the claimant sent a further email to Mr Hamer. In that email she asked if he could sort it out for her to be put on garden leave so she did not have to be at work. She said: "*Do you think there is any way that you can sort out for me to be put on garden leave and not here? If not, then don't worry, as I don't want to make matters worse or be given a bad reference over stuff like this."*

108. The claimant denied in evidence that she wanted to leave and still be paid for the week. She said in evidence she had been treated "*appallingly*" and she was asking if it was an option. The claimant said in evidence it was "*extremely uncomfortable*" for her but she was professional and prepared to work her notice.

109. The claimant then began to send to her personal gmail account, her recent work emails on the subject of her termination plus emails about the payroll corrections.

110. It was put to the claimant that she was not doing much work on 10 November 2017, although she said that she was. We find that apart from attending the finance meeting, the claimant was engaged on emails with a number of individuals about her termination and she was sending emails to her personal gmail account (for example pages 232, 233 and 236). In the email to Mr Hamer at 11:24 (page 236) she said "*To be honest it's quite hard to concentrate right now".* We find that Ms Jacobs' concern that the claimant was not doing much work that morning, was valid. The claimant told Mr Hamer she found it hard to concentrate and she was busy on emails to others about her personal situation and sending emails to her gmail account.

111. At 14:41 on 10 November the claimant again emailed Mr Peasnell (page 241A) saying: "*I am really not happy about this situation and they are expecting me to come in and do a weeks notice with a last day of Thursday, when in such a toxic and unsupportive environment. it's an*

*appalling way to be treated. I want you to urgently call her, Serena [Jacobs] and express how badly I have been treated and for you as my agency to stand up for me, is that possible? And I want to go to HR and express this too, unless you think its better you speaking to Victoria from HR?"*

112. At 15:06 the claimant asked Mr Peasnell whether, if she decided not to come back on Monday, they would still have to pay her and not deduct one week's pay (page 234A).

113. Shortly after she sent the email to Mr Peasnell at 15:06 the claimant was called into a meeting with Ms Jacobs who said that they would like her to leave right away and they would pay her for the rest of the week. Ms Robinson a junior HR Officer, was also present at the meeting.

114. Prior to making the decision to ask the claimant to leave immediately, Ms Jacobs consulted with a number of individuals about what to do. They were Mr Diaper, who as a Director had responsibility for HR, Ms Rona Chester, the Chief Operating Officer, Ms White in HR and Mr Peasnell at the Agency. Ms Jacobs said she had a number of reasons for asking the claimant to leave on that date. These were her concerns about the claimant's allegation that her engagement had been terminated because Ms Morton wanted to "*get rid of her",* the fact that she did not appear to be doing much work on that Friday, the email exchange with Mr Diaper in which she inaccurately said she had resigned, which Ms Jacobs described in evidence as "*weird"* and that she began to find the claimant's behaviour as unsettling within the team. Ms Jacobs' evidence was that it was a combination of factors and not one single thing. She was also concerned that the claimant, working in a senior role in Finance, had access to sensitive data and whilst she did not believe the claimant would do anything wrong, it was the practice with staff with access to such data because of the possible risk. With these additional factors that came into play on Friday 10 November, she made the decision to terminate the claimant's engagement with immediate effect and asked her to leave immediately.

115. We find that these were the reasons she held and that the decision to ask the claimant to leave immediately on 10 November was not because of her race. We find that if the reason had been race, there was no reason not to ask her to leave immediately on 9 November. It was the developments on 10 November that led to the decision to ask her to leave with immediate effect.

116. The claimant did not present facts to us from which we could conclude in the absence of any other explanation, that the decision to ask her to leave immediately on 10 November was because of her race. We find that it was not. Whilst we agree with the claimant that this meeting could have taken place at the end of the working day and this would have been easier for her to deal with, the reason for asking her to leave immediately had nothing to do with her race.

117. We find on Ms Jacobs' oral evidence that they asked the claimant to collect her belongings, which she did. The claimant appeared distressed. They did not stand over her while she collected her belongings but waited in the first floor reception area. Ms Robinson accompanied her downstairs. Ms Jacobs did not accompany the claimant downstairs. To the extent that the claimant's account differed, we find that she was very upset at the time and it is now 4.5 years after the event and we preferred Ms Jacobs' account.

118. At 15:47 on 10 November the claimant sent an email to Ms White in HR marking it "*urgent*", saying: "*Is it possible to speak with you right now? I'm in reception/outside?"* Ms White was not in the office that afternoon. She replied 10 minutes later by saying that neither she nor another HR colleague were actually in the office that day and suggested she contact Ms Robinson.

119. In her witness statement the claimant said was that she had a major loss of vision and had to go back into the building. She corrected this before swearing to the truth of her statement. The claimant's oral evidence was that she came back into the building and asked to speak to HR, she exited reception, had a visual migraine and returned to reception. She said in evidence that this did not permit her to read, send messages or use a phone, but in any event she was able to send the email to Ms White at 15:47, asking to speak with her and saying that she was "*In reception/outside*" (page 248C). The claimant could not remember if this was before or after her visual migraine occurred.

120. The claimant said in evidence for the first time, that she thought she had been "*set up*" by Ms Morton and Ms Jacobs in "*collusion*" with Mr Wilde and that they had agreed this between themselves and that the purpose was race discrimination. We do not agree, for the reasons set out above.

121. Just after 4pm on 10 November Ms Stephens gave authority for IT to grant Ms Jacobs access to the claimant's email account (page 241) which was done by 4:30pm. Ms Jacobs' evidence was that she wanted to make sure no files had been sent outside the organisation that should not have been and that it was good practice for her to check. The claimant submitted that in doing so, Ms Jacobs saw her email to Mr Hamer of 10 November 2017 (page 237) and seen that she raised matters about diversity. Ms Jacobs thought she saw it but was not sure. The claimant said in that email: "*And yes you were right about diversity in the organisation, I should have acted on that red flag sooner……...So much for that diversity plaque by the wall at the entrance".*

122. It is important for us to underline that this email to Mr Hamer of 10 November 2017 was not relied upon as a protected act in the list of issues for our determination. Even if it amounted to a protected act, upon which it is not necessary for us to make a finding, it cannot be relied upon as such in submissions.

13 November 2017

123. On Monday 13 November 2017 the claimant telephoned Ms White and asked how she could make a complaint. Ms White said she should do this via the Agency because they were the employer. This was confirmed to the claimant in an email from Mr Peasnell (page 248A). As the claimant was not happy with this response, Ms White referred her to the respondent's Complaints Policy. In Ms White's note of the call (page 252) she also said that the Agency had "*asked for her to be referred to them"*. Ms White's evidence (statement paragraph 9) was that she understood that it was distressing to be asked to the leave the workplace, both for agency workers and employees in their probationary period, but they had done this on other occasions.

124. At 8:09 on 13 November the claimant sent an email to Mr Peasnell (page 252A) saying that the decision was "*Rachelle driven"* because she "*just wanted her own person, or saw me as a threat, because I guess she was told I had gone for that role too*" – this being the Head of Management Reporting role. The claimant did not suggest to Mr Peasnell that she thought the decision had anything to do with her race.

125. That same evening, 13 November 2017 at 22:21, the claimant sent an email to Mr Bitel, the Chair of the respondent, whom she met at the away day on 8 November. She raised with Mr Bitel her concerns about the termination of her engagement (pages 254-255). She did not want to raise a formal complaint. The claimant said: "*I was called to a meeting with Serena and Rachelle and told my contract would be ending with a week's notice, at which point I resigned too" (*page 254). The claimant said at point 7 of the email, 3 days after the events of 10 November:

> *"Then about 3-330pm, Serena called me to a meeting room, I had been working on a file task for them that I'd just completed. An HR person was present, she didn't introduce herself until I asked who she was I have not met her before, then Serena proceeded to tell me she wanted me to clear my desk and leave immediately and would take my pass off me and walk me down out of the building, and I'd be given garden leave for the remaining 4 days. I was left stood outside on the steps of the building and then the street corner of the building for about 30-40 minutes In shock, and while I tried to see if I could get hold of Vicky from HR to speak with her, but she was not in that day. Needless to say I was shocked, as were my colleagues who I briefly said good bye to. I feel this was an overreaction, there was no reason why she couldn't have asked me to finish up then or at the end of the day and hand my pass to her."*

126. At point 8 of the email the claimant said: "*and that shock of being walked out in that manner out of the blue triggered a migraine attack in me later that evening and next morning too."* This account given to Mr Bitel did not say that she had the migraine attack during the day on Friday 10

November, but that it happened to her later that evening. The claimant said in evidence that she "*may not have documented it correctly*". The claimant's case was that the only reason she went back into the building was because she was so unwell and could not safely make her way home.

127. The claimant described her email to Mr Bitel as "*feedback to try to ensure that it doesn't happen to other ethnic people like me going forward*" (page 255). She was clear at that point that it was feedback. She did not say that she was making a complaint.

128. The claimant relied upon this email of 13 November 2017 as a protected act. The respondent did not accept it was a protected act. The claimant relied on the last line of that email saying: "*I'd like to give this feedback to you to try to ensure that it doesn't happen to other ethnic people like me going forward*". At the start of the email the claimant described herself as "*the Asian girl working in finance*" by way of reminding Mr Bitel who she was. The claimant said she felt that the way she was treated was not fair and she made a link to diversity. Although we considered this to be borderline, we find that in making the allegation of unfair treatment, identifying herself as "*Asian*" and complaining about diversity issues, this was enough to amount to an allegation, whilst not express, that the respondent had contravened the Equality Act. We find that this email was a protected act.

129. On Tuesday 14 November 2017 Mr Bitel replied saying that he would look into the matter if the claimant consented (page 254). The claimant replied saying she did not want to take any formal steps (page 253). She also asked him to wait until she was paid and she did not want to "*jeopardize the pay day*". Mr Bitel said he would respect her wishes. At 10:10am the claimant said she was happy for Mr Bitel to look into it, "*in an informal sense*". There was no suggestion on 14 November that the claimant wanted to make a formal complaint.

130. Mr Bitel asked Ms Rona Chester, the Chief Operating Officer, to consider the complaint. At the end of 2017 Ms Chester held responsibility for the Finance Department.

131. On 7 December 2017 (page 285) the claimant asked if Mr Bitel had made any progress and whether he was going to give her any feedback. He replied that he had raised it internally but was not planning to give her feedback save to say that he thanked her for raising the matter and if issues were identified they would take action to make improvements.

132. On 31 December 2017 the claimant said for the first time that she wished to raise a formal complaint (page 284). Mr Bitel was on holiday when he received that email. He did not play any part in deciding how the complaint would be dealt with. He passed it to Ms Stephens, the Head of Legal and Principal In-House Solicitor.

<u>January 2018</u>

133. On 4 January 2018 Ms Gail Laughlan, Information Governance Manager emailed the claimant about her complaint (page 301). She explained that the respondent's Complaints Procedure was aimed at members of the public who were dissatisfied with the respondent's actions or decisions and it was not intended to resolve issues arising from contractual disputes. Ms Laughlan said they would look into the cultural issues that the claimant had raised. The claimant was invited to provide more information but she did not do so.

134. At 6:17pm on 4 January 2018 the claimant replied (page 301) saying: "*I did immediately at the time say to Victoria [White] that I wanted to log a formal complaint with them. But she said as I was a contractor the only means was via the main complaint process that you have outlined."* The claimant asked if that meant that contractors could be treated in any way at all and there would be no consideration of it. The claimant followed this one minute later with an email to Mr Bitel asking if it meant her complaint would be "*whitewashed*". We were not taken to any reply from Mr Bitel and we find that he did not reply to this email.

135. The process that had been embarked upon was the Complaints Procedure. In cross-examination of Mr Bitel, the claimant's concern was that he appeared to be "*closing her down*" when she was asking for an appeal. The claimant accepts that she was allowed an appeal which we deal with below. We find that the continuation of the use of Complaints Procedure was because it was already underway following a decision from HR and Mr Bitel was not expressly asked to move to a different procedure. It was not because of her race or because of anything she said in her email of 13 November 2017.

136. Ms Chester completed her investigation into the informal complaint prior to the Christmas holidays but the outcome letter was not sent out until January. On 15 January 2018 Ms Chester sent an outcome letter (page 304), informing the claimant that the reason for the termination of her engagement was performance.

137. The claimant replied to Ms Chester saying that she had yet to submit the details of her complaint, so she was "*somewhat surprised*" to receive an outcome. We find that this was because Ms Chester had dealt with the informal complaint; she was not responding to the formal complaint raised on 31 December 2017. Ms Chester's outcome said: *"As you know this role was a temporary role but had a high transactional component and some very distinct deliverables which were not delivered to the satisfaction of the team. It was for these reasons alone that the decision was made to terminate the contract with the agency".* Ms Chester also said: "*Sport England prides itself of tackling issues of inequality both within the projects we fund, and internally within our recruitment processes".* We find that Ms Chester did consider the equality and diversity issue raised by the claimant because she made reference to tackling issues of inequality and we find that she would not have done so, if she had not considered the matter.

138. The claimant was not happy with this response and on the same day, 15 January 2018, she emailed Mr Bitel to say that she did not consider Ms Chester to be independent because she was Ms Jacobs' line manager and she wanted someone independent to consider her complaint.

139. The next level of complaint in the Complaints Procedure was to the Chief Executive. On 15 or 16 January 2018 the claimant emailed the Chief Executive and two other Board Members, Wasim Khan and Chris Grant, both of whom were said to be from ethnic minority backgrounds. The respondent accepts that this email was a protected act. Mr Khan commented in an email to Mr Bitel on 16 January 2018 that the claimant was "*making some pretty inflammatory comments with regards to race discrimination […] her strong tone and inference suggests that that she may well be looking to claim unlawful discrimination according to her rights under the Equalities Act."* (page 321). The respondent accepted from this that the claimant's email of 15/16 January 2018 was a protected act.

140. On 27 January 2018 (page 332) the claimant sent an email to Mr Bitel complaining about "*Mistreatment during my employment….that was not investigated properly, despite a formal written complaint*". In that email the claimant said she was "*the only Asian on the London office floor at that time*". Mr Bitel replied (page 331) to say that her concerns had been carefully reviewed by Ms Chester and that he "*should add that you were not the only Asian in the London office*".

141. The Complaints Procedure gave a right of appeal to the Chief Executive. This was set out under the heading "*Appeal*" (page 85H) so we find that the claimant was given a right of appeal. Despite this being an internal process, the claimant considered it "*appalling*" (page 344) that the respondent had not conducted an "*independent investigation"* into her complaint. Mr Bitel agreed to the claimant's request for a more independent investigation by appointing a Board Member, Ms Barrett-Baxendale. The claimant was informed of this on 29 January 2018 (page 348). She replied "*Yes, that's great, thank you".* She did not raise any objection to Ms Barrett-Baxendale's appointment when she was informed about it.

142. On 2 February 2018 the claimant asked if there was a reason for the delay (page 354) and on 9 February she asked if it was progressing or whether it was being delayed intentionally "*in respect of key employment law deadlines".* We saw internal correspondence on 3 and 6 February 2018 between the Chief Executive and Ms Stephens and we find they were seeking to contact Ms Barrett-Baxendale to move things along. We find that the respondent was not intentionally seeking to delay or hinder the claimant's prospects of bringing a claim. In any event there was nothing to prevent the claimant from bringing a claim whist awaiting the outcome of the internal process. Her claims were within time in any event.

143. Ms Barrett-Baxendale interviewed the claimant by telephone on 19

February 2018. In addition to speaking to the claimant, Ms Barrett-Baxendale interviewed six employees and one contractor as part of her investigation. The names of four of those interviewed had been put forward by the claimant. The claimant agreed in evidence that during the telephone interview Ms Barrett-Baxendale gave her a full opportunity to air her grievances and complaints.

144. The claimant said that Ms Barrett-Baxendale did not fully capture that her complaints were about race. The claimant also said that Ms Barrett-Baxendale investigated the failure to appoint her to the more senior role and this was not part of her complaint. The respondent accepts that Ms Barrett-Baxendale misunderstood that point. The claimant said she also failed to investigate that her role was taken by Mr Wilde. The respondent's case was that Ms Barrett-Baxendale considered whether the claimant's removal from the respondent was because of her race.

145. The claimant complained that she did not see copies of witness statements and notes taken by Ms Barrett-Baxendale. We find that this was not a right given within the Complaints Procedure, so there was no failure to comply with process in this respect.

146. We saw Ms Barrett-Baxendale's 11-page report titled "*Review of Removal of [the claimant]*" at page 468 which concluded that the claimant was not subject to an inadequate induction process or inadequate support, there was no basis for the claimant's belief that she was passed over for promotion or removed because of her race and she did not agree that the claimant's removal from the organisation was in any way improper or unprofessional (page 477).

147. On 26 March 2018 the claimant was provided with Ms Barrett-Baxendale's Investigation Report.

<u>Job losses within the restructure</u>

148. The claimant's case was that those who lost their jobs in the restructure were all members of ethnic minorities. As stated above, in October and November 2017 the respondent consulted the Finance department as part of an organisation-wide restructuring exercise. The organisation-wide consultation began in March 2017 with phase 3 which related to Finance taking place in October 2017. This was the third and final phase.

149. The proposal document for the restructure was dated 3 March 2017 and started at page 109. The respondent wished to introduce more modern finance systems to bring about greater efficiency and reduce manual data entry which was time-consuming. As there were wider organisational changes, the proposal was for the finance team to provide support to the organisation in a different way. A decision was made to remove the separation between financial and management accounting teams. All postholders were to have accountancy qualifications.

150. Two members of the finance team took voluntary redundancy and there were no compulsory redundancies. Mr Harper, whom the claimant described as being from an ethic minority, chose to take voluntary redundancy. He was offered an alternative role at a lower grade with pay protection for a year, which he declined. The other "*at risk*" employee decided to take voluntary redundancy with early retirement benefits. In terms of being placed at risk of redundancy, Mr Harper was a Finance Business Partner for a specific directorate which no longer existed in the new structure and he chose to take voluntary redundancy. The respondent complied with its obligation to offer an available alternative role and offered pay protection. We find that Mr Harper was not "*demoted*" as the claimant submitted. Neither of these two employees complained about their departure from the respondent.

151. We were taken to a list of the employees who were at risk of redundancy (page 106). Four positions were placed at risk within the finance team and these were two accounts officers positions, finance business partner and management accountant. The holders of the two latter roles were those who applied for voluntary redundancy.

152. Of the two accounts officer positions, one Mr AH, who describes himself as "BAME", was promoted to the role of Accounts Supervisor and the second, Mr EM, who describes himself as white, was matched into an Accounts Officer position. Mr AH was from an ethnic minority and was promoted within the restructure.

153. There were no compulsory redundancies in the restructure of the Finance team. We find that no one in the Finance Department from an ethnic minority was compulsorily dismissed and neither of those who took voluntary redundancy complained about their departure. One member who described himself as "BAME" was promoted.

154. The background evidence as to the restructure did not lead us to draw any inferences of race discrimination in the treatment of the claimant.

Comparator Andrew Wilde

155. As we have set out above, when the claimant's engagement was terminated Mr Wilde took over the post covering Ms Darling's maternity leave. Mr Wilde was himself an agency worker and maternity cover for a Finance Business Analyst role. He had been working in that maternity cover role from December 2016. We were told that he is white.

156. The claimant queried why Mr Wilde secured that role without any competition and during a restructure exercise. We find that as he was an agency employee and maternity cover he was not part of the respondent's "*headcount*" and like herself, he was not subject to the restructure. The person who was potentially subject to the restructure was the substantive holder of the post Mr Wilde was covering.

157. From Ms Jacobs' point of view Mr Wilde was a sensible choice to cover the role. Mr Wilde was himself agency maternity cover. The postholder, whose role he was covering, was due to return that month, November 2017. The claimant's departure was at short notice, there was an immediate gap and they had an urgent need to fill it. Rather than finding a new agency worker and with a view to keeping some consistency and continuity for the team, Ms Jacobs moved Mr Wilde into the role while they decided what to do next, particularly in view of the restructure. He had familiarity with the respondent's business and processes. It is open to the respondent to move agency workers around as the business need exists. There was no evidence of any performance or behavioural issues with Mr Wilde and we find that there were no such issues. Mr Wilde was available to fill the role when the claimant left and this had nothing to do with race.

158. As set out above, claimant suggested for the first time in evidence, that Ms Jacobs and Ms Morton "*colluded*" with Mr Wilde to remove her and this was an act of race discrimination. We find that this did not happen. We find on Ms Jacobs' evidence and on a balance of probabilities that she and Ms Morton did not "*collude*" with Mr Wilde, who was an agency worker, about their intentions concerning the claimant.

159. In addition in the meeting on 27 October 2017, when Ms Forster made a recommendation to Ms Jacobs and Ms Morton that they should "*let the claimant go*", Ms Morton wanted to give the claimant more time. As we have found above, if Ms Morton had an "*agenda"* to be "*rid"* of the claimant because of race or otherwise, she had the perfect opportunity on 27 October 2017 to put that agenda into practice by accepting Ms Forster's recommendation. She did not do so.

<u>The Complaints Procedure and the Dignity at Work Policy</u>

160. The claimant's complaint was that her grievance was dealt with as if it had been raised by a member of the public rather than a worker/employee and that there was no grievance hearing. Her case was that this was an act of direct race discrimination.

161. The claimant accepts that she was not an employee of the respondent and that she was an agency worker supplied by an Agency. We have made findings above as to the contractual situation.

162. We had the Grievance Procedure at page 104P and from clause 1 of that Policy and from Ms White's evidence, we find that it applied to employees only. The claimant did not assert that the Grievance Procedure should have been used.

163. It was Ms Victoria White in HR who pointed the claimant towards the Complaints Procedure when the claimant called her on Monday 13 November 2017 to ask how she could make a complaint. On her own evidence we find that it was Ms White who made the decision and directed the claimant towards the Complaints Procedure on the website because

she understood this to be the correct route. Ms White said that they would normally expect an agency worker to make a complaint through their agency in the first instance but she did not require the claimant to do this.

164. In her second witness statement (paragraph 20) the claimant dealt with her conversation with Ms White on 13 November saying that she told Ms White that she wanted to "*raise a grievance as a temporary worker to HR*". She did not say in her witness statement that she said she wanted to raise a complaint of race discrimination. We also saw Ms White's contemporaneous note of the telephone conversation, at page 252, which the claimant agreed in evidence was an accurate reflection of their conversation, which made no reference to the claimant mentioning race discrimination. We find that the claimant did not complain about race discrimination in her conversation with Ms White on 13 November.

165. We find that when Ms White pointed the claimant to the Complaints Procedure, this was because she was of the view that it was the correct route for someone in the claimant's position. We find that she did not refer the claimant to the Complaints Procedure, as opposed to the Dignity and Work policy, because of the claimant's race.

166. We saw from an email from the claimant to Mr Peasnell timed at 12:55 on 13 November that she was "*just on the phone to Vicky to explain that I was not happy with how I was treated".* The first protected act relied upon was the claimant's email to Mr Bitel of 13 November timed at 22:21 hours. We find that when Ms White referred the claimant to the Complaints Procedure, no protected act had yet been done by the claimant.

167. The Complaints Procedure was at page 85A and the Dignity At Work Policy was in the Additional Disclosure bundle at page 6. The claimant relied in particular on clause 2 of the Dignity At Work Policy which said:

> *This policy relates to all colleagues at Sport England. It also applies to any individuals who are not directly employed by Sport England but who interact with our colleagues through the course of their work.*

168. One of main purposes of the Dignity at Work Policy was to set out standards of behaviour expected of those working at the respondent and what to do if those standards were not met. It has an informal stage by which colleagues are encouraged to resolve matters informally by talking to the person concerned and then a formal stage whereby a written complaint should be submitted to that person's Executive Director with a copy to HR. It has an investigation stage followed by findings made by the Investigating Manager. It does not have a hearing stage. There is provision for an appeal to be heard by an Executive Director.

169. The Complaints Procedure also has an informal followed by a formal stage. The formal stage is to be addressed to the Head of Unit responsible for the matter in question. The Head of Unit is to look into the complaint, review the facts and consider the information provided and then provide

an outcome. It does not have a hearing stage. In the claimant's case the first stage was dealt with by Ms Chester, the Chief Operating Officer, which Ms Stephens said was not usual, but they felt in the circumstances they would do this to ensure a fair process. There is a right of appeal to the Chief Executive and if the complainant is still not satisfied, there is a right to go to the Parliamentary and Health Services Ombudsman if the individual believes that there has been injustice or hardship because the respondent had not acted properly or fairly or had given poor service and not put things right.

170. In terms of the right of appeal, rather than this going to the Chief Executive, as we have found above, Mr Bitel agreed to the claimant's request for a more independent investigation by appointing a Board Member, Ms Barrett-Baxendale. The claimant raised no objection to this and thanked Mr Bitel when he informed her.

171. The claimant submitted that the Dignity at Work policy was more beneficial because it allowed for witness statements to be retained and rights of appeal. Both policies provide a right of appeal. There are more restrictions on the right of appeal in the Dignity at Work policy because an appeal can only be submitted on one of three grounds under paragraph 7.3:

 *the decision reached was unreasonable considering the information; provided. This may include (where action was taken) the level of action;*
 *the policy and procedure was not adhered to;*
 *new evidence has become available.*

172. The Complaints Procedure provides no such restriction on the right of appeal. It also provides for a yet further right of appeal to the Parliamentary and Health Service Ombudsman which is not part of the Dignity at Work policy. The appeal under the Dignity at Work policy is not a rehearing but a consideration of the aspects with which the colleague is dissatisfied. The Complaints Procedure appeal is more comprehensive as the Chief Executive reviews the initial decision. In terms of the appeal process the Complaints Procedure is a more beneficial procedure.

173. The Dignity at Work policy at clause 7.4 provides for the retention of witness statements for 12 months following the outcome of a complaint. The Complaints Procedure does not deal with the retention of witness statements. The claimant submitted that the Dignity at Work policy allowed her "*more access to the information".* The Dignity at Work policy gives no express right of access to the statements and in that respect is no different from the Complaints Policy. This is in contrast to the Grievance Procedure at page 104Q (under heading "Investigation" which provides that "*In the majority of cases at the end of the investigation a copy of any evidence gathered should be sent to the colleague who made the grievance".* As there is no right of access to witness statements under either the Dignity at Work policy or the Complaints Procedure we find that there was no less favourable treatment of the claimant and no detriment

to the claimant by the use of the Complaints Procedure.

174. Neither policy provides for the equivalent of a Grievance Hearing as under the Grievance Procedure at page 104Q under the heading "*The grievance hearing*". The claimant's complaint, as set out in the Issues above, was that her complaint was dealt with as if it had been raised by a member of the public rather than a worker/employee and in particular that there was no grievance hearing. Neither the Dignity at Work policy nor the Complaints Procedure provide for such a hearing and as such the claimant was not less favourably treated by not being afforded a grievance hearing.

175. Ms Stephens, who at the relevant time was the respondent's Principal In House solicitor, said that the Complaints Procedure was the appropriate route for a third party.

Was the claimant still engaged by the respondent on 13 November 2017?

176. We have also considered whether the claimant was still engaged by the respondent when she raised her complaint on 13 November 2017 or whether her engagement had come to an end. Ms Jacobs' evidence (statement paragraph 40) was that after her discussions with Mr Diaper, Ms Chester, Ms White and Mr Peasell on 10 November "*it was agree[d] that I would call a meeting with the claimant and tell her that Sport England did not require her to work notice (she would be paid in lieu instead) and that her engagement would end that day."* We find that the events of 10 November led Ms Jacobs to terminate the engagement with immediate effect and this is what took place at the meeting on that date. When the claimant raised her complaint on 13 November 2017 she was no longer a contract worker with the respondent.

177. Ms Stephens could not recall whether the claimant was given notice on 9 November 2017. She was asked in cross-examination what a person's last day would be if they were given a week's notice on a Thursday and Ms Stephens replied "*A week from Thursday is a week*". We found that this was an answer to the question put to her and not an acknowledgement that the claimant remained in a notice period for a week from 9 November 2017. The events of 10 November superseded this. Ms Stephens was not present at the meeting on 10 November 2017.

178. In her written submission the first numbered paragraph 3 on page 11 the claimant complained that to exclude her from the Dignity at Work policy would be "*discriminating against temporary workers compared to others".* This was not a claim under the Agency Workers Regulations.

**The relevant law**

Contract workers

179. In terms of contract workers section 41 Equality Act 2010 provides that:

*(1) A principal must not discriminate against a contract worker*

*(a) as to the terms on which the principal allows the worker to do the work;*
*(b) by not allowing the worder to do, or to continue to do, the work;*
*(c) in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;*
*(d) by subjecting the worker to any other detriment.*

[…]

*(3) A principal must not victimise a contract worker –*

*(a) as to the terms on which the principal allows the worker to do the work;*
*(b) by not allowing the worder to do, or to continue to do, the work;*
*(c) in the way the principal affords the worker access, or by not affording the worker access, to opportunities for receiving a benefit, facility or service;*
*(d) by subjecting the worker to any other detriment.*
[…]

*(5) A "principal" is a person who makes work available for an individual who is –*

*(a) employed by another person; and*
*(b) supplied by that other person in furtherance of a contract to which the principal is party (whether or not that other person is party to it).*
*(c)*

*(6) "Contract work" is work such as is mentioned in subsection (5),*

*(7) A "contract worker" is an individual supplied to a principal in furtherance of a contract such as is mentioned in subsection (5)(b).*

Direct race discrimination

180. Direct discrimination is defined in section 13 Equality Act 2010 which provides that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

181. Section 23 of the Act provides that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

182. Bad treatment per se is not discriminatory; what needs to be shown is worse treatment than that given to a comparator - ***Bahl v Law Society 2004 IRLR 799 (CA).***

Victimisation

183. Section 27 Equality Act provides that a person victimises another person if they subject that person to a detriment because the person has done a protected act or because they believe that the person may do a protected act.

184. Each of the following is a protected act:

> *(a) bringing proceedings under this Act;*
> *(b) giving evidence or information in connection with proceedings under this Act;*
> *(c) doing any other thing for the purposes of or in connection with this Act;*
> *(d) making an allegation (whether or not express) that A or another person has contravened this Act.*

185. It is for the claimant to prove that he or she did the protected acts relied upon before the burden can pass to the respondent - see ***Ayodele v Citylink Ltd 2018 ICR 748 (CA)***: "*Before a tribunal can start making an assessment, the claimant has got to start the case, otherwise there is nothing for the respondent to address and nothing for the tribunal to assess.*"

186. In ***Scott v London Borough of Hillingdon 2001 EWCA Civ 2005***, the Court of Appeal held that knowledge of the protected act on the part of the alleged discriminator is a precondition to liability. The burden of proving knowledge lies on the claimant.

187. In relation to what is a detriment, this is not defined in the Equality Act. In the ***Shamoon*** case (referenced below) the House of Lords said that an unjustified sense of grievance cannot amount to a detriment, but that it is not necessary to demonstrate some physical or economic consequence. The tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that s/he had thereby been disadvantaged in the circumstances in which s/he had thereafter to work.

188. For the tribunal to find that there has been a contravention of section 41(1)(d) Equality Act (set out above) it must find both that there has been less favourable treatment because of the protected characteristic, in this case race and that the worker has suffered a detriment. This requires a finding of both discrimination and detriment – see ***Cordant Security Ltd v Singh EAT/0144/15.***

The burden of proof

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

concerned, the court must hold that the contravention occurred. This does not apply if the respondent can show that it did not contravene that provision.

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

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

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

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

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

195. More recently in ***Efobi v Royal Mail Group Ltd 2021 IRLR 811*** the Supreme Court confirmed the approach in ***Igen v Wong*** and ***Madarassy***.

**Conclusions**

Direct race discrimination

196. We have found above that when Ms Jacobs and Ms Morton called the claimant into a meeting on 9 November 2017 and told her that her contract was at an end this was principally because of performance concerns. It was not because of the claimant's race.

197. We have found above that when Ms Jacobs called the claimant into a meeting on 10 November 2017 together with Ms Robinson from HR, and told her that she had to leave immediately this was because of what had transpired over the following 24 hours leading to increased concerns on the part of Ms Jacobs. It was not because of the claimant's race.

198. In terms of the complaint that the grievance of 13 November 2017 was dealt with as if it had been raised by a member of the public rather than a worker/employee and in particular there was no grievance hearing we have found as follows.

    a. The decision maker was Ms Victoria White. She made the decision because she understood this to be the correct route for an agency worker whose engagement had been terminated. We have found that Ms White did not understand the claimant to be complaining about race discrimination. Our finding of fact is that the reason Ms White directed the claimant to the Complaints Procedure was not because of her race. When the claimant asked Mr Bitel whether her complaint would be "*whitewashed",* our finding is that the respondent continued to use the procedure which was underway and Mr Bitel was not expressly asked to move to a different procedure. We find that the continuation of the use of the Complaints Procedure was not because of the claimant's race.
    b. There was no less favourable treatment of the claimant in the use of the Complaints Procedure. If anything the Complaints Procedure was slightly more favourable. It had more comprehensive rights of appeal. Neither the Complaints Procedure nor the Dignity at Work policy afforded a right to access to the witness statements as under the Grievance Procedure. Neither procedure afforded a "grievance hearing" as under the Grievance Procedure. The procedure applied to the claimant was adapted at her request so that Ms Barrett-Baxendale dealt with her appeal and not the Chief Executive.
    c. In any event, we have found that the claimant was no longer engaged by the respondent on 13 November 2017 because her engagement had been terminated by Ms Jacobs with immediate effect on 10 November. As such she did not have a right to the use of the Dignity at Work policy. Any decision not to allow her access to that policy was not because of her race.

199. As such the claim for direct race discrimination fails and is dismissed.

<u>Victimisation</u>

200. The claimant also relied upon the use of the Complaint's Procedure rather

than the Dignity at Work procedure as an act of victimisation. Our finding above is that the claimant did not have a right to the use of the Dignity at Work policy because she was no longer engaged by the respondent on 13 November 2017 and in any event there was no detriment to her by the use of the Complaints Procedure. She would not have been afforded a formal "grievance hearing" under either procedure.

201. The protected acts relied upon by the claimant were the emails of 13 November 2017; 15 or 16 January 2018 and a contact via the respondent's website between those dates. We have found that the email to Mr Bitel of 13 November 2017 at 22:21 hours was a protected act but it had not been done when the claimant spoke to Ms White just before 12:55 on that date and the decision was made to use the Complaints Procedure. We have also found that the continuation of the use of the Complaints Procedure was not because of any protected act.

202. In any event, we have found that the claimant was no longer engaged by the respondent on 13 November 2017 because her engagement had been terminated by Ms Jacobs with immediate effect on 10 November. As such she did not have a right to the use of the Dignity at Work policy. Any decision not to allow her access to that policy was not because of any protected act.

203. As such the claim for victimisation fails and is dismissed.

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**Employment Judge Elliott**
**Date: 27 May 2022**

Judgment sent to the parties and entered in the Register on: 30/05/2022

For the Tribunal