EMPLOYMENT TRIBUNALS

Case Reference:	**1406301/2020**
Claimant:	**Ms V Grigorescu**
Respondent:	**Western Power Distribution (South West) Plc**
Heard at:	**Bristol by CVP**
On:	**23-26 May and 22 July 2022**
Before:	**EJ Lowe**
	Mr C Williams
	Ms D England
Representation	
Claimant:	**In Person, with the assistance of a McKenzie Friend, Mr Phillips**
Respondent:	**Ms H Winstone**

RESERVED JUDGMENT

The unanimous decision of the Tribunal is recorded as follows:

The Claimant's claim that she was victimised contrary to section 27 Equality Act 2010 is dismissed

The Claimant's claim that she was directly discrimination against by the Respondent on the grounds of sex is dismissed

The Claimant's claim that she was directly discrimination against by the Respondent on the grounds of race is dismissed

The Claimant's claim that she was directly discrimination against by the Respondent on the grounds of age is dismissed

REASONS

1. Introduction

In a claim form presented to the Tribunal on 30 November 2020, the Claimant brings the following complaints:

1.1. Discrimination on the grounds of sex, race and age (Equality Act 2010, section 13)

1.2. Victimisation (Equality Act 2010, section 27)

ACAS Early conciliation commenced on 7 October and a certificate of early conciliation was issued on 2 November 2020.

References in this judgment to the agreed hearing bundle are in the form **[B/page number]** and references to witness statements are in the form **[WS/surname/paragraph number]**.

2. Preliminary Applications

At the commencement of the hearing, the Claimant advanced the following applications:

2.1 - Adjournment of the proceedings so that the hearing could take place in person rather than remotely;
2.2 - An amendment application to include an additional issue in respect of the grievance proceedings;
2.3 - An application to call additional witnesses.

2.1 Adjournment of proceedings
The Claimant fairly outlined that the hearing was scheduled initially to take place In Person. However, on 20 May 2022, all parties were notified that the hearing would now take place remotely. The format of the hearing was changed at short notice and without consultation.

Tribunal decision
The Claimant initially objected to a remote format in her email dated 20 May 2022. Regional Employment Judge Pirani considered the Claimant's objection on the same date, outlining to the parties that, due to limited judicial resources, a judge was not available to sit in Bristol. As a consequence, and in accordance with the overriding objective and the interests of justice, the case should proceed remotely as opposed to being postponed.

The Tribunal acknowledged that the format of the hearing had been changed at short notice, and this had necessitated additional considerations in terms of technical equipment and location. However, with the assistance of Mr Phillips, a suitable venue and equipment had been found and was operationally effective.

The Tribunal confirmed that in terms of body language and non-verbal cues, these would still be clearly visible and identifiable. Importantly, parity between the parties would still be maintained.

The Tribunal enquired as to the health of the Claimant and, in particular, her eye condition. The Claimant confirmed that her vision was not causing any difficulties at present, but that she couldn't predict if this would remain the case. The Tribunal agreed that it would keep this matter under review and revisit if necessary.

The Tribunal noted the medical evidence provided, namely a private prescription, dated 14 May 2022. This prescribed eye drops for the right eye (4 times a day for the first week, and thereafter, twice a day for the next 7 days) and medication for 7 days.

The Claimant outlined further that she felt stressed, tired and that she was signed off unwell from work. The Tribunal acknowledged that, inevitably, proceedings were stressful and necessitated a 'revisiting' of events. Whilst being empathetic to the Claimant, this would always be the position during (and preparing for) any final determination hearing. The Claimant confirmed that there was no medical evidence before the Tribunal on this specific point. The Tribunal indicated that it would accommodate any reasonable adjustments as required by the Claimant and would again keep the matter under review.

The Tribunal had primary regard to the overriding objective and the need to deal with cases justly and fairly in accordance with Rule 2 of The Employment Tribunals Rules of Procedure 2013, as amended. In particular, this requires the avoidance of delay, so far as it is compatible with proper consideration of the issues.

The Tribunal noted that proceedings in this matter were issued on 30 November 2020, and as such, there had already been a considerable passage of time. Notably, the allegations for determination dated from February 2020 onwards – a period well in excess of two years. Any further delay would, in our view, be likely to compromise further the quality of recall for the individuals involved, and as a consequence, the quality of evidence received.

Fairness also requires consideration of the position of others, whose diaries and commitments have been adjusted in order to accommodate the hearing. On behalf of the Respondent, six witnesses are prepared in addition to the time and cost of representatives. Equally, the Claimant, has one witness in attendance as well as a McKenzie Friend. There are also a number of observers connected to both parties watching proceedings. Four days of Tribunal listing have been set aside to consider this matter, with a further day to be listed if required.

Taking into consideration all of the above matters, the Tribunal determined to proceed with the hearing on a remote basis. It ensured that all parties had the latest version of the Bundle/Supplementary Bundle documents and directed that matters should begin afresh on day 2.

2.2 Application to amend particulars of claim
Initially, the Claimant requested that the Tribunal allow an amendment to the particulars to include a further issue, namely, a further victimisation claim in respect of the grievance procedure itself.
The Respondent objected to the amendment on the basis that this raised a new matter for which they were neither aware of, nor prepared for. The Case

Management Order had considered the issues at length, and there had been no application to amend in the intervening period.
The Tribunal allowed the Claimant additional time to consider the matter and confirmed that the Claimant could use the Bundle and Supplementary Bundle documents in respect of the existing claims.
After further consideration, the Claimant confirmed to the Tribunal that she did not wish to proceed with the amendment application.

2.3 Application to call further witnesses
The Claimant indicated that she wished to call a number of additional witnesses, which she had initially anticipated (as employees/former employees of WPD) would be called by the Respondent. These totalled 5 in number and were added to the Cast List by the Claimant as an amendment. She only became aware that these particular individuals were not being called upon the exchange of witness statements. She had written to the Tribunal requesting details as to how to do this but had, in her view, not received a satisfactory response.
The Tribunal took some time to consider this; indicating that it would allow the Claimant the opportunity to reflect on the matter.

At the conclusion of the evidence (day 4), the Tribunal enquired with the Claimant as to her position. The Tribunal took care and time to discuss with the Claimant some of the generic issues surrounding witness orders. The Claimant indicated that she required additional time to consider the matter and seek further legal advice.
As one further day was required in order to hear closing submissions and deliberations in any event, the Tribunal granted the Claimant 7 days in which to obtain such advice in respect of the 5 employees/former employees identified.

At the conclusion of the 7 days, the Claimant informed the Tribunal that she did not wish to call any of the 5 witnesses as identified, but instead, wished to call Ms Cook. The Respondent strongly objected to this course of action.
The Tribunal refused this application, providing a written Judgment on this point, with final case management directions – Appendix 1.

3. Evidence

The Tribunal received evidence from the following:

Viorica Grigorescu, Claimant
Adrian Chidlow, Former WPD employee
Justin Blundell, Unite Union workplace representative
Joanna Mainstone, Diversity and Inclusion Officer/Recruitment Lead
Ian Gamble, Former Team Manager
Christopher Garnsworthy, Distribution Manager
Simon Richards, Team Manager
Lisa Atkinson, Safety, Training, Engineering and Policy Administration Support Manager

The Tribunal was provided with the following:

Bundle comprising 649 pages and Index
Supplementary Bundle comprising 34 pages
Witness statements from the Claimant, Adrian Chidlow, Joanna Mainstone, Ian Gamble, Christopher Garnsworthy, Simon Richards and Lisa Atkinson

Skeleton argument for the Respondent, including chronology
Cast List, chronology of key events and list of key documents

4. Hearing Timetable

Reasonable adjustments were implemented throughout the hearing, allowing routine breaks/additional preparation time as and when requested by the parties.

Day 1 (23 May 2022):

10am – 3.30pm - Preliminary matters – Tribunal considering Claimant's applications (including appropriate breaks and consideration time for the Claimant)

Day 2 (24 May 2022):

10am – 12.55pm - Evidence from the Claimant (including 10-minute break)
12.55pm - 1.45pm – Lunch break
1.45pm – 3.15pm – Continuation of Claimant's evidence
3.15pm – 4pm – Break and assisting Mr Chidlow with computer software
4.00pm- 4.30pm - Evidence from Mr Chidlow, former employee at WPD

Day 3 (25 May 2022):

10am – 10.28am - Evidence from Mr Blundell, Senior Lay Union Representative
10.28am - 10.50am – Time allowed for Claimant to prepare questions for cross examination and compare notes of evidence with McKenzie Friend
10.50am – 12.00pm – Continued evidence from Mr Blundell
12.00pm – 12.15pm – Break
12.15pm – 1.08pm - Evidence form Joanna Mainstone, Diversity and Inclusion Officer
1.08pm – 1.45pm – Lunch Break
1.45pm – 2.18pm – Continued evidence from Joanna Mainstone
2.18pm – 2.40pm – Break and preparations time for Claimant
2.40pm – 3.15pm – Assisting Mr Gamble with computer software
3.15pm – 4.23pm – Evidence of Ian Gamble

Day 4 (26 May 2022):

10am - 10.25am - Continued evidence of Ian Gamble
10.25 – 10.35am – Break
10.35 – 12.11pm – Continued evidence from Ian Gamble
12.11pm – 1.15pm – Lunch
1.20pm - 2.32pm - Evidence from Chris Garnsworthy
2.32pm – 2.45pm – Break
2.45pm – 3.22pm - Evidence from Simon Richards
3.22pm – 3.35pm – Break
3.35pm – 4.15pm - Evidence from Lisa Atkinson
4.15pm – 4.30pm – Case management; adjourned part heard

Day 5 (22 July 2022):

Consideration of written closing submissions and Tribunal deliberations

5. List of Issues

A list of Issues has been drafted by the Tribunal in the Case Management Order (CMO) dated 1 July 2021 [B/33-44]. These are as follows:

5.1 Direct age, sex and race discrimination

The Claimant, self identifies as being female, of Romanian National Origin and as being in the age range of 40 – 50 years. Although the Claimant became a British National in 2018, she argues that she was still perceived as Romanian because of her name and accent.

Did the Respondent do the following things:

1. ***Appoint Mr P to the permanent Team Support role in February 2020 whilst appointing the Claimant to the temporary position (sex discrimination)***
2. ***Rejected the Claimant's application for permanent Team Support roles based in Taunton during a recruitment process in May 2020 (race and age discrimination)***
3. ***Rejected the Claimant's application for permanent Team Support role based in Crewkerne during a recruitment process in June 2020 (race and age discrimination)***
4. ***Rejected the Claimant's application for a permanent Training Support Assistant role in Taunton during a recruitment process in July 2020 (race and age discrimination)***

Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated less favourably/worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was no one else in the same circumstances as the Claimant, the Tribunal will decide whether the Claimant was treated less favourably/worse than someone else would have been treated. The Claimant says she was treated less favourably/worse than:

1. ***Mr P in respect of allegation 1 above;***
2. ***The individual appointed, who was British and in the age range 20 – 30 years in respect of allegation 2 above;***
3. ***Ms F, who was in the age range 20 – 30 years in respect of allegation 3 above;***
4. ***The individual appointed, who was British and in the age range 20 – 30 years and/or a hypothetical comparator who is British, with a British name and aged between 20 – 30 years in respect of allegation 4 above.***

If so, was it because of a protected characteristic?

5.2 Victimisation

Did the Claimant do a protected act as follows:

1. ***Inform Justin Blundell verbally in March 2020 that she had been the subject of sex discrimination?***
2. ***On a date between 21 July and 16 August 2020, sent a document to the Respondent complaining of sex discrimination***?

Did the respondent do the following things:

1. ***Reject the Claimant's application in or about July 2020 in respect of the two Team Support roles based in Taunton?***
2. ***Reject the Claimant's application in or about July 2020 in respect of the Team Support role based in Crewkerne?***
3. ***Reject the Claimant's application in or about August 2020 in respect of the Training Support Assistant role based in Taunton?***

By doing so, did the respondent subject the Claimant to a detriment? If so, was it because of the Claimant had done the protected acts?

Facts

5. We made our findings of fact based on the material before us, taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. We resolved conflicts of evidence that arose on the balance of probabilities. We have taken into account our assessment of the credibility of witnesses and the consistency of their evidence with the surrounding facts.
6. Having made findings of primary fact, we considered what inferences we should draw from them for the purpose of making further findings of fact. We have not simply considered each allegation but have stood back to look at the totality of the circumstances to consider whether, taken together, they may represent an ongoing regime of discrimination.

Background:

7. The Respondent is part of the Western Power Distribution (WPD) group of companies. The WPD Group is a major electricity distributor covering the Midlands, South Wales and the South West regions. The Respondent is involved in the distribution of electricity to industrial, commercial and domestic customers across the latter region.

8. The Claimant was employed by the Respondent between 11 November 2019 and 20 August 2020 in a temporary Team Support role. Initially, this was a one-year contract (covering maternity leave) on a part-time basis at the Crewkerne depot.

9. In February 2020, the Claimant applied for a Team Support position based in the Taunton depot. Two vacancies were available – one permanent and one temporary (as cover for a secondment). The Claimant was successful in securing the temporary role; the permanent role being awarded to a male colleague seeking redeployment. The Claimant accepted this position and commenced this role in Taunton on 2 March 2020.

10. Following this appointment, the Claimant applied for further permanent Team Support roles in May 2020 (based in Taunton) and June 2020 (based in Crewkerne). The Claimant was unsuccessful in both selection exercises.

11. In July 2020, the role of Training Support Assistant based in Taunton was advertised. Again, the Claimant applied and was unsuccessful in securing this role.

12. Following these unsuccessful outcomes, the Claimant instigated the Respondent's Grievance Procedure (at Stage 2) on 21 July 2020. Meetings were conducted on 31 July and 17 August 2020, with the Claimant being informed on 18 August 2020 that her grievance had not been upheld.
13. The Claimant appealed this decision under Stage 3 of the Grievance Procedure, resulting in further meetings on 9 September, 2 and 5 October 2020. The appeal was rejected, the Claimant electing not to take the matter any further within the Respondent company.
14. The Claimant remained in her temporary Team Support role until she was given notice, leaving the employment of the Respondent on 20 August 2020.

Summary of the position of the parties

15. The Claimant avers that, initially, she was discriminated on the grounds of sex and as a consequence, suffered detriment by being unsuccessful in securing a permanent job role. The Claimant avers further that, this was the first element in a sequence of discrimination on the grounds of sex, race and age, all of which are interlinked.
16. The Claimant also asserts that, having disclosed the sex discrimination allegation to the Respondent, she was subjected to ongoing acts of victimisation, culminating in the termination of her employment on 20 August 2020.

17. At the outset, we fully acknowledge the Claimant's position. Application was made for five roles, covering 4 interview processes, at which she was not successful. This included roles that she was currently undertaking. This, in and of itself, was difficult and demoralising for the Claimant.
18. The Claimant articulates this: "How did these people get a full-time permanent contract so easily, straight away, while I have been interviewed so many times for my own job, for the job I did previously and for slightly different jobs within the company, for which I brought my previous experience and skills?" [B/50].

19. The Respondent denies discrimination, stating that the Claimant was ultimately dismissed as a result of a business organisation that was necessitated through the loss of the WSCC contract and declining work volumes. At that time, the Claimant was subject to a temporary contract of

employment, and this was terminated with the requisite notice period having been provided.

20. The reason why the Claimant was not successful in the role selection exercises solely relates to her performance at interview. Quite simply, other candidates performed better than the Claimant. There was no unfavourable treatment or discrimination on any of the grounds suggested.

21. Victimisation

Did the Claimant do a protected act as follows:

1. **Inform Justin Blundell verbally in March 2020 that she had been the subject of sex discrimination?**

2. On a date between 21 July and 16 August 2020, sent a document to the Respondent complaining of sex discrimination?

Did the respondent do the following things:

1. Reject the Claimant's application in or about July 2020 in respect of the two Team Support roles based in Taunton?

2. Reject the Claimant's application in or about July 2020 in respect of the Team Support role based in Crewkerne?

3. Reject the Claimant's application in or about August 2020 in respect of the Training Support Assistant role based in Taunton?

By doing so, did the respondent subject the Claimant to a detriment? If so, was it because of the Claimant had done the protected acts?

22. Relevant Law

A claimant will have been victimised contrary to section 27 Equality Act 2010, if he proves that he has carried out a protected act, and that he has been subjected to detriment because of doing the protected act.

A protected act can be bringing proceedings under the Equality Act; giving evidence in connection with the Equality Act 2010, doing any other thing in connection with or for the purposes of this act or making an allegation whether or not express, that that A or another person has contravened the act (section 27(2) Equality Act 2010).

The test of causation under s. 27 was similar to that under s. 13 in that it required us to consider whether the Claimant has been victimised 'because' he had done a protected act, but we were not to have applied the 'but for' test (Chief Constable of Greater Manchester Constabulary-v-Bailey [2017] EWCA Civ 425); the act had to have been an effective cause of the detriment, but it does not have to be the principal cause. However, it has to have been the act itself that caused the treatment complained of, not issues surrounding it.

In Nagarajan-v-London Regional Transport [1999] ICR 877; Lord Nicholls' explained the test as "whether the prescribed ground or protected act 'had a significant influence on the outcome'".

Findings of fact

23. The Claimant states that, in March 2020, she was:

"approached in person by Justin Blundell to become a Unite Union member, I mention to him the sex discrimination that took place in February. He advises me to sit and wait, to not jeopardise my position in the company by making official allegations, with a view to future interviews. He does not protect me by advising to put this in writing or mention any time intervals linked to such allegations" [WS/VG/1].

"It is also my belief that JB, (whose manager is also Ian Gamble), broke my trust and disseminated my unofficial allegation to him, to KM (directly or via Ian) and further to the higher management. Managers talk and such information would've not have stayed with Ian alone. The series of events that followed showed clearly that since that time I've been victimised and managed out of the company, because all the Team Managers and the District Manager found out about my unofficial allegation of sex discrimination, from which all the differentiated treatment stems" [WS/VG/1].

24. Justin Blundell attended the Tribunal as a result of a witness order having been issued.
25. In evidence he stated that he approached the Claimant in March 2020 with a view to becoming a Unite Union member. He could see that the Claimant was "upset". She informed him that she had been "unsuccessful in securing a permanent role in the company". He stated further:

"There was a general conversation about how well she had done, and that she thought she had done well. She didn't understand why she hadn't got the permanent job. She described to me the differences between the two job roles".

26. In respect of any allegations made or disclosed to him, Mr Blundell stated:

"No allegations were made. No sexist comments were made to me".

27. Mr Blundell was asked what he would have done if such an allegation had been made to him. He replied that "he would have taken it further and asked for the assistance of a full-time manager. He was aware of the need to be very careful as there were timescales from the date of the act".

28. We find as a fact that the Claimant did not, either at the time or subsequent to the interview, make any disclosure in respect of the allegation – either officially or unofficially. This included referring the matter to the ethics helpline, ER or the Claimant's manager.

29. We further find that on the date of the conversation with Mr Blundell, the Claimant did not seek out Mr Blundell with the purpose of raising the matter with him. Mr Blundell instigated a spontaneous conversation with the Claimant, in the wider main office, with a view to providing membership information.

30. Mr Blundell could not recall having a specific discussion with Ian Gamble after the interviews. Mr Gamble, however, does recall a conversation with Mr Blundell:

"I recall saying to Justin following the interviews that I had explained the nature of the permanent and temporary roles to Viorica and C. Justin did not mention any allegations of sexist comments as part of this conversation" [WS/IG/5].

31. Mr Blundell indicated in his evidence that he had "off the record conversations with Ian Gamble in general", but that as interviews were always confidential, there was little point in having a detailed conversation on this. He concluded by indicating that "there was nothing memorable going on" that distinguished this conversation from any other.

32. In our view, Mr Gamble's account supports the position that nothing out of the ordinary had occurred. We find this was a routine conversation in general, not specific, terms.

33. The Claimant's allegations about Mr Blundell are twofold. Firstly, a failure to take the appropriate action/provide proper advice to the Claimant upon disclosure, and secondly, that, without the Claimant's knowledge or authority, allegations were disclosed to the Respondent's management [B/59].
34. We agree that allegations of this nature would have obligated Mr Blundell to take further action, and consequently, any failure to do so would have exposed him (as has occurred) to serious personal complaint and investigation. The risk to himself and the Claimant's position would be grave.
35. Mr Gamble, Mr Garnsworthy, Mr Richards and Ms Atkinson were all asked directly by the Panel when they became aware of the allegations of sex discrimination – all were consistent that they only became aware as a result of the grievance procedure.

36. We found Mr Blundell to be a clear and consistent witness. His position during the grievance proceedings [B/442-3] reflect precisely his evidence to the Tribunal.

37. During the first meeting of the Grievance Procedure on 31 July 2020, the Union Representative Mr F "confirmed that VG took the comment about more suitable for a man to the Union but it was pushed under the carpet" [B/300]. This position, however, was rescinded during the grievance meeting on 5 October 2020 [B/475-535]. During this meeting, Mr F confirmed:

"I am racking my brains now on the conversation. If discrimination comments were brought up my recollection is that Justin said he was happy to be witness to back that up but I might be wrong. It was a while ago. I'd have to check my emails" [B/526]. He continues:

"I'm starting to doubt what my conversations were now. I'd have to check." After checking his correspondence, he confirms:

"I'm going to have to apologise. I have no hard proof of the conversation and I can't recall 100% what was said" [B/526].

38. We therefore conclude that Mr F made an erroneous assertion during the first meeting of the Grievance procedure on 31 July 2020.
39. In the Claimant's original grievance document dated 21 July 2020 at [B/290-291], there is no mention of the sex discrimination allegation. By this date, the Claimant had sought advice from ACAS. The Claimant requests a formal appeal be carried out and requests document disclosure. Given the central and originating cause of complaint this allegation represents, we find its omission extremely surprising.

40. During the grievance proceedings, the Claimant did not object to seeking further assistance from Mr Blundell, despite the assertions made. We find this inconsistent. In contrast, Mr Blundell's decision to remove himself from any further involvement with the Claimant (once he was made aware of the allegations), aligns with his position.

41. Taking into account all of the above factors, we therefore conclude that the Claimant did not inform Mr Blundell verbally in March 2020 that she had been the subject of sex discrimination. No protected act disclosure was made.

42. The Claimant was asked by the Tribunal, after the Case Management Hearing on 1 July 2020, to confirm the date upon which she first mentioned sex discrimination to the Respondent. The Claimant states in an email dated 8 July 2021:

"The first piece of evidence I have for when WPD were officially informed of the sex discrimination allegations is during the initial meeting of the Grievance Procedure, on 31.07.20, which was for me to put forward the key points of my grievance" [B/45].

43. There is no other evidence before the Tribunal that this disclosure was made at an earlier occasion. We therefore accept the Claimant's confirmation.

44. We conclude, therefore, that the Claimant did not on a date between 21 July and 16 August 2020, send a document to the Respondent complaining of sex discrimination.

45. It is common ground that the Claimant did raise sex discrimination orally with the Respondent during the initial meeting of the Grievance Procedure on 31 July 2020 [B/300]. The Claimant confirms this in the email dated 8 July 2021, attaching an exert of the minutes of this meeting [B/47] and [B/60].
46. We therefore find that the Claimant did make a protected disclosure to the Respondent on 31 July 2020.

47. As a matter of logic, the protected act must have taken place before the detrimental treatment alleged. As a consequence of our findings, this negates the earlier rejection of the Team Support roles in Taunton and Crewkerne as being acts of victimisation. The claim for victimisation in respect of these roles, therefore, does not succeed and must fail.

48. The protected act disclosure is, however, before the third alleged act of detrimental treatment, namely, the rejection of the Claimant's application in respect of the Training Support Assistance role based in Taunton.

49. The interview for this role took place on 3 August 2020 and was conducted by Lisa Atkinson and Becky Porter.

50. We find as a fact that the Claimant was unsuccessful in securing this position, and of itself, this was a detriment to the Claimant.

51. Causation requires this detriment to have been as a result of the protected act. In these circumstances, this would require Lisa Atkinson or Becky Porter to have had knowledge of the protected act.
52. We find that the date of the protected act was 3 days prior to the date of the interview, giving a very restrictive timeframe for the interviewers to have gained this knowledge.
53. Lisa Atkinson was asked directly by the Panel in evidence whether she had knowledge of the Claimant's grievance proceedings. Her response was clear; at the time of the interview, she did not. She confirmed that, prior to the interview, she had no interaction with the Claimant.
54. We find that the Training team was a separate department within the WPD Taunton depot. There was little connection between the team and the main operational section. Ms Atkinson confirmed that she was based in Tipton, not Taunton, and as a consequence was not involved with the routine business of the depot. She had responsibility for a team of 21 staff across 3 WPD sites.
55. We found Lisa Atkinson to be a competent and credible witness. It was evident that she adopts a high level of professionalism.

56. We find that there is no evidence to support the assertion that the interviewers had knowledge of the protected act made on 31 July 2020. We therefore find, as a fact, that they did not.
57. We conclude, therefore, that the claim for victimisation does not succeed and the claim must fail.

Direct Discrimination

58. We refer to the list of issues as outlined above.

The applicable legal provisions

Direct discrimination (s.13 Equality Act)

Some of the Claimant's claims were brought under s. 13 of the Equality Act 2010:

"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."

The protected characteristic relied upon was sex, race and age.

The comparison that we had to make under s. 13 was that which was set out within s. 23 (1):

"On a comparison of cases for the purposes of sections 13, 14 or 19, there must be no material difference between the circumstances relating to each case."

We approached the case by applying the test in Igen v Wong [2005] EWCA Civ 142 to the Equality Act's provisions concerning the burden of proof, s. 136 (2) and (3):

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

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

In order to trigger the reversal of the burden, it needed to be shown by the Claimant, either directly or by reasonable inference, that a prohibited factor may or could have been the reason for the treatment he has alleged. More than a difference in treatment or status and a difference in protected characteristic needed to be shown before the burden would shift. The evidence does not have to be positive evidence that the treatment had been on the alleged prohibited ground; evidence from which reasonable inferences could be drawn might suffice. Unreasonable treatment of itself is generally of little helpful relevance when considering the test. The treatment ought to have been connected to the protected characteristic. What we were looking for was whether there was evidence from which we could see, either directly or by reasonable inference, that the Claimant had been treated less favourably than others not of his race or religion on grounds of his race or his religion.

The test within s. 136 encouraged us to ignore the Respondent's explanation for any poor treatment until the second stage of the exercise. We were permitted to take into account its factual evidence at the first stage, but ignore explanations or evidence as to motive within it (see Madarassy-v-Nomura International plc [2007] EWCA Civ 33 and Osoba-v-Chief Constable of Hertfordshire [2013] EqLR 1072). At that second stage, the Respondent's task would always have been somewhat dependent upon the strength of the inference that fell to be rebutted (Network Rail-v-Griffiths-Henry [2006] IRLR 856, EAT).

If we had made clear findings of fact in relation to what had been allegedly discriminatory conduct, the reverse burden within the Act may have had little practical effect (per Lord Hope in Hewage-v-Grampian Health Board [2012] UKSC 37, at paragraph 32). Similarly, in a case in which the act or treatment was inherently discriminatory, the reverse burden would not apply.

When dealing with a multitude of discrimination allegations, a tribunal was permitted to go beyond the first stage of the burden of proof test and step back to look at the issue holistically and look at 'the reasons why' something happened (see Fraser-v-Leicester University UKEAT/0155/13/DM). In Shamoon-v-Royal Ulster Constabulary [2003] UKHL 11, the House of Lords considered that, in an appropriate case, it might have been appropriate to consider 'the reason why' something happened first, in other words, before addressing the treatment itself.

As to the treatment itself, we always had to remember that the legislation did not protect against unfavourable treatment per se but less favourable treatment. Whether the treatment was less favourable was an objective question. Unreasonable treatment

could not, of itself, found an inference of discrimination, but the worse the treatment, particularly if unexplained, the more possible it may have been for such an inference to have been drawn (Law Society-v-Bahl [2004] EWCA Civ 1070).

We reminded ourselves of Sedley LJ's well-known judgment in the case of Anya-v-University of Oxford [2001] ICR 847 which encouraged reasoned conclusions to be reached from factual findings, unless they had been rendered otiose by those findings. A single finding in respect of credibility did not, it was said, necessarily make other issues otiose.

Findings in fact

Recruitment to Team Support role based in Taunton (February 2020) (sex discrimination)

59. It is common ground that Mr P was appointed to the permanent Team Support role and the Claimant appointment to the temporary Team Support position.

60. The Claimant avers that the failure to offer her the permanent role was an act of direct sex discrimination. Further that in order to placate the Claimant about this decision, she was misled into believing the temporary role was equally secure to that of the permanent role, as this would be a formality in due course.
61. In evidence the Claimant details:

"After the interview, I'm told that we're equally successful and asked which role I'd prefer. IG explains the permanent contract comes with a role in the yard store, involving being outside in the cold and lifting harnesses/other heavy equipment, therefore better suited for a man, whereas I'd be better suited in the office, being a lady and that this is the secondment contract, but not to worry because I have the job for 18 months with the temporary contract and it would just be a formality to have the secondment contract made permanent, via an informal chat where we'd confirm I'm happy and doing well in the role" [WS/CG/1].

62. We find that, in and of itself, the failure to appoint the Claimant to the permanent position was unfavourable treatment as the Claimant was not able to obtain a secure position within the Respondent company.
63. We have considered, therefore whether or not the Claimant was treated differently to another person, actual or hypothetical.
64. We then have to consider if this was less favourable treatment.
65. The Claimant's position is that she was treated differently and less favourably than Mr P, her nominated comparator.

66. In our view, Mr P is not a reasonable comparator. His circumstances are significantly different to that of the Claimant. He was an employee of some 27 years, comparative (at that stage) to the Claimant's 3 months. His technical knowledge and skills within the company were extensive and comprehensive, whilst the Claimant had experience of one role only. Mr P was already a permanent employee at WPD, looking for redeployment comparative to the temporary part-time position of the Claimant.

67. We will consider a hypothetical comparator; someone who is the same as the Claimant in all relevant respects, except that this individual does not have the Claimant's protected characteristic (in these circumstances, is male).
68. Both roles were advertised internally as generic Team Support roles. There were two applicants for the permanent role, the Claimant and Mr P. The Claimant was the only applicant for the temporary role. Both were interviewed and appointed.

69. The interview Panel consisted of Mr Gamble (Team manager, West Somerset) and Mr Monkton (Team Manager, South Somerset).

70. As the specific differences between the Team Support roles were not highlighted in the vacancy notice, Mr Gamble outlined the differences between the two roles during the interview process. This is accepted. It was reasonable for the Panel to enquire, in the light of this additional information, whether the Claimant had a preference of role.

71. Mr Gamble denies that he made any remark that suggested that the permanent role was better suited to a male colleague. He recalled being shocked when the allegation was put to him [WS/IG/4]. He further denies that the Claimant was offered the choice of role, as both had been equally successful. He states:

"I recall saying during the interview that a temporary TS role would put Vioricia in a good position if she were to apply for a permanent role in the future, but I was not in any position to suggest that the temporary role would become permanent" [WS/IG/5].

72. We reaffirm, in the Claimant's original grievance document dated 21 July 2020 at [B/290-291], there is no mention of the sex discrimination allegation. By this date, the Claimant had sought advice from ACAS. The Claimant requests a formal appeal be carried out and requests document disclosure. Given the central and originating cause of complaint this allegation represents, we find its omission extremely surprising.

73. We also find that the authority to convert a temporary role into a permanent one did not sit with either Mr Gamble or Mr Monkton; it was a matter entirely for the senior WPD management supported by the HR department.

74. We find further that it is not plausible to suggest that the interview Panel needed or required some form of justification as to why the permanent role was awarded to Mr P. They were perfectly entitled, upon having carried out the interview process, to determine which candidate should be allocated to the permanent role. There was no reason or requirement in addition that necessitated additional justification.

75. We find that Mr Gamble's explanation as to any discussion in relation to the long-term prospect of securing a permanent position to be realistic and

reasonable. There is a considerable difference between discussing potential opportunities and offering the guarantee of a permanent role.

76. During the interview, both candidates were asked the same 'standard' questions using the templates provided by HR. There were no modification to these questions. Scores were awarded independently by each interviewer and then discussed overall. There was a fair process which was applied equally to both candidates.

77. The difference in knowledge, experience and skills between the Claimant and Mr P was substantial. The latter had the requisite knowledge of the permanent role as he was working as a linesman on standby out of hours at the time and had held the position in the past. In addition, he had clerical experience from his time as a planner.

78. We accept Mr Gamble's overall assessment of interview performance was that Mr P was able to provide "in-depth answers in response to questions, whereas Viorica's responses were more generic" [WS/IG/4].

79. We find that the difference in job status was also notable – he was a permanent member of staff seeking redeployment. As Ms P observed "she was surprised that [the Claimant] had been given the option of a permanent role as Mr P is a permanent employee looking for a different role due to personal reasons" [B/300].

80. We find that there is no evidence to support either allegation against Mr Gamble. In addition, there is also no evidence before us that the reason for the Claimant not securing the permanent role was anything to do with gender.

81. We have considered whether the Claimant was treated differently to a hypothetical male comparator and conclude that there is simply no evidence to support a finding of different treatment. In the absence of such evidence, we have also considered whether or not there are findings of fact (including those set out below) from which we could draw inferences, and we find there are not. Accordingly, the Claimant's allegation of direct sex discrimination is not well-founded and fail.

Team Support roles (Faults Desk and vacancy in Mr Hitchcock's team) – May 2020 (race and age discrimination)

82. It is common ground that the two successful candidates were British, one in the age group 20 – 30 years; the other in the age group 30 – 40 years. Both successful candidates have different protected characteristics to that of the Claimant in respect of age and perceived race.
83. We find that, in and of itself, the failure to appoint the Claimant to the permanent position was unfavourable treatment as the Claimant was not able to obtain a secure position within the Respondent company.

84. We have considered, therefore whether or not the Claimant was treated differently to another person, actual or hypothetical.
85. We then have to consider if this was less favourable treatment.
86. The Claimant's position is that she was treated differently and less favourably than both the successful candidates, her nominated comparators.

87. The Claimant asserts that she was "heavily underscored" as a result of the ongoing victimisation. The Claimant does not accept that it is possible for two external candidates with little or no experience within WPD to secure these roles given that the Claimant has been undertaking the Faults desk role since March 2020. Given this outcome, the Claimant asserts that her failure to secure these roles is as a result of the ongoing victimisation combined with direct race and age discrimination [WS/VG/4].
88. The Claimant asserts that an objective scoring mechanism was not utilised, that scores/marks were recorded directly onto the interview papers/score sheets in an arbitrary and subjective manner and that no criteria was given/applied as to how the marks should be awarded.
89. In addition, the Claimant asserts that the interviewers were hostile towards her during the interview, especially in the "Questions to Panel" section and that Mr Gamble becomes "irritated" [WS/VG/4].

90. The Tribunal has been provided with Respondent's Recruitment and Selection Policy and Procedure [B/133] and Diversity, Inclusion and Equality Policy [B/150].

91. Paragraph 8.5 details the 'Selection (Interview and Testing)' procedure [B/137]. The essential elements outline: that interview panels should consist of at least two managers, of which one must be of a higher grade, with the other being at the same grade or higher than the vacancy. The panel should be well prepared and ensure that the questions are not intrusive or discriminatory. The questions should be the same for each candidate and focus on the needs of the job and skills needed to perform it effectively. A record of each interview including an objective scoring mechanism must be made.

91. We find that these roles were advertised internally and externally; the respondent receiving 170 applications. The Claimant was one of twelve candidates selected for interview which took place on 10 July 2020. The interview panel consisted of: Mr Hitchcock (Team Manager, Taunton Dean) and Mr Gamble (Team Manager, west Somerset).

Telephone call from Mr Chamberlain

92. The Claimant asserts that the Panel displayed "hostility towards me from the start of the interview and ongoing victimisation" [WS/VG/3] as a result of the Claimant answering a telephone call before the commencement of the interview. The Claimant's position is that:

"I arrive early and as I am still standing up and having light conversation with the panel, before the interview, when my phone rings. Seeing it was Mr Chamberlain (therefore an important call), I ask for permission to answer. It is granted and I have a very short exchange. AC knew I had been unwell and was

checking to see if I was able to make the interview. I reassure him briefly and hang up, then switch off my phone before sitting down for the interview. The panel were fully aware this was a call from a manager, prior to the interview's start time [WS/VG/3].

93. There is no suggestion that the Claimant answered this call without reference to the interviewers – she requested permission to answer, and this was duly given.

94. Mr Gamble indicated in his evidence that he was surprised by the Claimant's decision to wish to answer the call; his expectation being that the Claimant would have immediately turned the mobile off, apologised, with the interview continuing from that point. Nothing more would have been thought of the matter.

95. There is no dispute as to the facts of this matter. The more significant question is whether there is any evidence that shows that, as a result of this, the interviewers became 'hostile' towards the Claimant. We can find no evidence to support this. Our assessment of Mr Gamble's evidence on this point was fair and reasonable. Albeit he was surprised, it was immediately put to one side and the interview continued. We accept this.

96. We can find no other evidence to support the Claimant's assertion that the interview was hostile. No other reasoning is put forward to support this interpretation.

Scoring

97. The Claimant asserts that she was "heavily underscored" as a result of the ongoing victimisation. She had studied "extensively all the sources available to me. I draw on my experience in the company (approx. 8 months). To my knowledge and assessment, I present myself outstandingly" [WS/VG/4].

98. We find that each candidate was asked the same 7 questions and scored individually by each interviewer based on the responses provided. The scores were then combined to give an overall score.

99. We find further that the scores ranged from 44 to 59; with the Claimant scoring 51 (23 and 28 from each interviewer). 7 candidates scored higher than the Claimant.

100. The Interview records for the Claimant are provided at [B/202-205], with the interview scores and notes recorded at [B/206] in the form of a matrix table.

101. The Claimant rightly observes that the interview record or scoring matrix table do not include a rating scale or descriptions behind each allocated mark. The Claimant infers from this that the scoring was arbitrary and subjective. The Claimant has provided the Tribunal with her suggested scoring matrix at [B/432].

102. We accept the addition of a scoring matrix is a useful term of reference. However, the omission of such a generic guide does not automatically render the process arbitrary and subjective. It does not fundamentally change the method of assessment itself; it is an aid memoire to the interviewers. The method of scoring remains predicated on the manager's individual assessment

of the candidate and what they regard as the quality of the response received. We find that the methodology of scoring was applied equally to all candidates.

103. We find that the Claimant scored the highest of all candidates in respect of question 5, achieving 5 marks from each interviewer. Both interviewer notes for this question record a thorough answer. Question 5 is in relation to 'Guaranteed Standards of Performance', and this is a question where the Claimant was able to demonstrate her knowledge of the role. It was an answer that request a more 'verbatim listing' of the Guarantees without further explanation.

104. We find that no other candidate received 10 marks for any question other than the Claimant.

105. We find further that the Claimant scored 9 marks for question one (5 and 4 from each interviewer); a generic question about WPD and its role/customer base. This again was the highest score of all the candidates; the Claimant was able to utilise her in-house knowledge/research to score highly.

106. As a fact, we find that the Claimant's weakest questions were question 4 (scoring 3 overall) and question 8 (scoring 5 overall). Question 3 was in relation to dealing with a persistent customer. Our assessment of the interviewer notes is that the Claimant's focus was on listening, showing understanding and not taking the matter personally. Mr Gamble records that no mention was made of an apology and that the main solution offered was that of compensation. From the notes, we accept that this would not have been a comprehensive answer and that the scores awarded align with the interview notes.

107. Question 8 was questions for the panel. It is self-evident that neither interviewer considered this a high scoring response. Mr Gamble records 'waffle' on his record sheet and Mr Hitchcock records that the Claimant mentioned that some colleagues were not utilising the Ipad technology as expected. Other comments record that the Claimant was discussing the previous roles and expectation that the role would have been made permanent.

108. We conclude that the marks scored reflect the Claimant's recorded response.

109. Candidates 2 and 3 were the successful candidates. Overall, their scores were more consistent across the range of questions, with two notable exceptions:

Candidate 2 – the 'Questions from candidate' score was 2 (from interviewer 1); only one mark higher than the Claimant's score from the same interviewer;

Candidate 3 - Question 5 on 'Customer guarantees'; the candidate scored 1 (from interviewer 1).

110. We conclude, and record as a finding, that the scoring was fair and objective; each candidate receiving a score synonymous to the response provided. Scoring was varied for all candidates and each question separately assessed. We cannot find any evidence to support the claim of heavy underscoring.

Experience and training

111. The Claimant was employed in the Team Support role (Faults desk) from 2 March 2020 until her employment with the Respondent ended. During this period, however, the first lockdown was implemented and return to the office environment was on a part time rota basis until June 2020. As the Claimant has acknowledged, training and development during this period was minimal. As a consequence, the ability for the Claimant to gain in-depth experience within the role was limited.

112. A one-month initial performance review completed by Mr Chamberlain [B/166]. His assessment is that the Claimant 'achieved expectations'; an area of improvement was noted as "answering the phone for colleagues more quickly". In respect of overall performance:

"Viorica has settled slowly into the role, made difficult due to the position only being 2.5 days a week, but has had a positive attitude and very conscientious to do the role correctly".

113. The Claimant acknowledges in her evidence that she received "little training" on the Faults Desk role in Taunton [WS/VG/2]. However, she was able to "manage on my own very efficiently, learning on my own, applying myself, watching company tutorials and asking for help occasionally from more experienced colleagues, when needed and possible". [WS/VG/2].

114. In July 2020, Mr Chamberlain provides a reference for the Claimant in which he describes the Claimant as "an excellent employee" with "all the good traits you would look for in a new employee" [B/180]. The Claimant has relied on this reference as a true reflection of her abilities. We note that the reference is dated the same date as the written notification of the termination of employment was provided. The reference, in our view, has to be seen in that context.

115. The Claimant recognises that her experience, and as a consequence, level of knowledge and skill in relation to the faults desk position is in its early stages [B/179]:

"all on my own at a faults desk (with occasional help from Alex who is always keeping an eye and giving a hand when he can and I really appreciate it! And asking many questions to the team in the office on a rota….bless them!).

"So it's been very, very hard for me, being a beginner too, with only a couple of weeks alongside Kerry before lockdown. It's a steep learning curve"

Noting further that the job role "can get incredibly difficult and intense at times".

116. In view of this, we consider that the Claimant's view of her knowledge, skill and competence within the role to be misguided. As a fact, we find that it doesn't support the general proposition that an external candidate would be (in the absence of the Claimant being treated less favourably) incapable of securing the role.

Comment from Mr Gamble post interview – race discrimination

117. The Claimant asserts that, following her unsuccessful appointment to this role, Mr Gamble made the comment (on 13 July 2020) that "these people lost

their jobs through Covid-19", and that this comment "put their decision *(not to appoint the Claimant)* in a light of ethnic discrimination" [WS/VG/4].

118. The Claimant details the rationale for this inference:

"The Covid 19 comment brought back discourses that filled the entire socio-political spectrum during Brexit, where it was states that immigrants were taking the jobs of the British. Ian's comment and attitude resonated that attitude towards me and made me feel that he was protecting British people (as it was inferred), giving them jobs after being furloughed, while I didn't need any protection, being thought non-British" [WS/VG/4].

119. Mr Gamble denies making this comment [WS/IG/8]. He states that, factually, this would be inaccurate, as neither of the two successful candidates had lost their jobs due to the pandemic.

120. We find that Mr Gamble did not make this comment in relation to the two successful candidates for the reason he outlines – it was simply not the case. The more likely scenario, in our view, is that there was a generic conversation about the overall calibre of candidates in this selection exercise; Mr Gamble wishing to convey that this was of a very high standard.

121. We comment further, that even if we had found that this phrase had been used, we cannot conclude that this was racially discriminatory. It is entirely a subjective interpretation on the part of the Claimant based on her own historic concerns. As we have outlined, we interpret Mr Gamble's comment to refer to the high calibre of candidates generally, some of whom may have been unexpectedly looking for employment as a result of the pandemic.

Email from Ms K – age discrimination

122. After the Claimant was unsuccessful in the interview process, she corresponds with Ms K. The latter responds in an email dated 15 July 2020 [B/434]:

"I heard him tell Justin that you answered the questions ok. The odd thing was he normally strangely reticent about saying who has got the job. Normally they'll tell us something. But it was like he didn't want to talk about it."

123. The Claimant recalls at [B/434] a further oral exchange with Ms K:

"Also, in a verbal conversation, Ms K told me Chris Garnsworthy has a very specific type of team supports that he prefers, which me and her aren't: in their 20s, young and pretty, that do as they're told, not fully formed in their character so they wouldn't question any decision. This is not an exact quote, but in essence that is what she told me when I first informed her I wasn't given the job."

124. The Tribunal has been provided with the age bands of Team Supports based at Taunton [B/603]. This indicates a spread of ages as follows: (age band 21-30) – 4, (age band 31-40) – 1, (age band 41-50) – 3; (age band 51-60) – 2. In summary, the numbers are equally split between those above and below 40 years. We record this as a finding.

125. We note further that the Claimant describes Ms K as an individual who "retired at the end of August, under the same unpleasant circumstances, being very unhappy and disappointed with the direction things were taking" [B/434]. On the Claimant's own assessment, this is an individual who was leaving the respondent's employment in undesirable circumstances.

126. We have neither a witness statement or had the benefit of hearing directly from Ms K. We therefore have no evidence to support Ms K's assertions to the Claimant. The evidence before us reflects that this is simply not the position.

Conclusions

127. We have considered race and age discrimination separately.

128. In respect of each, we have further considered whether the Claimant was treated differently to a hypothetical comparator whose material circumstances were the same. Taking all the evidence before us, we are satisfied that the Respondent would have treated them in exactly the same was the Claimant.

129. To conclude, we are satisfied that the interview process was not less favourable treatment. A relevant comparator in the same circumstances would have been treated in exactly the same way. Accordingly, we are unable to draw any inference from the facts that it was because of the Claimant's age or race. Accordingly, the Claimant's allegations of direct age and race discrimination in respect of the Taunton Team Support roles are not well-founded and fail.

Team Support role based in Crewkerne – June/July 2020 (race and sex discrimination)

130. It is common ground that the successful candidate, Ms F, was British in the age group 20 – 30 years. This candidate has different protected characteristics to that of the Claimant in respect of age and perceived race.

131. We find that, in and of itself, the failure to appoint the Claimant to the permanent position was unfavourable treatment as the Claimant was not able to obtain a secure position within the Respondent company.

132. We have considered, therefore whether or not the Claimant was treated differently to another person, actual or hypothetical.

133. We then have to consider if this was less favourable treatment.

134. The Claimant's position is that she was treated differently and less favourably than the successful candidate, Ms F, her nominated comparator.

The Claimant avers that she was treated "less favourably than the other applicants during the shortlisting for the TS vacancy in his team in Crewkerne", and that "this stems from the sex discrimination allegations made at the February interview" [WS/VG/3].

135. The Claimant raises two events that occurred on 15 and 16 July 2020, just prior to her interview on 17 July 2020:

Feedback meeting 15 July 2020

136. The Claimant requested feedback on 14 July 2020 from the Taunton interview on 10 July 2020 in order to prepare for her next interview later that week. In response to this request, a feedback meeting was arranged for 15 July 2020 with Mr Gamble and Mr Hitchcock.

137. It is common ground that this meeting was not productive for either party. The Claimant states:

"The one phrase reiterated by both, (as if recited from a script), was again "The others were of a higher calibre and sold themselves really well". During the feedback session, Ian is aggressive and intimidating, raises his voice and makes the atmosphere very hostile and uncomfortable" [WS/VG/5].

138. Mr Gamble recalls:

"I recall that, while [Mr Hitchcock] was speaking, Viorica kept interrupting and talking over him. At one point, Viorica asked [Mr Hitchcock] if he was calling her a liar. I interrupted to say no one was calling her a liar, in an attempt to diffuse the situation. She then left the meeting shortly after this. I do not agree that my reaction was aggressive or intimidating" [WS/IG/9].

139. The Tribunal is not in a position to make any findings in relation to the conversation that took place during the meeting. What we do find, however, is that the meeting was arranged at short notice in an attempt to assist the Claimant in her preparation for her forthcoming interview. The meeting itself was not constructive for either party; it ended abruptly and was tense in nature. Emotions were understandably high given the timescales; the Claimant had only learnt she was not successful from the Taunton role two days previously, a decision that had left her "distraught" [WS/VG/4].

Phone call regarding work attendance on 16 July 2020

140. The following morning, Mr Gamble made a telephone call to the Claimant in relation to her non-attendance at work. His understanding was that:

"Viorica was due to work from the office on 16 July as at this time she would alternate working from the office and home with her colleague Kerry and Kerry was not in the office that day. Prior to calling Viorica, I asked another TS about this. They confirmed that Kerry was on holiday so Viorica should be in" [WS/IG/9].

"He checked to see if Viorica was coming into the office. When she answered the phone her voice was hoarse, so I asked her if she was alright and she said no. I asked her if she was unwell and she said no, she was fine and working from home" [WS/IG/9].

141. The Claimant states that:

"In an accusatory voice, he asks "Why aren't you in, are you sick? And if you're sick, why aren't you calling in sick. I sense retaliation. I explain I am on the rota to work from home, while Kerry was due to work from the office. Why would I call in sick? Ian goes on to say that Kerry is on special leave. I then ask f he needs me to come in and cover for her. Ian says yes" [WS/VG/5].

142. The Claimant raises the matter in her grievance, Chapter 4 – Retaliation, Grievance 12 – Retaliation. Breach of PPL Standards of Integrity [B/382].

143. An investigation is undertaken by Mr Llewellyn, Distribution Manager (Swansea) in respect of all matters outlined at the initial grievance meeting on 31 July 2020; this included both the feedback meeting and the subsequent telephone conversation. Individual meetings were conducted with Mr Gamble, Mr Hitchcock and Mr Richards.

144. We note Mr Richard's account:

"On this day Viorica's rota was to work from home and when Kerry didn't turn up we realised there was nobody on the faults desk as Kerry had taken SL but we didn't know this as [Mr Hitchcock] wasn't in and Ian then phoned Viorica and asked her if she was in today and if your home then you need to let us know you're on the sick. Ian was only trying to make contact, we didn't communicate this very well" [B307].

145. We find, on balance, that Mr Gamble was not in possession of all the facts at the time the telephone call was made. He believed, erroneously as it transpired, that the Claimant was working from the office that day. Otherwise, he simply would not have had cause to telephone the Claimant. The conversation was initiated on the basis of this assumption. However, once the Claimant clarified the position, Mr Gamble accepted this without question. The error in communication clearly should not have occurred, but the mistake was not intentional and comprised a series of events unconnected to the Claimant. It was not a retaliatory act on behalf of Mr Gamble; it was a misinformed, reactionary response to the situation as it was presented to him that morning.

Shortlisting

146. It is common ground that this role was advertised internally and externally; the Respondent receiving 110 applications. The Claimant was one of 6 candidates selected for interview which took place on 17 July 2020. The Interview Panel comprised Chris Garnsworthy (Distribution Manager) and Simon Richards (Team Manager, Sedgemoor).

147. It is also accepted that Mr M, the manager originally allocated to conduct the interviews, would not have shortlisted the Claimant at the interview sift phase had he not been instructed by HR to do so. On 25 June 2020, he states:

"Should I interview out of curtesy, she wouldn't be in my choice with all the other CV's I've seen and also Ms F who is working part time with [Mr C's] team at moment is a much stronger candidate" [B/251].

The response provided is that:

"Given Viorica is already doing the job it would be difficult not to interview her so I would recommend you do!" [B/250].

148. We find that Mr M was entitled to draw the conclusion that the Claimant's CV, in his view, was not as strong as some of the other candidates. That was the role he was required to undertake at this stage. He needed to make an assessment of each CV in order to reduce the shortlist of 28 to a manageable number of interviews.

149. [B/377-378] is an exchange of 4 emails, dated 6 July 2020, between Ms C (HR) and Mr M. The latter requests a list of questions in advance of the forthcoming interviews, which Ms C provides. Mr M asks Ms C whether the Claimant should be expected to "know more" in light of her previous interview experience. Ms C responds that "you could always push her a bit more on things like the broader measures/restoration times, etc. She will know some of the answers off by heart by now but there's not much we can do as need to score comparatively".

150. In evidence, Ms Mainstone (Diversity and Inclusion Officer) accepted that the contents of these emails raise some 'red flags'. The inference is that Mr M has already formulated a pre-determined view that the Claimant was not a strong candidate comparative to the other individuals shortlisted.

151. We find as follows: Mr M qualifies with HR whether, in the light of the Claimant's previous WPD interview experience, the level of performance expected remains the same. HR confirms that it does. Given that the Claimant's previous interview had taken place the week before, it was not unreasonable of Mr M to seek clarification on this point. He is clearly directed by HR that all candidate scores must be assessed comparatively. The matter is not taken any further.

152. As matters materialised, Mr M did not conduct the interviews as planned. Instead, Simon Richards took over this role. His evidence was that he was "not planning to be on the interview" and that he was "asked to step in by Chris" that morning (as a result of Mr M experiencing some health issues [WS/CG/2]).

153. In evidence, Mr Richards confirmed that he had no previous involvement with the interview process up to the morning of the interviews, and that he had little familiarity with the Claimant prior to this.

154. Mr Garnsworthy has confirmed that he "did not have much interaction with Viorica aside from…customer queries and fault work" [WS/CG/1]. As the Distribution Manager, he confirmed that his day-to-day interaction was mostly with the Team Managers.

155. We therefore find that any asserted inference from Mr M assessment of the Claimant's CV and interview performance clarification cannot be sustained. His involvement did not extend beyond the interview preparation stage. Both the interviewers had little, if any, day to day involvement with the Claimant.

Interview

156. The Claimant asserts that she was "heavily underscored" during the interview process [WS/VG/6].

157. We find that each of the 6 candidates were asked the same 11 questions and scored individually by each interviewer based on their responses. The scores were combined to give a total score.

158. We further find that the scores ranged from 47 to 92; the Claimant scoring 74 (37 being awarded by each interviewer). Two candidates scored higher than the Claimant, three below [B/235].

159. We find in respect of question 7, the Claimant scored 6 points (the maximum recorded score) from each interviewer. No other candidate achieved this in respect of any question. Again, this was in relation to the Customer Guarantees. There was only one other incidence of any other candidate scoring a 6; this score was seldom awarded as a consequence.

160. Further findings relate to the Claimant's weakest scores: question 8 (scoring 2 from each interviewer) relating to why 'Customer Guarantees' were important. The interview notes record "talked about OFGEM" and "Broader measures". For the same question, the successful candidate scored 4 from each interviewer, the notes show that all 4 of the suggested talk points were mentioned. This, in our view, reflects objectivity.

161. There is consistency of score (37) from each interviewer, as with candidate 4 - the successful candidate (46). The other candidates had a wider divergence of scores, with interviewer 2 scoring more generously in respect of 3 candidates, and interviewer 1 scoring more generously in respect of the final candidate.

162. We find that there was a fair, objective interview process where all candidates were scored in accordance with the answers they provided.

163. Mr Garnsworthy's feedback for Crewkerne role highlighted a generic focus by the Claimant on securing any permanent role. It was the nature of the contract that had greater significant rather than the specific job role. This was apparent to the interviewers during the selection exercise. By the date of this interview, and without criticism of the Claimant, she had already applied for the Training Support role. Mr Garnsworthy records:

"it became apparent that if she was given both jobs she would not commit 100% to me that she would accept the Team Support role because of her love for training/teaching she has"

164. We find two points from this: commitment is an essential candidate requirement to any role, and secondly, this clearly rebuts the Claimant's suggestion that there was an orchestrated plan by the management to remove her from the company. Mr Garnsworthy clearly anticipated there was a chance of success for the Claimant in the Training Support Assistant role.

165. Mr Richards confirmed in his evidence to the Tribunal that the reference he recorded on the interview notes record of "long blonde hair, bubbly" was purely as a way of identifying each candidate, an aid memoir [B/242]. We note that similar style was undertaken in November 2019, when the Claimant was successful. Personal descriptive reference was also utilised: "Romanian name means "Bluebell" [B/110]. We accept his explanation of this reference.

Notification of appointment

166. Claimant asserts that Ms D agreeing to continue in her employment with the Respondent on a part-time basis, when she was due to retire on 29 July 2020, was a premeditated decision, which infers that the interview process was predetermined:

"Conveniently, arrangements have been made, most probably before taking the decision. Isn't that premeditation. Doesn't that look like purposely manipulating to keep me out of a job and push me away from the company" [B/50].

167. On 21 July 2020 Mr Chamberlain notifies colleagues at WPD that [Ms D] has agreed to return as an agency worker until November, part time. The basis of the Claimant's assertion is the timescales involved - notification being received 4 days after the interview.

168. This, in our determination, is clearly enough time to have a conversation with Ms D in relation to a short-term extension of her employment at WPD. The chronology would easily have allowed the invitation to Ms D to have been made. This, of itself, does not support an inference of predetermination.

Conclusion

169. We have considered race and age discrimination separately.

170. In respect of each, we have further considered whether the Claimant was treated differently to a hypothetical comparator whose material circumstances were the same. We are satisfied that the Respondent would have treated them in exactly the same way as the Claimant.

171. To conclude, we are satisfied that the interview process was not less favourable treatment. A relevant comparator, Ms F, in the same circumstances would have been treated in exactly the same way. Accordingly, we are unable to draw any inference from the facts that it was because of the Claimant's age or race. Accordingly, the Claimant's allegations of direct age and race discrimination in respect of her unsuccessful application for the Crewkerne Team Support role is not well-founded and fail.

Training Support Assistance role based in Taunton – July 2020

172. It is common ground that the successful candidate was perceived as British in the age group 30 - 40 years. This candidate has different protected characteristics to that of the Claimant in respect of age and perceived race.

173. We find that, in and of itself, the failure to appoint the Claimant to the permanent position was unfavourable treatment as the Claimant was not able to obtain a secure position within the Respondent company.

174. We have considered, therefore whether or not the Claimant was treated differently to another person, actual or hypothetical.

175. We then have to consider if this was less favourable treatment.

176. The Claimant's position is that she was treated differently and less favourably than the successful candidate, her nominated comparator or a hypothetical comparator who is perceived as British and in the age range 20-30 years. This is reflected in the scores awarded to the Claimant, which it is asserted, were heavily underrated.

177. We record as a finding that this role was advertised internally and externally; the Respondent receiving 142 applications. The Claimant was one of 10 candidates selected for interview (of which 5 were actually interviewed)

which took place on 3 August 2020. Three candidates withdrew their application prior to interview and two candidates did not attend the interview.

178. It is common ground that the interviews were conducted on 5 August 2020; the interview panel consisting of Lisa Atkinson (Safety, Training, Engineering and Policy Admin Support Manager) and Ms Porter (Training Support Officer).

179. We find that each of the candidates were scored out of 5 for each question, except question 10, which considered whether candidates possessed the requisite computer skills, and was not scored. Ms Atkinson outlines in her evidence that all candidates were informed at the start of the interview that she would largely be focusing on note taking, with her colleague focused on maintaining eye contact [WS/LA/2].

180. Further, each interviewer scored separately after each question. The scores were collectively reviewed at the end of the interview to understand any disparity.

181. We find that the Claimant scored 36 and 33, a total of 69. Three other candidates scored higher than the Claimant.

182. The Claimant has challenged the accuracy of the score in respect of team working, especially the comment at the end of the interview notes [B/272] “works well on own, no demonstration of team working”. Ms Atkinson clarified that she had scored this question based on the Claimant’s response, which outlined some of the challenges of team working rather than the Claimant not providing any examples of team working. The clear impression was that the Claimant was more comfortable working on her own, demonstrated by examples where she acted alone in order to support weaker productivity from her colleagues. We accept this clarification.

183. The Claimant has also challenged the note made that record the Claimant’s assertion that she can “predict the future” [B/266]. We make as a finding that these words were used by the Claimant; the notes are a contemporaneous record of the interview, and the comment so unusual so as to have been documented erroneously.

184. The Claimant asserts that the marking system was defective, with marks being superficially given. We have considered carefully Ms Atkinson’s explanation of the scores, which details how the response differed from the successful candidate, what was required in order to score effectively and why the Claimant’s answers did not always do this. We accept Ms Atkinson’s evidence. We found her to be fair and balanced and her explanations credible.

Conclusion

185. We have considered race and age discrimination separately.

186. In respect of each, we have further considered whether the Claimant was treated differently to a hypothetical comparator whose material circumstances were the same. We are satisfied that the Respondent would have treated them in exactly the same way the Claimant.

187. To conclude, we are satisfied that the interview process was not less favourable treatment. A relevant comparator, the successful candidate, in the same circumstances would have been treated in exactly the same way.

Accordingly, we are unable to draw any inference from the facts that it was because of the Claimant's age or race. Accordingly, the Claimant's allegations of direct age and race discrimination in respect of her unsuccessful application for the Training Support Assistance role are not well-founded and fail.

EJ Lowe

Date: 08 August 2022

Judgment & Reasons sent to the Parties: 19 August 2022

For the Tribunal Office

APPENDIX 1

EMPLOYMENT TRIBUNALS

Case Reference:	1406301/2020
Claimant:	Ms V Grigorescu
Respondent:	Western Power Distribution (South West) Plc (WPD)
On:	20 June 2022
Before:	EJ Lowe
	Mr C Williams
	Ms D England

CASE MANAGEMENT DIRECTIONS

Application

The Tribunal has received an application from the Claimant for permission to call a further witness (SC) to give evidence.

The application is opposed by the Respondent.

Both parties have provided the tribunal with written submissions (Claimant by way of emails dated: 2, 8, 9 and 15 June 2022 and the Respondent by way of emails dated: 6 and 9 June 2022).

The Tribunal Panel has considered carefully these submissions and has dealt with the application on the papers.

Background

The Tribunal is considering complaints of Discrimination on the grounds of sex, race and age (Equality Act 2010, section 13) and Victimisation (Equality Act 2010, section 27).

The Tribunal has heard 4 days of the allocated 5 days to this matter. It has dealt with preliminary applications and heard evidence from all scheduled witnesses from both parties. One further day will be required in order to consider closing submissions, Tribunal deliberations and Judgment.

As part of the preliminary applications, the Claimant applied to adjourn the hearing. One of the grounds advanced in this application was the Claimant's request to cross examine a further 5 WPD employees. The Claimant informed the Tribunal that she had expected the Respondent to call these witnesses, and it was only in the period immediately prior to the hearing that she had become aware that this was not the case. She wished to secure their attendance at the hearing in order to present her case fully.

These additional witnesses were clearly identified and added to the 'Cast List' accordingly.

At the conclusion of day 4 of the Hearing, the Tribunal granted the Claimant 7 days in order to obtain further legal advice/give further consideration to her initial request as outlined (this included the need to consider witness orders and the concept of hostile witnesses).

Adjudication

The Tribunal has had full regard to the Overriding Objective contained within rule 2 and rule 32 Requirement to attend to give evidence of Schedule 1 of the Employment Tribunal Rules of Procedure 2020.

This outlines the duty on the Tribunal to ensure that evidence is proportionate to the complexity and the importance of the issues that it is required to determine. There

are additional considerations, inter alia, in relation to avoiding delay and saving expense.

The Tribunal has had regard to all the circumstances of the case and its detailed knowledge of the issues in dispute.

In determining the relevance of the proposed witness testimony to the issues in dispute, we note the following:

SC is not a witness that was either expected or anticipated by either party in advance of the commencement of the final hearing. This witness was not part of the Claimant's application to adjourn proceedings initially and was not included on the 'Cast List'. As a consequence, SC is an additional witness proposed after the conclusion of the scheduled evidence heard by the Tribunal.

Significant references involving SC within the evidence bundle are contained at [B/250-257] and [B/377-378]. [B/250-257] is an email chain, dated 25 June 2020, arising from discussions around the interview shortlist for the forthcoming Team Support role. SC involvement in this conversation is to recommend to KM (Former Team Manager, Crewkerne) that the Claimant is included in the shortlist and to confirm/clarify the final arrangements for the interviews.

[B/377-378] is an exchange of 4 emails, dated 6 July 2020, between SC and KM. The latter requests a list of questions in advance of the forthcoming interviews, which SC provides. KM asks SC whether the Claimant should be expected to "know more" in light of her previous interview experience. SC responds that "you could always push her a bit more on things like the broader measures/restoration times, etc. She will know some of the answers off by heart by now but there's not much we can do as need to score comparatively".

In evidence, JM (Diversity and Inclusion Officer) has accepted that the contents of these emails raise some 'red flags'. The Tribunal clearly comprehends the point that is being made here; it is fully understood.

SC participation in the proceedings is confined to the above - interview selection and discussion around interview questions with KM. Crucially, she does not have any further involvement with the interviews themselves. It is noteworthy that, as events materialised, KM did not ultimately interview the Claimant. On the morning of the interviews, KM was not able to attend work and SR (Team Manager, Sedgemoor) was asked to assume this role at very short notice. The relevance of SC's evidence has to be evaluated in the light of this.

On a broader basis, the Claimant avers that SC would be able to give evidence that would provide insight into the selection process. However, the Claimant has not spoken to SC directly and there is no witness statement before the Tribunal. In our view, it is therefore not possible to speculate as to what relevant evidence this witness would be able to provide. It would not be appropriate or acceptable for a witness to be called without a clear evidential foundation that would be of assistance to the Tribunal in determining the claims before it.

Taking all the above factors into consideration, the Tribunal considers that the evidence of SC will have little, if any, evidential value in assisting determination of the claims.

Accordingly, the Tribunal makes the following **Case Management Orders**:

1. **Permission is not granted for the Claimant to call witness SC**
2. **By 4pm on 8 July 2022 the parties are to provide to the Tribunal, and exchange with each other, written closing submissions for the Tribunal's consideration**
3. **If so advised, the Claimant may by 4pm on 8 July 2022 file an updating Schedule of Loss**
4. **If so advised, the Respondent may by 4pm on 15 July 2022 file a Counter Schedule of Loss**
5. **Day 5 of the hearing shall be listed on the next available date after 18 July 2022**

EJ Lowe
20 June 2022