



# EMPLOYMENT TRIBUNALS

**Claimant:** M Bogdan

**Respondent:** The Cabinet Office - Government Digital Services

**Heard at:** East London Hearing Centre

**On:** 3, 4, 5, 6, 10, 12 May 2022  
In Chambers on 13<sup>th</sup> (afternoon only), 20 May and 16 June 2022

**Before:** Employment Judge C Lewis

**Members:** Ms M Legg  
Mr M Rowe

## Representation

**Claimant:** In person

**Respondent:** Mr J Chegwiddden of Counsel

# RESERVED JUDGMENT

*The unanimous judgment of the Tribunal is that the claims for:*

- (i) Direct discrimination under s 13 of the Equality Act 20210 fails and is dismissed;*
- (ii) Harassment under s 26 of the Equality Act 2010 fails and is dismissed;*
- (iii) Victimisation under s 27 of the Equality Act 20120 fails and is dismissed;*
- (iv) Unlawful deductions from wages fails and is dismissed; and*
- (v) breach of contract is dismissed for lack of jurisdiction.*

# REASONS

1. The Claimant presented proceedings on the 28 August 2020, after a period of early conciliation from the 17 June 2020 to 31 July 2020, complaining about treatment during the period from April 2017 to the date of issuing the proceedings. The Claimant is still employed by the Respondent, she is Romany Gypsy and brought complaints of direct race discrimination- s13, harassment related to race -s26, and victimisation -s27, under the Equality Act 2020; unauthorised deductions from wages, s13 ERA 1996; unreasonable refusal to allow time off for dependents, s57A ERA 1996 [this claim was later withdrawn and did not appear in the agreed list of issues] and breach of contract.
2. The Respondent denied the claims

## The Issues

3. The parties had agreed a list of issues in accordance with the Order of Employment Judge O'Dempsey dated 15 July 2021. That list of issues was in the hearing bundle at p 59.1-59.6. On Day 3 of the hearing the Claimant withdrew parts of her claim, specifically, she told the tribunal that she made no complaint of discrimination against Simon Dadd, who took over the investigation from Ms Healey, nor against the decision takers Mr Williams and Ms Baldwin; she clarified that her complaints in relation to the grievance investigation were limited to steps taken up to 1 July 2020; the Claimant also withdrew her complaint of victimisation in respect of her "partially met" performance marking in October 2019. She clarified that she relied on her grievance dated 19 June 2020 as the protected act (and not the earlier grievance dated 3 October 2019, which she conceded did not amount to a protected act).

## The issues the Tribunal had to decide

4. The factual allegations contained in the list of issues which the Tribunal had to decide are set out below (the issues also included jurisdictional issues as to time which the Tribunal considered but which are not set out below). The numbering is taken from the list of issues agreed between the parties

### **"6 The allegations of direct race discrimination**

6.1 The Respondent refused to carry out the job evaluation for the Claimant several times which she has been requesting throughout her employment despite the fact it is her contractual right.

6.2 From the beginning of her employment she made several requests to her line managers as it has been admitted by Timothy Marcus on 27 July 2020 during the investigation: quote she has tried with every line manager that her

role should be a higher grade." He took this to SLT [Senior Leadership Team] and it wasn't agreed.

She also made a request on 18th of [November in the list of issues but October according to the evidence] October 2019 for job evaluation in her email to her line manager Susie Healey at the time which was not agreed until April 2020. The content of the form was approved in July 2020.

6.3 The Claimant's caseload doubled between the end of April 2017 until February 2019. This was an equivalent job that done by other colleagues, digital engagement managers but she was not paid for "acting up" whilst her colleagues, Dilek Celik, Lorela Broucher and Alkistis Geropoulou who are not Romany Gypsy were receiving pay at the higher grade what the Claimant was not. The Claimant alleged that this treatment was on account of her race.

6.4 In September 2018, when the Claimant needed to visit her brother whose condition was deteriorating after a major accident earlier in the year, she was told on Friday, 14 September 2018 by Chad Bond that it was fine. Then on Tuesday, 17 September 2018 Timothy Marcus emails the Claimant and hold her that it was authorised leave. The Claimant was not allowed to take "special leave" and was forced to use her annual leave allowance instead. This was in breach of Cabinet Office Special Leave policy. Even if the policy allows the exercise of discretion, the Claimant contends that in overturning permission already given by Chad Bond, the discretion was exercised in a discriminatory manner. This negatively impacted the Claimant's end of year performance bonus.

6.5 The Claimant was covering the role of Evans Bissessar (Web Domain Manager) who had left the team. His role was at the higher grade, Higher Executive Officer, (HEO). The Claimant covered his role in addition to her own job from December 2018 until March 2019. Temporary Duty Allowance (TDA) was promised to her by Simon Everest in December 2018 but never got paid to her.

6.6 In December 2018, insulting comments were made by Simon Everest that the Claimant was a "single point of failure" which has been spread within senior management. The Claimant was degraded and humiliated publicly in front of others. This has led other managers to get a negative perception about the Claimant and she has been treated less favourably after this incident (less favourable treatments are described below).

6.7 In April 2019, a senior manager Timothy Marcus asked the Claimant's previous line manager Evans Bissessar to provide evidence on the Claimant's performance (to back up his own decision) to give the Claimant a poor performance marking.

6.8 In April 2019, Simon Everest said he was "ready to fire her (the Claimant) out of a cannon" when discussing her performance with Timothy Marcus.

6.9 In April 2019, the Claimant was given a poor performance marking without having a 1:1 meeting with her line manager, Timothy Marcus, and without having a performance review meeting. Performance processes were not

followed. Colleagues Carl Massa, Ana Belen Lopez Santiago, Thomas Beckett who were managed by Timothy Marcus at that time, who are not Romany Gypsy, had an opportunity to give evidence and discuss their performance. This unfavourable treatment was because of her race.

6.10 On 21 June 2019, the Claimant was not allowed to bring a union representative to the meeting to discuss her complaint about her poor performance marking, which was unlawful and against section 13 (4) the Employment Relations Act 1999. The subject of the meeting impacted her bonus payments, career progression and promotion opportunities. The Claimant claims this treatment was on account of her race.

6.11 In November 2019, the Claimant was excluded from the promotion opportunity for a Digital Engagement Manager. According to the Cabinet Office policy "when a post is vacant and needs to fill in urgently if there is someone suitable at the band below to cover this Temporary Duty Allowance can be given. This does not have to go through fair and open competition, but should go through an expression of interest process." The Claimant claims that only her and Dilek Celik were suitable for the role as it had to be filled immediately and it was done so. The only difference between the Claimant and Dilek Celik was race. They were both originally at the same grade.

6.12 In May 2020, the Claimant was again excluded from a promotion opportunity for a Digital Engagement Manager position. According to the Cabinet Office policy the role should have been advertised under the Expression of Interest recruitment process. Dilek Celik was now appointed to cover for Olivia. The only difference between Dilek Celik and the Claimant was race.

6.13 On 29 July 2020, after job evaluation, it was identified that the Claimant had been wrongly graded. Samantha Helliard who was doing the same role as the Claimant, was graded one grade higher than the Claimant. Karen Stokes, who had the Claimant's role for three years before the Claimant, was paid at I SEO grade (one grade higher than HEO). The Claimant states that the incorrect grading and the length of time it persisted for were acts of less favourable treatment. Other colleagues who were not Romany Gypsy were not wrongly graded and wrongly paid for five years.

6.14 From October 2019 [to 1 July 2020] the grievance investigation has been discriminatory and had not been dealt with in line with ACAS code of practice. [the allegations against Simon Dadd were withdrawn on day 3]

6.15 On 3 October 2019, Susie Healey was appointed as an investigation manager for the Claimant's grievance that was about Timothy Marcus, who was Susie Healey's line manager's manager. She was being asked to investigate someone she worked under.

6.16 From 16 December 2019 [to 1 July 2020] the Respondent failed to adequately investigate the Claimant's grievance.

6.17 In July 2020 during the investigation, unauthorised absences by the Claimant were fabricated by Timothy Marcus. The alleged absences were June

2018, September 2018 and December 2018. [last sentence re Simon Dadd withdrawn on Day 3]

7 If so, was the Claimant subjected to those acts of less favourable treatment because of her race?

**Section 26 of the Equality Act 2010- harassment related to race**

8 Did the Respondent engage in unwanted conduct that had the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

8.1 The Claimant relies on paragraphs 6.5 and, 6.7 above [the allegations relying on 6.1 6.14 were withdrawn]

9 if so, was that conduct related to the Claimant's race?

**Victimisation, section 27 of the Equality Act 2010**

10 Did the Claimant do a protected act? The protected act relied on by the Claimant was the grievance the Claimant raised on 19 June 2020.

11 If yes, then did the Respondent subject the Claimant to the following detriments:

[11.1 allegation withdrawn by the Claimant]

11.2 The Claimant believes that the fact that she raised a grievance on 19 June 2020 influenced the job evaluation outcome. HR Business Partner David Sones even mentioned in his email to the Claimant that the Claimant did not mention SEO grade in her complaint, only B2 (HEO grade) when she raised a concern around the job evaluation outcome.

11.3 The Claimant claims that the reason why the Respondent do not agree with her role being at the SEO grade is because she had raised a race discrimination complaint.

**Unlawful deduction of wages section 13 Employment Rights Act 1996**

The Respondent notes that the claim for unlawful deduction from wages may properly be characterised as an issue of remedy relating to the discrimination claims. The Claimant notes that it is damages for breach of contract.

12 Did the Respondent unlawfully deduct wages properly payable to the Claimant for the periods and amounts set out below:

12.1 The following sums subject to the Tribunal's decision regarding the Claimant's grading. The Claimant maintains that an admission has been made by her line manager that the role she was recruited for in 2015 was "always at the higher grade", therefore if they correct her pay and grade the past years she cannot claim the Temporary Duty Allowances below but can claim for higher performance bonus:"

[the calculations are not set out here, they are relevant to remedy only]

## The hearing

### Application to postpone the hearing

5. The hearing was originally listed for eight days. On 25 April 2022 shortly before the hearing was due to start the parties were informed that only seven days would be available for the hearing. This led to an application from the Respondent to postpone the hearing and re-list it for eight or 10 days. Mr Chegwidden renewed this application on the first day of hearing. The application was refused for the reasons given orally, these included that the tribunal was able to reinstate half a day on the 13th of May and agreed to start early each day. In the event the evidence and submissions were concluded on 12 May and the Tribunal sat in Chambers in the afternoon of 13 May and on two further days, namely 20th May and 16 June 2022.
6. The parties had cooperated in respect of a timetable for cross examination of witnesses. On the first day the morning was spent on housekeeping and reading, unfortunately the afternoon was lost to a fire alarm at the tribunal building. The Claimant's evidence got underway on day 2 and concluded on day 3. As a result of the Claimant's withdrawal of some of her complaints and on confirming she had no question for them, Simon Dadd, Bruno Williams and Thalia Baldwin were not called to give evidence. The tribunal heard evidence from the Claimant, Simon Everest, Timothy Marcus, Beverley Hoskins, Susie Healey and Chad Bond. The evidence concluded in the morning of 12 May. The Tribunal heard the Respondent's submissions before lunch and then the Claimant's submissions at 3 o'clock to allow her time to consider the Respondent's submissions before making her own. The tribunal reserved its decision. The tribunal met in Chambers on the afternoon of 13 May, and on 20 May and 16 June 2022

### The Claimant's application to amend

7. On 10 May 2022 the Claimant sent an email making an application to amend her claim to include a claim for equal pay and sex discrimination, comparing herself to Damilola Adewuyi. This was brought to the Tribunal's attention at the start of day 6 of the hearing. Mr Chegwidden objected to the application on a number of grounds, including that it had not been formulated in writing, and that if granted it would require substantial new documentation to be disclosed and further evidence which would necessitate an adjournment of this hearing partway through. Having had an opportunity to reflect on the position and the possible costs implications of pursuing the application, the Claimant informed the Tribunal that she had decided to withdraw her application, indicating that she would consider whether to bring fresh proceedings in respect of those complaints.

## The documents

8. The Tribunal was provided with three lever arch files of documents which were intended to be the joint bundle of documents, however there a number of documents that the Claimant wished the Tribunal to consider which were not included in the main hearing bundle and those were provided in additional bundles. It was explained that the Tribunal would only be reading those documents that were referred to either in witness statements, oral evidence or we were invited to read by the parties. As is quite often the case in the Tribunal's experience some further additional documents were added to the bundles during the course of the hearing.

### **Findings of Fact**

9. We have set out our findings of fact below as far as they are relevant to the issue we had to decide. We have tried to set out the facts in chronological order except for where it made sense to deal with related issues together.
10. On 14 September 2015 the Claimant joined the Civil Service through the Fast-Track Apprenticeship scheme as Digital Engagement and Policy Business Admin at Grade B1 [P988]. Her appointment was on a permanent basis subject to the completion of security clearance and passing her Fast - Track Apprenticeship qualification. The relevant apprenticeship framework and level was Business and Administration Level 4; Higher Apprenticeship in Business and Professional Administration and the apprenticeship was tied to the job title. Grade B1 is now equivalent to EO (Executive Officer).
11. In light of the low volume of work involved in the Secretariat Team, HR had been looking for work opportunities within GDS for the Claimant. She was subsequently offered an opportunity with the Standard Assurance Team in early December 2015 after completing a test and interview for a Programme Support Officer role. Her salary stayed the same. The Standard Assurance Team consisted of three functions: Service Assessment, Spend Controls and GOV.UK naming and exemption. The business support role was split between the Claimant and another apprentice, Aisha Kiani. The Claimant was assigned to the Spend Controls team (Savings) and Aisha Kiani was responsible for supporting the Service Assessment and GOV.UK naming and exemption functions.
12. Chad Bond was a senior manager in the team when the Claimant joined, he was subsequently promoted to Deputy Director. The Claimant was managed for a very short time by Chad Bond and thereafter by Evans Bissessar. When Evans Bissessar left the department Tim Marcus, who had been Evans Bissessar's line manager, formally took over the Claimant's line management for a period of time, in the absence of any direct line manager above the Claimant, until Susie Healey became her line manager in July 2019. Both Timothy Marcus and Simon Everest who joined the team later were managers were under Chad Bond's line management.
13. The Claimant's first end of year performance review was undertaken by Chad Bond on 24 March 2016 when she had been in post less than 6

months: it set out 5 objectives, including at 5 her apprenticeship objectives. (p1408-1409). In respect of the GOV.UK enquiries, her role was to direct them to a proposition team or Evans Bissessar. At p1412 the Claimant sets out what she says she was undertaking as part of the performance review. Chad Bond's summary of the Claimant's end of year performance is at p1413, in which he states out, the following;

“Mariann has made a good start to her position on the Standards Assurance Service. Her main focus has been acting as the conduit with departments to record their spend requests including the associated process. The other element has been the savings work. This is a complex process scrutinized by the NAO and previously contracted to consultants. She has picked the methodology up, understood and applied swiftly to deliver key updates and reduce the burden on the team.”

The Claimant says this shows she was responsible for leading on savings work and not just providing support to the Service Manager.

14. The two main roles of the team were interventions to departments to make sure they followed the correct digital strategy and to assist them where they did not, which would lead to making savings. Departments would provide evidence of those savings by documentation to account for GDS's savings statements to the National Audit Office. The Claimant's main task was in the provision of those saving statements and respective calculations. Previously savings was a bolt on to the Fast Streamers role, whose main role was focused on technology plans. Other areas of GDS and the Cabinet Office would ask Mr Bond about levels of savings and he would pass these queries on to the Claimant who would either reply directly or provide him with the information to reply.
15. The Claimant compares herself to Emma Bury and Anushka Nagpal who were both Civil Service Fast Streamers, that is, part of the Civil Service Graduate Fast Stream programme, they both had the job title of Digital & Technology Advisor (p66.1 -P66.4 ). The post description sets out that the Digital/Technical Advisor works as part of the reform team with the Government CTO to set the strategy for Government technology, challenge departments as part of the spend control process and to support them on an advisory basis. The main responsibilities are at p66.1 - 66.2
16. We are satisfied that the responsibilities set out in the Fast Streamer's JD are not the same as those of the Claimant at that time. Having seen the JD we accept Chad Bond's evidence that the Digital and Technology Advisor did not just provide the savings work, that they were also engaged with the department on technical details about how to make the savings and advising on digital strategy and approach and what they should or should not do when building systems and/or services. Their role was broader and more complex than the Claimant's. See for example, at p 66.2



“Strategy and Policy

Candidates will analyse departmental plans and strategies for deploying technology and digital products benchmarked against the technology code of practice for Whitehall ... Product Design  
The candidate will analyse propositions for user stories and digital concepts as part of the controls process. ...”

17. Evans Bissessar was the Claimant’s line manager from early 2016 until December 2018. He told us that her key responsibilities under the Savings function was gathering cost savings for Government through the work of the team collectively; and her other duties included general administrative tasks such as keeping on top of the GDS approvals inbox relating to technology or digital spend enquiries from government departments; providing support to the assessments team by booking venues, finding panel members, assessment managers, booking rooms, booking assessors, writing and publishing reports on assessments and setting up rotas. Additionally, supporting the GOV.UK naming and exemption by checking emails from applicants, providing some responses, logging some applications and covering administrative elements of his role in his absence. We find this is consistent with the documentation, including the job descriptions and the organisation chart identifying the respective responsibilities at the different roles (as set out below). We accept his evidence.
18. There were problems with the apprenticeship in July and November 2016 which are evidenced by the emails at p69.1 and 69.2 25<sup>th</sup> and 27<sup>th</sup> July 2016 between Evans Bissessar, the Claimant and Angela Knight at Capita. Concerns of plagiarism, non-completion of assignments and time management were raised. The Claimant highlighted issues with the course provider which were accepted. The email at p70 acknowledges there were issues which were addressed.
19. On 22 Nov 2016 Chad Bond emailed the Course Director, copying in Tim Marcus (p68.) waiting to hear if the Claimant and Aisha had failed their apprenticeships. We heard unchallenged evidence from Chad Bond that Tim Marcus provided support to the Claimant to help her complete her apprenticeship and the Claimant was able to complete the apprenticeship and was taken on as a substantive EO. We are satisfied from the contemporaneous documents that Tim Marcus did provide support (see p303 and p2016). The Learner Progress Review on 9.8.17 show that two study days were provided per month. The Claimant accepted that Tim Marcus stepped in with support by placing Elizabeth Homans in the department for 3 months but suggests his motive was to stop another apprentice failing and to avoid the department looking bad. The Claimant maintained she was doing the same work as Elizabeth Homans.

Issue 6.3 allegation the Claimant’s workload doubled

20. In April 2017 Aisha, the other apprentice, left and was not replaced. This resulted in the Claimant picking up additional duties. Service Assessment duties were added to the Claimants Objectives and her Objectives increased from 5 to 7(p738). In the Review completed by Evans Bissessar on 31.8.17 the Claimant was marked as a “Good Performer” (p738). The Respondent disputed the workload doubled but accepts that it did increase.
21. The Organisation chart referred to by the Claimant in her statement (p1031-1032) shows the roles and responsibilities attached to the roles. At that time Business Support consisted of the Claimant plus one vacant post, covering three areas of responsibility:
- Administration of the Spend Controls team
  - Supporting administration of service assessments,
  - Business support to the Standards Assurance function.

The responsibilities of the Senior Technology Advisors, who included Thom Beckett, Carl Massa, Sam Helliard and Ana Belen Lopez Santiago were described as follows:

- to manage the relationship between GDS and several Whitehall departments for digital and technology expenditure
- Providing a challenge and approval function to departments on specific programmes and making recommendations to Cabinet Office Ministers on all departmental IT expenditure
- To assist in ensuring that large scale citizen services are delivered whilst influencing tangible savings
- To work with senior stakeholders across government and other governments around the world, advising and guiding them in reshaping government’s technology to enable digital services as set out in the GDS Service Design Manual
- The potential to have an additional role to work as part of an international team delivering spend assurance to a number of countries in conjunction with the FCO Prosperity Fund.

The responsibilities of the Digital Engagement Managers (including Alkistis Geropoulou) were described as follows:

- run assessments efficiently and effectively, working closely with the assessors from across GDS
- work with a number of departments to support them through the service standard assessment process
- make decisions and provide advice to departmental teams on queries relating to the service standard
- provide oversight of assessments to ensure consistency in assessment results and quality in assessment reports
- build capacity through developing and running training sessions for those within GDS and those in departments
- provide analysis and advice on issues requiring escalation

- support the engagement aims of the team, including blogging and taking on speaking opportunities
  - support the strategic development of the standards assurance team, and continuous improvement of eh assessment process
22. In February 2017 Evans Bissessar notes that the Claimant is struggling with what he describes as “everyday work” (p78.1). By February 2018 Sam Helliari provides feedback for the Claimant’s end of year review (p82) that the Claimant “has done well on the savings work which in the past she has found to be challenging and tedious work at times”. and that the Claimant needs further support from other EAs (EO) in the organisation for sourcing panel members and finding rooms. We find that is consistent with the Claimant having done this work as part of her wider role but not consistent with her doing the same role as Sam Helliari.
23. It was accepted that on occasions the Claimant had to cover for specific aspects of the Service Assessment Manager role, nor was it disputed that there was a vacant Digital Engagement Manager role (p79.3.) This meant that on occasion the Claimant was responsible for hosting the service assessment meeting as well as arranging and providing administrative support (p185). We find that the Claimant did not cover the full duties of the Digital Engagement Manager (see p1032), specifically we find that the Claimant was not expected to and did not carry out, the higher level advice; directing the assessment itself; strategic development and decision making.
24. At the mid-year review for the period April 2018 to March 2019 (completed by the Claimant on 5 October 2019), the Claimant records that she has, “led on two DWP Service Assessments while a new DEM joined my team” (p1366.6). At p1366.8 under Development Needs the Claimant records that shadowing of DEM’s is ongoing and at p1366.9 Evans Bissessar sets out in his line manager’s summary a number of ways he has explored with the Claimant to challenge and stretch herself and put her in a position of possible promotion in the future. We are satisfied that the review document records his honest assessment of the Claimant’s performance at that time and that it was his view that the Claimant was not currently ready for promotion.
25. The Claimant compares herself to Lorela Broucher and Alkistis Geropoulou who were Digital Engagement Managers and therefore paid at HEO grade. We do not find that their circumstances were materially the same. Having heard the Claimant’s evidence we find that she is unwilling to recognise that doing part of a job that is done by a higher grade is not the same as doing that job at that grade, even though the job at the higher grade includes numerous other functions that are at a higher level of responsibility.

Damilola Adewuyi

26. On 6 July 2018 Chad Bond sent an email to the Standards Assurance Service team announcing that Damilola Adewuyi and a Summer Intern were to join the department to support the 6 week deadline to complete the audit

on the 2017/18 savings. We were told that at that time there were 180 cases left to audit.

27. Damilola Adewuyi was head of Community for Business Analysts, which meant that he was an experienced Business Analyst with responsibility for assisting other Business Analysts.
28. In August and September 2018 Chad Bond asked the Claimant about the savings work for 2017/18. She tells him that Damilola is working on it and that she has fallen behind (p97 & 98).
29. We find that there was dispute within the team about the savings calculations and disagreement on how the calculations should be made and how to collate them. The Claimant was using a methodology previously produced for the team by external consultants, while Damilola Adewuyi as a business analyst had a different view as to how the savings should be captured and recorded. The savings work was split and the Claimant worked on 2017/18 whilst Damilola worked on 2018/19 (p101) Damilola Adewuyi was subsequently moved off the work and Rachel O'Neil came in to support the team.
30. It is correct that for a period of time Damilola and the Claimant were doing the same work in that they were each tasked with producing the information for capturing a specific financial year's savings work, however we are satisfied that Damilola Adewuyi's role was different, and that he was in other aspects of his role working at a higher level. We are satisfied that carrying out the same task as part of a job does not mean doing the same job overall.

#### Issue 6.4 September 2018 absence

31. In September 2018 the Claimant needed to go home to Hungary to visit her brother who had had a major accident earlier in the year. The Claimant relies on an online chat between herself and Chad Bond on 14 September 2018 as evidence that her leave had been authorised by him. We were taken to the print out of the chat at p98-99. In response to a request from Chad Bond asking for the savings figures the Claimant informs him that she is behind. Chad Bond asks when they will be done and the Claimant informs him that Diana (who was an intern) will be back next week, she goes on to say "however I have to go home to see my brother" and suggests she could work on it the following week. Chad Bond replies, "no focus on your time off." Chad Bond was not her line manager and would not have been aware of whether the Claimant had requested or been authorised the leave. The Claimant accepted that she had not formally requested the leave in the normal way from her line manager or anyone else. We do not find that Chad Bond's remark in this context can reasonably or credibly be relied upon as having authorised the Claimant's absence the following week. There was no evidence that C had applied for special leave.

32. The Claimant also relies on an email dated 14 September 2018 (p100.1) as confirmation that she had notified the Delivery Manager, Iwona, that she would be taking leave. On 18 September the Claimant forwarded Iwona's email to the Service Assessment Team saying that she will be working remotely and that Diana (the intern) will not be coming back. This was copied to her line manager Evans Bissessar. On 18 September 2018 James Pitman emailed Evans Bissessar to ask if the Claimant was definitely on leave and Evans Bissessar informed Tim Marcus that she appeared to have gone on leave without his knowledge or agreement (p1452.) Tim Marcus contacted the Claimant the same day to inform her that he was concerned that she was taking unauthorised leave if she were on leave (p100).
33. The allegation before us is that the Claimant was not allowed to take special leave and that there was a decision to overturn the permission already given by Chad Bond. We find that the Claimant did not make a request for leave in line with the policy for special leave, nor did Chad Bond grant her permission to take leave. The leave was authorised as annual leave in retrospect by Evans Bissessar after the Claimant's return.
34. The Claimant alleges that this absence negatively impacted her end of year performance, having been referenced in her October 18 mid-year review. The mid-year review was completed by Evans Bissessar, the Claimant received a 'Partially Met' (p1366.6). He makes reference in the mid-year review to the Claimant 'taking leave without knowledge or agreement' and gave evidence that this was to support the marking of 'Partially Met', (paras 10 and 11 of his witness statement). This was not challenged by Claimant at the time; she sent an email to Evans Bissessar (p100.5) saying the mid-year assessment was fair and thanking him for his support.

#### Issue 6.5 Evans Bissessar Leaving and TDA

35. Evans Bissessar moved to another team in December 2018. His line manager had been Tim Marcus up until he left. No formal handover had been undertaken, either of his work or his line management of the Claimant. The Respondent accepts that this was not handled well (para 10 Simon Everest's witness statement). There were no steps taken to backfill Evans Bissessar's role or transfer his line management responsibilities. The Claimant was left to cover much of Evans Bissessar's role (HEO) from Dec 18 – March 19. We find she covered up to 60% of his role. We are satisfied that she did not cover the 40% of his role which involved going out of the office to meet with Devolved Governments, Agencies and Government Departments to advise on the Gov.Uk exemptions. The Claimant did cover the Gov.Uk exemptions mailbox, which involved responding to enquiries from other departments, during a transition period until it was moved to Mark Barrington's team (p106 message from Chad Bond dated 3 December 2018).

#### Temporary Duty Allowance

36. In December 2018, Simon Everest acknowledged the additional work being undertaken by the Claimant (p112.3) in an email to Mark Barrington, which was copied to Tim Marcus and Chad Bond. He describes the additional work the Claimant was having to do as “higher level work” and suggests that this might be recognized through a temporary duty allowance. He emails Mark Barrington, Tim Marcus, and Chad Bond again on 19 December 2018 to get clarity on the plans to move the work being undertaken by the Claimant and letting them know he has dropped a note to the People Team to see if the TDA process could be started for the Claimant, backdating to Evans Bissessar’s last day if possible (p112.5). He sends the request to the People Team on 19 December 2018. The People Team respond and ask for completion of the TDA Business case which needs to be approved by the Head of Business Unit, John Strudwick. The email from People Team was copied to Tim Marcus and Chad Bond. The Respondent accepted that this was not followed up and should have been.
37. Having heard evidence from Simon Everest, Tim Marcus and Chad Bond we find that Simon Everest assumed that Tim Marcus and Chad Bond would pick this up on their return to work after the Christmas break. However Tim Marcus and Chad Bond were both on leave when the email was sent. The both told us that that they were not aware that they were expected to follow it up and we accept that was their honest evidence. We find that there was ambiguity and lack of communication between the three managers as to who would be responsible for following this up and taking forward the TDA application and that none of them followed it up.

Issue 6.6 December absence and ‘single point of failure’

38. On Thursday 13 December 2018, Simon Everest sent an email to Tim Marcus and Evans Bissessar asking if either of them had heard anything from the Claimant (p112.2 ). He had understood that she was working from home on the Monday but had not heard anything more. He ask d one of them to contact her, “first and most importantly to check on her welfare” He told them that he had a few people flagging that the Claimant’s tasks were not being completed, including responses to the gdsapprovals mailbox that he believed she was in charge of. He goes on to say:

“These pre-date her recent absence, so we separately need to look into that, and figure out a bit of resilience, as she’s a single point of failure as far as I can tell at the moment (I’m not sure if either of you also have access to that mailbox?)”

The Claimant complains that this was an insulting comment about her which was spread with senior management and degraded and humiliated her publicly in front of others.

39. Simon Everest gave evidence that his comment was about the process rather than the Claimant personally, hence his reference to resilience and asking whether Tim and Evans had access to the mailbox. As far as he was

concerned the fact that there was only one person tasked with checking the mailbox meant that if they (in this case the Claimant) did not do it, whether because they were absent or for any other reason, meant it did not get checked, which was a process failure. A single point of failure was referring to the fact that only one person had the responsibility and there was no back up. Having heard his evidence and having read the email we accept that is what he is referring to. We find that the phrase was not a reference to the Claimant personally.

40. The Tribunal notes that Simon Everest sends this email on 13 December but in the emails referred to above sent a few days later, on 18 and 19 December he describes the Claimant as “holding the fort” and is seeking support for her, progressing the TDA application and expressing frustration that she has been left under pressure as a result of the lack of planning before Evans moved on, we do not find this to be consistent with him viewing the Claimant personally as a failure.
41. In early 2019 the Claimant applied for a Digital Engagement Manager vacancy and was unsuccessful. The Claimant received feedback on 15 April 2019 (p130) which included that, she should “look to develop a more in-depth understanding of the role and the purpose behind it”. We find this to be consistent with Evans Bissessar’s feedback at the mid-year review.

#### Issues 6.7, 6.8 and 6.9 End of Year Performance Review

42. On 1 April 2019 Chad Bond, Tim Marcus and Simon Everest (the SLT) met to discuss the end of year markings for all of their reports. The Claimant was discussed briefly and concerns were raised about her performance. Simon Everest told the Tribunal that he could not come up with anything very positive to say about her performance at the SLT meeting as in his experience he did not consider she was doing a great job. We find that Tim Marcus entered the Claimant’s mark on 1 April 2019 after the SLT meeting and based on their discussion. He also referred to conversations with Evans Bissessar about the Claimant’s performance at Evans’ mid-year review when forming an assessment of the Claimant.
43. The Respondent did not dispute that the Claimant’s performance mark was decided without any 1:1 having been held with her. We find that as a result of the failure to transfer the Claimant’s line management to another manager at HEO level when Evans Bissessar left the department, Tim Marcus, as Evans Bissessar’s former line manager became responsible for line managing the Claimant by default, although he considered it to be inappropriate that he as a Grade 6 should be managing an EO.
44. On 5 April 2019 Simon Everest emailed Tim Marcus reminding him that , if had not done so already, he should enter the Claimant’s end of year review mark on SOP (the employee line management and pay roll portal) before

formally transferring her line management to James Pitman (p127 and p786 and 787). Tim Marcus replied that as he had not managed her he was not sure it would be fair for him to do the Claimant's review, however he offered to record the mark on the system as 'underperforming as we discussed'. In response Tim Marcus sought feedback from Simon Everest to support or "back up" the performance marking. Simon Everest replied to Tim Marcus 'I'm ready to fire her out of a cannon after the week, so happy to provide some thoughts' (p784).

45. In his evidence to the Tribunal Simon Everest expressed his concerns about the Claimant's work. He also says he did not know she had not had a performance meeting. (see paras 14 ,15 and 16 of his witness statement). We accept that the evidence given by Simon Everest reflects his genuine belief regarding the Claimant's performance and the issues that had come to his attention. He refers to the Claimant being difficult to contact and unresponsive, particularly in December 2018 and that she would often not turn up to the office and then ask for permission to work from home retrospectively. We were also taken to p126.3 an email from Simon Everest to Chad Bond on 15 April 2019 in which he sets out his frustration with the Claimant's approach to the savings work where "she has created unrealistic expectations and refused to share the load or even consider how we could bring more people in to get the work done quicker".
46. On 8 April 2019 Tim Marcus asked Evans Bissessar for feedback (p782) as her previous line manager, informing him that she would be receiving a "partially met" marking or below. Evans Bissessar responded the same day sending a copy of her mid-year report completed in September 2018.
47. It is not disputed that Tim Marcus gave a poor performance mark without having a 1:1 meeting. We find that in the absence of a direct line manager Tim Marcus was the Claimant's line manager and it was his responsibility to hold 1:1's with her. However, Tim Marcus did not have oversight of the Claimant's day to day work which fell within Simon Everest's area of responsibility. The Claimant has compared her treatment to four of Time Marcus' other line reports. Tim Marcus accepts that his other reports all had a 1:1 performance review meetings. Carl Massa, Ana Belen Lopez Santiago and Thomas Beckett were all Senior Technology Advisors, their role sat above the Digital Engagement Manager role in the structure (p1031-1032) the DEM grade being at Band B2 (HEO equivalent) (p1033). We find that none of the comparators identified by the Claimant were at the same grade as the Claimant, namely EO.
48. We find that the reason Tim Marcus did not carry out 1:1's or a performance review with the Claimant was that he did not consider he was the appropriate person to do so because he was not responsible for her day to day work and the Claimant was too far below him in the grade structure.



49. The Claimant was asked in cross examination whether she was saying the comment 'firing out of a cannon' was related to her race, as a Romany Gypsy. The Claimant told the Tribunal that she understood from the comment that Simon Everest wanted her to be fired, that is, dismissed. She did not pursue in evidence her contention that this remark was a reference to gypsies in any way. Simon Everest accepted that it was a poor choice of words, he told the Tribunal that it was an expression of his frustration with his perception that the Claimant had failed to listen to his advice about speaking to Chad Bond and getting support with the savings work. He had not wanted the Claimant to be dismissed, he had not even considered this and had taken no steps to start either a capability or disciplinary procedure.

Issue 6.10 Not allowing attendance of a TU Representative

50. On 19 June 2019 Tim Marcus emailed the Claimant to say he understood from Simon Everest that she was concerned over her end of year process and apologising that it may not have been as smooth as it should have been. He suggested they have a face to face the following week (p140) and blamed the transition from Evans (leaving) for things slipping through the cracks. On Friday 21 June he emailed the Claimant to ask her to supply her agreed objectives for 2018/19 and details of how she had meet these in advance of their meeting scheduled for Monday (24 June) (p139)
51. The Claimant emailed Tim Marcus on 21 June 2019 to say that she had not had 1:1s in the last six months or any regular catch-ups to discuss her performance and that they should have had a discussion before the final marking was agreed. She attached her last performance report and said that she did not feel this would add any value to the current end of year marking (p138).
52. On 24 June at 11:27 the Claimant emailed Tim Marcus informing him she would like an objective third party view and had invited a union representative to attend the meeting and was waiting for her to confirm availability so the meeting would have to be postponed (p143). Tim Marcus responded telling the Claimant that he would like to keep the meeting just to set out what's what informally and then they could have a subsequent meeting later (p143). Simon Everest emailed the Claimant saying he thought it would be a mistake to postpone the meeting, he asked the Claimant, "Can we keep this meeting and arrange a session if needed with the union rep?" The Claimant replied to both shortly before the meeting was due to start confirming it could go ahead (p142).
53. Both Tim Marcus and Simon Everest acknowledged that the Claimant had been given a poor performance marking without having had a performance review meeting; they thought that it would be sensible to meet with her and give her the opportunity to provide evidence / feedback to support a better performance marking. The Claimant asked to postpone the meeting on the

morning of the day it was due to take place, she did not propose a date on which the rep could attend and had told Tim Marcus that she did not know when the rep would be available. We find that the Tim Marcus and Simon Everest told the Claimant that they wanted the meeting to go ahead as an informal discussion, and, as Simon Everest pointed out in his email, the union rep could be invited to attend another meeting if one was needed, that is, if the marking was not resolved to the Claimant's satisfaction. We do not find there was a refusal to allow the trade union representative to attend the meeting or that the Claimant was "not allowed" to bring a union rep to the meeting.

Issue 6.11 and 6.12 Exclusion from promotion opportunity

54. The Claimant alleges that she was excluded for a promotion opportunity for the role of Digital Engagement Manager in November 2019 and May 2020. She compares herself to Dilek Celik.
55. The Digital Engagement Manager role sat within Simon Everest's team. Dilek Celik had been brought in to work alongside the Claimant as an EO supporting service assessment and savings work. We accept Simon Everest's evidence that at the time of Dilek's appointment he explained to the Claimant that this was an opportunity for her to share her experience and work alongside the new EO, to demonstrate that she was ready for opportunities at the next grade, including managerial or supervisory and knowledge sharing skills. He also explained the benefit of sharing work and the benefit of greater resilience this would bring to the team. However, what then happened was that the Claimant separated out the spend control task for herself and left the service assessment responsibilities to Dilek, providing her almost no guidance or support. In Simon Everest's view Dilek took it very well and did a brilliant job: she consistently showed interest and capability so when an opportunity for temporary acting up in DEM role came up in November 2019, rather than run a competitive EOI exercise he recommended Dilek for the opportunity. He saw Dilek as in effect the sole candidate as she was the only person carrying out the service assessment work. He spoke to Chad Bond, who approved the temporary acting up and dealt with HR.
56. The Claimant agrees that she arranged the work such that she split the savings and service assessment work. She carried on with the savings work and allocated the service assessment work to Dilek. She accepted that at the point the vacancy arose she had not been doing the service assessment work for some time, although she was at the same grade as Dilek and would have benefitted from a promotion.
57. We find that when the temporary acting up opportunity arose in November 2019 Simon Everest saw Dilek as in effect the sole candidate as she was the only person carrying out the service assessment work. He looked at the

team that was carrying out that work and saw Dilek as a member of that team. He took the suggestion to Chad Bond who agreed and took it to HR who approved it. We find that he did not consider the Claimant for the acting up opportunity because she was not carrying out any service assessment work at that time as a result of having separated her work and Dilek's thereby taking herself away from that team's work.

58. The Claimant alleges she was again excluded from a promotion opportunity as a Digital Engagement Manager in May 2020 when the temporary role was not advertised or offered through an EOI. The Cabinet Office's policy on Temporary Duties Allowance states that,

"All roles to be offered on promotion including temporary promotion should go through an EOI process or be advertised. ... Any exceptions that are made are to be reported ... through HR. For further advice speak to your HRBP (HR Business Partner)." (p1224)

"If staff are appointed to a higher grade without any form of competition they will receive temporary duties allowance for the period they are acting at the higher grade. "(p1225).

59. The Claimant gave evidence was that there were two separate acting up/ TDA opportunities, the original vacancy from November 2019, which was in respect of Antonia's role, then when Antonia returned a vacancy arose covering another colleague, Olivia's role (although in her statement the reference is to p246.1 which refers to the role Alkisis was then doing). Dilek was originally covering the Digital Engagement Manager role on a temporary acting up basis. As far as Simon Everest recalled there were not two separate vacancies. Dilek was acting up as a DEM and received TDA to fill a temporary vacancy in December 2019 as a result of the number of TDAs in the team was down by one, her acting up was extended in May 2020 as a result of the team still being down by one DEM pending advertising and recruitment to fill the position permanently. Dilek applied for the permanent role and was successful. The Claimant did not apply for this vacancy.

60. We accept that Simon Everest was looking at the number of DEM's on the team as a whole and not the individuals fulfilling the role when he told us that he did not consider these to be two separate vacancies.

#### 6.14, 6.15, 6.16 Grievance investigation

61. The complaint is that from October 2019 until 1 July 2020 when Simon Dadds took over the grievance investigation, the Respondent failed to adequately investigate the Claimant's grievance.

62. Susie Healey was appointed as the Claimant's line manager in July 2019. Under the GDS matrix management structure although she was responsible for formal line management their work streams did not overlap and she never gave the Claimant work. The work the Claimant was doing was mainly given to her by Chad Bond. If Susie Healey needed feedback on the Claimant's

performance she would ask Chad Bond, Simon Everest and Steve McCready. Tim Marcus was Susie Healey's line manager under the matrix management structure.

63. The Claimant emailed Susie Healey on 3 October 2019 raising a formal complaint about her end of year review marking in March 2019 where she given a 'partially met' rating by Tim Marcus (p 152-153). Susie Healey emailed the Claimant on 20 November 2019 formally acknowledging receipt of the complaint and informing her that having initially treated the complaint informally she had now concluded that it should be addressed through the formal dispute resolution process, that she would investigate the complaint and the investigation report would be sent to the Claimant as soon as it is completed. She invited the Claimant to a meeting on 2 December 2019 to discuss her complaint and told her that she had the right to be accompanied by a trade union representative at that meeting. The date of the meeting was rearranged to 16 December 2019 and the Claimant attended with her union representative
64. The Claimant added to her grievance on 26 November 2019, (p169) with a complaint in relation to the marking and procedure for the mid-year rating given to her by Susie Healey. This complaint was included in the grievance submission that SH was dealing with.
65. At the meeting on 16 December 2019 the union representative raised objections to Susie Healey being the investigating manager as the complaint was partially about decisions that she had made. Susie Healey agreed to discuss this with HR. She proceeded with the meeting and went through the Claimant's complaint with her. After the meeting and whilst waiting for a response from HR the Claimant's union rep confirmed that they were happy for Susie Healey to carry on as the grievance manager.
66. In January 2020 Susie Healey was waiting for clear advice from HR as to whether she should proceed with investigating the complaint or whether another manager should be appointed. On 4 February 2020, the Claimant's union rep asked for the investigation to be carried out by another manager (p190) but by 6 March 2020 (p238) confirmed to David Sones, the HR Business Partner that they were happy for Susie Healey to continue as long as it was concluded quickly. David Sones reply confirmed that the investigation would remain Susie Healey's responsibility, but a new decision manager would conclude the case. On 9 April 2020 the Claimant's union rep emailed to say the process was taking too long. A new Decision Manager was identified by 17 April 2020 and David Sones wrote to the Claimant's union rep to inform her of this. On 8 June 2020 David Sones responded to a chasing email from the union rep, agreeing that the investigation needed to be 'closed off' and informing her that he had been pressing for it to be resolved. He explained his understanding was that there were some delays due to Susie Healey's team needing to prioritise COVID-19 work and that

she had committed to having this [the investigation report] done by 12 June and ready to hand over.

67. In the event the investigation report was not completed and handed over to a new decision manager before Susie Healey went on maternity leave in June 2020.
68. Susie Healey gave evidence that by the time had received the advice to continue with the investigation and this was agreed with the Claimant's union rep, the country was in the grip of the pandemic and she was overwhelmed with work. She was relatively new in role and was travelling around the country. Her workload was increasing dramatically as a result of the pandemic and she was overwhelmed with work. She was working with HMRC, DWP and Department of Health amongst other government departments to support the provision of digital services that had to be urgently created in a matter of weeks (instead of months or even years) in response to the pandemic and having to make sure they were as good as they could be. These were all factors that contributed to her not completing the investigations before she went on maternity leave. Her evidence in this regard was not challenged by the Claimant, nor did the Claimant suggest that her race had been a contributing factor to the delay.
69. Ms Healey expressed her considerable regret and embarrassment that she had not completed the investigation before going on maternity leave and that she had not felt able to ask for more support in completing the investigation in a timely manner. We accept that Ms Healey was sincere in her evidence and that she gave an honest account of the reasons for the delays and her failure to complete the investigation.

Issues: 6.1 Refusal to carry out job evaluation

6.2:Requests to line managers for regrading

70. We do not find that there was a refusal to carry out a job evaluation. Nor do we find on the evidence that the Claimant made several requests to her line managers for a job evaluation or higher grading.
71. We find that under the Respondent's Job Evaluation policy a job evaluation request from a member of staff is subject to line manager approval (p1330). We are satisfied that the Claimant's first formal request for a job evaluation was made in February 2020 and she provided the completed written evaluation form in March 2020 (p195). The evaluation request was agreed by the Claimant's line manager in April 2020. On 29 July 2020, after five job evaluations the Claimant's role is graded as HEO.

6.13: Allegation that the Claimant was wrongly graded for 5 years. The Claimant alleges it is an incorrect grading and it is persisting

72. The Claimant alleges that on 29 July 2020 it was identified that she had been wrongly graded, she also alleges that Samantha Helliar was doing the same role as her but was graded one grade higher and Karen Stokes who had the Claimant's role for three years before the Claimant was paid at SEO level.
73. Samantha Helliar was a Senior Technology Advisor in Standards Assurance (p83). The responsibilities of a Senior Technology Advisor are set out at p.1032. We are satisfied that she is carrying out the responsibilities at a high level, as can be seen from the five bullet points. We are also satisfied that the Claimant was carrying out an administrative support function to Samantha Helliar. At times they were both involved in carrying out work on producing reports on the savings made as a result of the team's input. We do not find that Samantha Helliar both carried out this aspect of savings work meant that she and the Claimant were doing the same job.
74. Karen Stokes was a Fast Streamer and was paid at SEO grade. We find that she was carrying out a larger role and working at a higher level (see JD at p66.1).
75. The Claimant relies on an email from Karen Stokes in which she states that saying she worked on the savings work with Chad Bond in 2013-2015 whilst she was at B2\* grade (p2015). However we accept Chad Bond's evidence that following the introduction of the methodology by PWC the work no longer had to be done by Fast Streamers and could be done by administrative resource.
76. We find that the level of input required in producing the savings reports diminished after PWC carried out an assessment which led to some of the work being systemized and requiring a lower level of input. Karen Stokes carried out some of the work in producing the savings reports but we are satisfied that this was as part of many other tasks she undertook in her wider role. We accept Chad Bond's evidence at paragraph 6 of his witness statement and are satisfied that this also applies to the work carried out by Karen Stokes.
77. The job evaluation outcome in July 2020 after five evaluations was that the Claimant was carrying out a HEO role. The first evaluation delivered an outcome at EO level, the Claimant was not satisfied with this outcome and unusually was allowed to resubmit her four further times having had some feedback, on her first evaluation in June 2020. The information was provided by the Claimant to justify the regrade in July 2020 following the feedback she had received and on each of the four further evaluations it was evaluated as an HEO outcome (by 3 trained evaluators). The evaluation was based on the role that was described by the Claimant at that time. It was not a comparative exercise in that it did not compare the work the Claimant was

doing with the work done by Sam Helliard or Karen Stokes. The evaluation is based on the evidence provided and not the person's performance in the role.

78. We are satisfied that the fact that the Claimant's role was evaluated as at HEO level in July 2020 does not mean that the Claimant was doing an HEO for 5 years. The original grade for the Claimant's role was established prior to the Claimant applying for and being offered the role. When recruited to the role Claimant was not the only appointee and the grading did not apply solely to her. The role changed over time and by July 2020 the Claimant was able to demonstrate that the role's grading should be HEO, the descriptors at p472 sets out what maps over to an SEO role.
79. We have found that the process was enhanced to include additional evaluations for the Claimant and she was given more opportunities than is normally provided for in the evaluation process to determine the grade for the role.

Issues 11.2 and 11.3 victimisation complaint –allegation that the discrimination complaint influenced the job evaluation outcome

80. The relevant grievance relied on as the protected act was raised 19 June 2020. It is not disputed that in that grievance the Claimant complaint of discrimination and that the grievance amounts to a protected act under s27 of the Equality Act 2010. The Claimant relies on the email at p311 in which David Sones makes reference to her complaint to suggest that her discrimination complaint had influenced the outcome of the evaluation process.
81. David Sones did not carry out the evaluation. The evaluation was carried out independently and by four different trained evaluators people with the HR team. We heard from Beverley Hoskins that she used the evidence provided by the Claimant as the basis for the evaluation. We find that Beverley Hoskins was aware of the fact a grievance had been raised by the Claimant but accept her evidence that she did not know any details of the grievance and was not aware that the Claimant had made complaints of discrimination and nor were the other assessors who carried out the other evaluations. We find there is no evidence to support the suggestion that the discrimination complaint influenced the outcome of the evaluation to the Claimant's detriment and are satisfied that it did not.

6.17 The Claimant complains that Tim Marcus fabricated unauthorised absences by the Claimant during an investigation meeting on 27 July 2020. The absences were June 2018, Sept 18 and Dec 18 (p303/P304).

82. We do not find that Tim Marcus fabricated absences. We are satisfied that he made reference to absences which he believed were not authorised in advance. He refers to specific instances, namely in December 2018 when

he understood that the Claimant had been working from home due to a problem with her leg but had only told Chad Bond; the absence in September 2018 which was not approved in advance or requested as special leave; and his recollection was there had also been an unauthorised absence in June 2018 which he had seen reference to in the mid-year review written by Evans Bissessar.

### **Relevant law**

83. The relevant provisions of the Equality Act 2010 were helpfully set out by Mr Chegvidden in his written closing note. The legal principals were not in dispute and the Tribunal bore in mind the following guidance from the authorities in reaching its conclusions.

#### *Direct discrimination*

84. Section 39 of the Equality Act 2010 provides that an employer must not discriminate against an employee of his by, amongst other things, subjecting him to a detriment.
85. Section 13 of the Equality Act 2010 sets out the legal test for direct discrimination. A person (A) discriminates against another (B) if, because of a protected characteristic (race in this case), A treats B less favourably than A treats or would treat others.

#### *Causation*

86. The House of Lords has considered the test to be applied when determining whether a person discriminated “because of” a protected characteristic. In some cases the reason for the treatment is inherent in the Act itself: see James v Eastleigh Borough Council [1990] IRLR 572. The council’s motive, which had been benign, was besides the point. In that case the council had applied a criterion, though on the face of it gender neutral in that it allowed pensioners free entry, was inherently discriminatory because it required men to pay for swimming pool entry between the ages of 60 and 65 whereas women could enter the swimming pool free of charge. Sex discrimination was thus made out. In cases of this kind what was going on in the head of the putative discriminator – whether described as his intention, his motive, his reason or his purpose, will be irrelevant.
87. If the act is not inherently discriminatory, the Tribunal must look for the operative or effective cause. This requires consideration of why the alleged discriminator acted as he did. Although his motive will be irrelevant, the Tribunal must consider what consciously or unconsciously was his reason? This is a subjective test and is a question of fact. See Nagarajan v London Regional Transport 1999 1 AC 502. See also the judgment of the Employment Appeal Tribunal in Amnesty International v Ahmed [2009] IRLR 884.



*Comparators*

88. For the purposes of direct discrimination, section 23 of the Equality Act 2010 provides that on a comparison of cases there must be no material difference between the circumstances relating to each case. In other words, the relevant circumstances of the complainant and the comparator must be either the same or not materially different. Comparison may be made with an actual individual or a hypothetical individual. The circumstances relating to a case include a person's abilities if on a comparison for the purposes of section 13, the protected characteristic is disability.
89. In constructing a hypothetical comparator and determining how they would have been treated, evidence that comes from how individuals were in fact treated is likely to be crucial, and the closer the circumstances of those individuals are to those of the complainant, the more relevant their treatment. Such individuals are often described as "evidential comparators"; they are part of the evidential process of drawing a comparison and are to be contrasted with the actual, or "statutory", comparators; see, Ahsan v Watt [2007] UKHL 51.
90. Whether there is a factual difference between the position of a claimant and a comparator is in truth a material difference is an issue which cannot be resolved without determining why the claimant was treated as he or she was; see: Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337.

*Harassment*

91. Section 40 of the Equality Act 2010 provides that an employer must not, in relation to employment by him, harass an employee. The definition of harassment is set out in section 26(1) of the Equality Act 2010. A person (A) harasses another (B) if:
- (a) A engages in unwanted conduct related to a protected characteristic (race in this case); and
  - (b) the conduct has the purpose or effect of : -
    - (i) violating B's dignity, or
    - (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
92. Section 26(4) provides that whether conduct has the effect referred to in subsection 1(b), each of the following must be taken into account:
- (a) the perception of B;
  - (b) the other circumstances of the case;
  - (c) whether it is reasonable for the conduct to have that effect.

93. Thus, the test contains both subjective and objective elements. Conduct is not to be treated as having the effect set out in section 26(1)(b) just because the complainant thinks it does. The Tribunal is required to take into account the Claimant's perception, the other circumstances of the case, and whether it is conduct which could reasonably be considered as having that effect.
94. In Richmond Pharmacology v Dhaliwal [2009] IRLR 336, the Employment Appeal Tribunal held a Tribunal should address three elements in a claim of harassment: first, was there unwanted conduct? Second, did it have the purpose or effect of either violating dignity or creating an adverse environment: Third, was that conduct related to the Claimant's protected characteristic?
95. When considering whether conduct is related to a protected characteristic, the Employment Appeal Tribunal in Warby v Wunda Group plc UKEAT/0434/11 relied upon the judgments of the House of Lords in James and Nagarajan and held that alleged discriminatory words must be considered in context. In Warby the Employment Appeal Tribunal upheld the decision of the Employment Tribunal which found that a manager had not harassed an employee when he accused her of lying in relation to her maternity because the accusation was the lying and the maternity was only the background.

#### *Victimisation*

96. A 'detriment', which must be examined from the point of view of the alleged victim -see MOD v Jeremiah [1979] IRLR 436, [1980] ICR 13, CA where it was said that a detriment exists 'if a reasonable worker would take the view that the treatment was to his detriment'. The need however to show that any alleged detriment must be capable of being objectively regarded as such as emphasised by HL in St Helens Metropolitan Borough Council v Derbyshire [2007] UKHL 16, [2007] IRLR 540, [2007] ICR 841, applying Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11, [2003] IRLR 285, [2003] ICR 337, where it was held (para 35) that 'an unjustified sense of grievance cannot amount to 'detriment'.
97. The detriment must be 'because' of the protected act. Once the existence of the protected act, and the detriment have been established, in examining the reason for that treatment, the issue of the respondent's state of mind therefore is likely to be critical, and in assessing this it is necessary to consider the judgments of the House of Lords in the cases of Nagarajan v London Regional Transport, and Chief Constable of West Yorkshire Police v Khan, and to the same effect, the Court of Appeal in Cornelius v University College of Swansea [1987] IRLR 141. The key issue in such situations will be the tribunal's understanding of the motivation (conscious or unconscious) behind the act by the employer which is said to amount to victimisation.

*The burden of proof*

98. Section 136 of the Equality Act 2010 sets out the burden of proof that applies in discrimination cases. Subsection (2) provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that person (A) has contravened the provisions concerned, the Tribunal must hold that the contravention occurred. However, subsection (2) does not apply if A shows that A did not contravene the provision.
99. Thus, it has been said that the Tribunal must consider a two stage process. However, Tribunals should not divide hearings into two parts to correspond to those stages. Tribunals will wish to hear all the evidence before deciding whether the requirements at the first stage are satisfied and, if so, whether the Respondent has discharged the onus that has shifted; see Igen Ltd v Wong and Others CA [2005] IRLR 258.
100. At the first stage, the Tribunal has to make findings of primary fact. It is for the Claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of any other explanation, that the Respondent has committed an act of discrimination. At this stage of the analysis, the outcome will usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal. It is important for Tribunals to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination and in some cases the discrimination will not be an intention but merely an assumption.
101. At the first stage, the Tribunal must assume that there is no adequate explanation for those facts. At this first stage, it is appropriate to make findings based on the evidence from both the Claimant and the Respondent, save for any evidence that would constitute evidence of an adequate explanation for the treatment by the Respondent.
102. However, the burden of proof does not shift to the employer simply on the Claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination. "Could conclude" must mean that a reasonable Tribunal could properly conclude from all the evidence before it; see Madarassy v Nomura International [2007] IRLR 246. As stated in Madarassy, "the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal could conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".
103. If the Claimant does not prove such facts, his or her claim will fail.
104. If, on the other hand, the Claimant does prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed the act of discrimination, unless the Respondent is able to prove on the balance of probabilities that the treatment of the Claimant was in no sense whatsoever because of his or her protected characteristic, then the

Claimant will succeed. That explanation must be adequate, which as the courts have frequently had cause to say does not mean that it should be reasonable or sensible but simply that it must be sufficient to satisfy the tribunal that the reason had nothing to do with the protected characteristic in question: see Glasgow City Council v Zafar [1998] ICR 120 and Bahl v The Law Society [2004] IRLR 799."

105. In Laing v Manchester City Council [2006] ICR 1519, the EAT stated, among other things, that:

*"No doubt in most cases it will be sensible for a Tribunal formally to analyse a case by reference to two stages. But it is not obligatory on them formally to go through each step in each case... An example where it might be sensible for a Tribunal to go straight to the second stage is where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question whether there is such a comparator – whether there is a prima facie case – is in practice often inextricably linked to the issue of what is the explanation for the treatment, as Lord Nicholls pointed out in Shamoon .... it must surely not be inappropriate for a Tribunal in such cases to go straight to the second stage. ... The focus of the Tribunal's analysis must at all times be the question of whether or not they can properly infer race discrimination. If they are satisfied that the reason given by the employer is genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a Tribunal to say, in effect, "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that, even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race"*

106. In every case the tribunal has to determine the reason why the claimant was treated as he was. As Lord Nicholls put it in Nagarajan v London Regional Transport [1999] IRLR 572, 575 - 'this is the crucial question'. He also observed that in most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator.
107. If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial

## **Conclusions**

### **Issue 6.1**

108. We found there was no automatic contractual right for a job evaluation. The evaluation was subject to line manager approval. The formal request was made in February 2020 and from there the evaluation was progressed, the claim is not made out.

**Issue 6.2**

109. We find there was no delay. The first formal request for a job evaluation was made in February 2020 and the Claimant provided the completed written evaluation form in March 2020 (B195). The request was agreed in April 2020.

**Issue 6.3**

110. We do not find that the role doubled in size between April 2017 and February 2019. There is no factual basis for alleging less favourable treatment and the allegation fails.

**Issue 6.4**

111. Based on our findings there is no factual basis and no less favourable treatment. There is nothing to suggest a hypothetical comparator would have been treated differently.

**Issue 6.5**

112. Based on our findings we found the Claimant was told that Temporary Duty Allowance request would be made but it did not get processed. The explanation given for failing to progress it was that it was an oversight contributed to by a lack of clear accountability for the process. It was accepted that there had been a failure and we find that the result led to the Claimant's application for TDA being neglected. We do not find that the fact that this should have been actioned and was not is enough to shift the burden of proof. In any event, we accept that the explanation was due to the chaotic management structure. We considered whether the Claimant's race was a factor and found that it did not. We found Tim Marcus would have acted the same for anyone else at the Claimant's level.

**Issue 6.6**

113. We find that 'single point of failure' referred to the process and not to the Claimant personally. We are satisfied that the same point would have been made about the process whoever was in the role, regardless of their race.

**Issues 6.7 and 6.9**

114. Tim Marcus did ask for feedback after the event from Evans Bissessar to support the grading and the C was given a poor performance mark without having a 1:1 performance review meeting, or any meeting. It is accepted by the Respondent that this amounts to less favourable treatment. We considered whether the Claimant's race played any part of that treatment.
115. We accept the Respondent's explanation that the reason for the Claimant having been given a performance mark without having had a 1:1 performance review meeting was due to the poorly managed transition of Evans Bissessar from the Claimant's team. Tim Marcus was to pick up the line management role in the interim pending it being transferred to a suitable line manager but did not do so. We then considered whether race was a factor in Tim Marcus's reluctance to take on responsibility for the

Claimant. We find that the reason he did not carry out a 1:1 performance review with the Claimant before recording it was a combination of her role not being one that fell under his remit, and her grade which did not normally report to someone at his level. We find that this combination of factors meant the Claimant did not register as his priority. We can understand why the Claimant felt she was overlooked but are satisfied that it was not connected with her race.

***Issue 6.8***

116. We found that the comment had nothing to do with the Claimant's race.

***Issue 6.10***

117. We have found on the facts that the Claimant was not denied union representation, this allegation therefore fails.

***Issues 6.11 and 6.12***

118. We have not found that the circumstances of Dilek Celik and the Claimant to be identical. We do not find that the only difference in their circumstances is race. There was a material difference in the work they carried out and where they were placed in terms of which part of the team they supported. It was not disputed that when Dilek joined, it was the Claimant who allocated the Service Assessment Support role to her and exclusively took on the savings work for herself. We accept that the explanation for appointing Dilek to the DEM acting up and substantive role was that she was currently working in the team, and had the experience and enthusiasm for the role. We do not find that the Claimant's nationality or Romany Gypsy ethnicity influenced the Respondent's decision.

***Issue 6.13***

119. We do not find there was 5 years' of failure of a wrong grading for the reasons set out. There is no basis for finding less favourable treatment on the grounds of race.

***Issues 6.14, 6.15, 6.16***

120. We accept Susie Healey's explanation for the delays. Based on our findings of fact we do not find that a hypothetical comparator would have been treated any differently.

***Issue 6.17***

121. We do not find that absences were fabricated by Tim Marcus. The allegation is not made out.

**Harassment on grounds of race.**

**Issues 6.5, 6.7** (6.1 and 6.14 were withdrawn as harassment allegations)

122. We have found this treatment was not related to the Claimant's race.

**Victimisation**

**Issues 11.2, 11.3**

123. We have found that the outcome was not influenced in any way by the Claimant raising a grievance alleging discrimination.

**Time Limits**

124. We do not have to consider time limits under the Equality Act as no discrimination has been proved. We are satisfied that the matters complained of in issues 6.1 to 6.11 are in any event out of time and there is no ongoing series of acts or overarching policy or regime applied to the Claimant such as to amount to a continuing act.

**Unlawful deduction of wages in respect of TDA from December 2018 – February 2019**

125. We find that the wages are not properly due until the TDA is approved. We find in any event the claim is out of time.

**Breach of contract**

126. We do not have jurisdiction under the breach of contract claim. The Claimant was still employed when she brought the claim. The Employment Tribunal Extension of Jurisdiction Order (England and Wales) 1994 article 3 (c) provides that a breach of contract claim may only be brought if arises or is outstanding on the termination of the employee's employment.

127. For the reasons set out above, each of the claims fail and are dismissed.

**Employment Judge C Lewis  
Dated: 12 September 2022**