EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		Respondent
Ms F Thorn	**AND**	**Nationwide Building Society**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT **Bristol** **ON** **9 to 12, 16 to 19 and 23 to 26 January 2023**

EMPLOYMENT JUDGE **J Bax**
MEMBERS **Ms S Maidment**
Mr H Launder

Representation

For the Claimant: **Mr L Betchley (counsel)**
For the Respondent: **Mr P Michell (counsel)**

RESERVED JUDGMENT

The unanimous judgment of the tribunal is that:

(1) The claims of direct discrimination under s. 13 of the Equality Act 2010 are dismissed.
(2) The claims of victimisation under s. 27 of the Equality Act 2010 are dismissed.
(3) The Claimant was unfairly dismissed and remedy for which is to be determined at a separate hearing.

REASONS

1. In this case the claimant Ms Thorn, who was dismissed by reason of redundancy, claims that she was unfairly dismissed and had been directly discriminated against on the grounds of race and/or had been victimised

contrary to the Equality Act 2010. She presented four claims about these matters. In the fourth claim there was also a claim of breach of contract.

Background, issues and preliminary matters

2. The First claim (1402955/2020) was presented on 11 June 2020. The Claimant notified ACAS of the dispute on 24 May 2020 and the certificate was issued on 10 June 2020. The claim also included claims of disability discrimination, which the Claimant subsequently withdrew and were dismissed upon that withdrawal on 6 April 2021.

3. The Second claim (1404843/2020) was presented on 14 September 2020. The Claimant obtained a further conciliation certificate with notification taking place on 14 August 2020 and the certificate was issued the same day.

4. The Third claim (2405619/2021) was presented on 1 May 2021. This claim was subsequently withdrawn and on 25 February 2022 was dismissed upon that withdrawal.

5. The Fourth claim (1404750/2021) was presented on 13 December 2021. The Claimant obtained a further conciliation certificate with notification taking place on 23 September 2021 and the issue of the certificate on 3 November 2021. This claim made allegations of race discrimination and victimisation, unfair dismissal and breach of contract. The Respondent, in its response, conceded that the decision to dismiss was unfair, but denied the other claims.

6. In these reasons the claims of direct discrimination are numbered D1, D2 etc. and the victimisation allegations start with the letter V followed by the respective number.

7. Claims 1 and 2 were considered at a Case Management Preliminary Hearing on 6 January 2021 and they were listed for a preliminary hearing. On 29 and 30 April 2021, Employment Judge Rayner considered an application by the Claimant to amend her claims, the Respondent's application to exclude evidence and an application to strike out any matter alleged to have occurred before 27 January 2014, on the basis of a Settlement Agreement concluded on that date. Employment Judge Rayner concluded that the Settlement Agreement was binding and the Claimant was prevented from bringing any claim of race discrimination arising before 27 January 2014 and such claims were struck out. The application to amend the claims was granted to a limited extent in relation to 3 allegations of direct discrimination however no determination was made as to whether they were presented in time, or that it was just and equitable to extend time, with such

issues to be determined at the final hearing. The amended allegations were D9, D10 and D12. The Respondent's application to exclude evidence was dismissed. The issues for claims 1 and 2 were identified and agreed.

8. On 9 December 2021, at a case management hearing, the issues in relation to claims 1, 2 and 3 were discussed and clarified. Claim 3 was later withdrawn. The Claimant had been dismissed by this stage, but had not presented claim 4. Claim 4 was subsequently presented, although there was not a specific case management hearing in relation to it.

9. The parties provided an agreed list of issues and the case had been listed to determine liability only.

10. In relation to claim 1 there were 12 allegations of direct discrimination (D1 to D12). In relation to some of those allegations the following people were named as actual comparators: Penny Martin, Barry Shedden, Hayley Zerebecki and Gareth Endicott.

11. Claim 2 concerned 8 allegations of victimisation (V1 to V8). The Claimant relied upon and the Respondent accepted that the following matters were protected acts:

    (a) Submitting a grievance on 12 March 2020 (Protected Act 1);
    (b) Appealing against the grievance outcome on 24 May 2020 (Protected Act 2)
    (c) Submitting the first claim on 11 June 2020 (Protected Act 3);
    (d) Sending an email to Tracy Conwell on 17 June 2020 (Protected Act 4);
    (e) Sending an email to Mark Pugh on 29 June 2020 (Protected Act 5); and
    (f) Sending an email to Leanne Pearce on 4 July 2020 (Protected Act 6).

12. Claim 4 concerned 7 allegations which were said to be both allegations of direct discrimination and victimisation (D13 to 19 and V9 to V15). The Claimant relied upon a hypothetical comparator for the direct discrimination claim. In terms of the victimisation claim the Claimant relied upon and the Respondent accepted that the following matters were protected acts:

    (a) Bringing proceedings against the Respondent under the EqA 2010 on 11 June 2020;
    (b) Bringing proceedings against the Respondent under the EqA 2010 on 14 September 2020; and
    (c) Bringing proceedings against the Respondent under the EqA 2010 on 01 May 2021.

    In terms of the unfair dismissal claim, it was agreed that the Tribunal would consider whether the Claimant would have been dismissed if a fair

procedure had been followed and what if any reduction to potential compensation should be.

13. In the course of cross-examination, on 10 January 2023, the Claimant accepted that the benefits conferred by the Job Security and Redundancy Policy were not contractual and withdrew the breach of contract claim. During cross-examination, on 11 January 2023, the Claimant withdrew allegation D6 which concerned a scrum master vacancy in 2019. Those claims were dismissed upon the withdrawals.

14. Later on 11 January 2023, during cross-examination, the Claimant broke down whilst being questioned about allegation D9. The Claimant had previously referred to struggling reading some of the documentation. She indicated that she did not want to break down and would not want to pursue the allegation. She also indicated that there were other claims she might not want to pursue. The Judge was concerned whether she intended to withdraw the allegation. It was agreed with the Respondent, that the Claimant would speak to Mr Betchley about whether she was pursuing all allegations. After the Claimant spoke to Mr Betchley, he said that the Claimant was proposing to withdraw various allegations. The Respondent confirmed that there would not be a costs application if allegations were withdrawn. The Claimant said that she was not able to go on with all allegations due to reliving the events. Mr Betchley was satisfied that the Claimant was capable of giving him instructions and he indicated which claims were likely to be withdrawn. The Claimant was given further time to consider whether all of those claims were withdrawn. On resumption the Claimant said that she was pursuing the following allegations: D1 to D5, D7, D8, V1, V6, D13/V9, D14/V10, D16/V12 and D17/V13 and that all other allegations were withdrawn. Other than the allegations which the Claimant maintained, all other allegations including the breach of contract claim were dismissed upon that withdrawal. The Claimant wanted to carry on giving evidence and was keen to conclude her evidence by the end of Thursday.

15. On 12 January 2023, the Claimant did not attend the Tribunal, it was explained by Mr Betchley that she had a mental health incident overnight and had said she was not fit to attend the hearing. No further evidence was heard and it was agreed that the hearing would resume on 16 January 2023, which it did. In the meantime the Claimant was asked to provide some medical evidence which would include information about her fitness to attend the hearing and any proposed adjustments. Counsel for the Respondent agreed that the Claimant could speak to her barrister. Mr Betchley agreed he would discuss with the Claimant about possible adjustments for her, including giving her evidence by video.

16. The Tribunal was unable to hear evidence on 19 January 2023 due to the injury of one of the members. The parties had further discussed the issues

to be determined and the Claimant withdrew allegations D14/V10 and D16/V12 and they were dismissed upon that withdrawal. It was confirmed that allegation D17/V13 was contingent upon allegation D13/V9 being established and if allegation D13/V9 was dismissed, allegation D17/V13 would also fail. The Respondent agreed it would not pursue the Claimant for costs in respect of the liability hearing. The issue of Polkey, for the unfair dismissal claim remained and therefore it was still necessary for evidence to be heard from the Respondent's witnesses who dealt with the Claimant's applications for alternative employment during the redundancy process.

17. In the third week of the hearing the Claimant and Ms Maidment, by agreement, attended by video.

The evidence

18. We were provided with a bundle consisting of 1675 pages, any reference in square brackets within these reasons is a reference to a page in the bundle. We heard from the claimant. We also heard from the following witnesses on behalf of respondent: Hazel Hogfress, Hayley Zerebecki, Mark Pugh, Lucy Moore, Tracy Conwell, Darren Marsden, Leanne Pearce, Barry Shedden, Lucy Swansborough, Kenneth Yau, Stephen Agnew, Amy Powell, Emma-Jane Dyer, Paul Walsh, Tracey Palframan, James Stroud, Jennifer Wagstaff, Jagdeb Bassi, Neil Griffiths, Jacqui Gough and Lia Gash. The evidence of Tanya Cooper was not disputed and we read her witness statement.

The facts

19. There was a degree of conflict on the evidence. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

20. The Claimant is South African by birth and of Indian origin, she identifies as being British Asian.

21. The Respondent is a Building Society.

22. The Respondent's Voluntary Ethnicity Pay Gap reporting data showed that of its total workforce of 18938, as of 5 April 2020, 10% was of a BAME background, 77% was non-ethnically diverse and 13% were undeclared. The graphs indicated that 10.5% of the workforce in frontline and support roles were from BAME backgrounds and 7% undeclared. Middle management and specialist roles had 6% of employees from a BAME background and 12% undeclared. Senior executives consisted of 3% from BAME backgrounds and 7% undeclared. The information was contained on

a single page, with other information about pay, however it was based on limited percentages only and was very much an overall snapshot.

23. The Claimant said in evidence that the document showed that as you go into management roles BAME staff were not adequately represented. She asserted that there was a glass ceiling at the 2.2 level, the level at which company cars were provided, however specifics were not provided. Ms Conwell, People Director, formerly Director of Employee relations, accepted that at the Swindon Head Office, the majority of employees were white British. We accepted her evidence that within the branch network the employees were ethnically diverse and that included managers at level 2.2. The Respondent had the aim to improve diversity and had an ambition of being representative of society at large and its customer base. Ms Conwell did not accept that lack of diversity was a barrier in Swindon and we accepted that the Respondent was trying to address the lack of diversity. We accepted that the Respondent had engaged in training on equal opportunities and also training for managers in relation to unconscious bias. They had also used recruitment agencies which specialised in helping increase diversity. We did not accept that there was a glass ceiling.

24. The Claimant asserted that there was a culture which seemed to celebrate whiteness, however she did not adduce evidence which tended to support such an attitude and we rejected the suggestion . The Claimant's witness statement said she understood that there was a significant gap in performance ratings between white employees and BAME employees, however no such evidence was adduced and we rejected the suggestion.

25. The Respondent had a system of 'Talent Banking'. When the Respondent sought to fill a vacant role, after the initial sift of applicants, it conducted interviews at which the candidates were assessed against the criteria for the role. The criteria consisted of essential criteria and desirable criteria. The criteria were assessed on evidence based competencies. Each competency was often scored out of 5. There were benchmark scores for each competency, which when scored out of 5 would be a score of 3. If a candidate met the benchmark for each competency, but someone else scored more highly they would be put on the talent bank. The Claimant understood talent banking to be where the benchmark is reached that person is guaranteed an interview for the role if a future vacancy arose in the next 6 months and in certain circumstances was guaranteed the role. We concluded that the Claimant had partially misunderstood the effect of being talent banked.

26. Ms Swansborough's unchallenged evidence was that if the benchmark was met for each competency, the employee was told by the panel that they would be interested in speaking to them about future opportunities. Managers were told that if someone is talent banked they should be

seriously considered for the role. Some areas of the business are easier to talent bank for than others. for example a cashier is easier to talent bank, whereas mortgages and operations functions are complex and the requirements vary from role to role. We accepted that unless an applicant had been talent banked for a specific role, by a specific manager and the requirements for the role had not changed, a talent banked applicant may not expect to be contacted every time a vacancy is raised. Talent banking increases the possibility of an interview, however it does not guarantee it because different roles have different criteria and competencies.

27. The Redundancy policy provided, "Where an employee meets the minimum criteria for an alternative role they will be automatically considered for it. If, following assessment, they meet the requirements they will normally be appointed in advance of employees who are not at risk of redundancy" [p254]

28. The Claimant first commenced employment with the Respondent on 25 September 2006 as a transition consultant. Her first period of employment ended on 31 December 2013. The Claimant signed a binding Settlement Agreement on 27 January 2014 in which she waived the right to bring various claims including those of race discrimination.

29. The Claimant started a second period of employment with the Respondent on 1 September 2014 as a Senior Analyst.

30. In November 2015 the Claimant became a Transition Consultant in the Application Support team on the Digital Channels Platform.

31. There were 6 platforms in the Application Support Team. Each platform had an Application Support Consultant, who was managed by an Application Support Lead, who was managed by a Platform Manager. The Respondent had bands/levels of seniority. A support consultant role was in band 2.1 and a support lead role was in band 2.2. Band 2.2 roles were further divided into lower, middle and upper. The Band above a 2.2 was 3.1. The Lead on each platform would oversee projects and the Consultant would deal with day to day releases. The Lead would have a more challenging attitude with senior stakeholders and would have difficult conversations. The Consultant managed day to day work and looked to the Lead to manage relationships within the business. We accepted that there was a degree of specialism in each platform, however there was a general desire to make the roles a bit less specialist.

<u>Work undertaken on the Mortgages and Operations Platform</u>

32. In 2017 the Claimant moved to the Mortgages and Operations Platform ("M&O"). The Application Support Lead was Barry Shedden. In mid to late

2017 Mr Shedden was allocated to the Respondent's Agile@Scale project for 6 months.

33. The Claimant's evidence was that from mid-2017 she covered Mr Shedden's lead role whilst he was seconded to the Agile@Scale project. The Claimant's oral evidence was that Mr Shedden underplayed what she had done, because he would have looked bad with his promotion and he needed to make people think he had a hand in what she did, this was not put to him in cross-examination and we rejected that evidence.

34. The Claimant's performance appraisal, by Mr Shedden, for March 2018 recorded her as 'exceeding' for her rating. This was the first time the Claimant had an 'exceeding' rating. Mr Shedden recorded that the Claimant had "stepped up to the plate in terms of taking on lead activities" and filling in for him. He said that the year had been a success and she needed to build on it further [p336]. He recorded that she had had to step up and take on a number of lead activities in his absence, but she still had a few things to learn about being a lead [p337]. She had also built up some strong relationships. The appraisal was approved by Ms Hogfress

35. We accepted Mr Shedden's evidence that he was undertaking a new initiative at the same time as acting as the M&O lead and it became clear the new initiative would take up much of his time. The Claimant was asked to take on some lead activities and attend some project meetings on his behalf. The support partners were asked to pick up some of the Claimant's consultant work. We accepted that there were aspects of the lead role the Claimant was not doing, such as the Post Implementation Costs process and she did not have the technical network of resources at her disposal. We also accepted that she was doing day to day things but Mr Shedden was still there to assist her. The Claimant did not take on the whole of the lead role and she was partially filling a gap with Mr Shedden undertaking the parts she could not do.

36. In his interview for the Claimant's grievance, Mr Shedden said the arrangement was not formal and she was undertaking the majority of the role and certainly the day to day things. He was there as an escalation point and there were parts she had not done. He also said that there were parts that you could not ask someone to step up and manage [p781-782]. In Mr McKee's interview for the Claimant's grievance, he said that the Claimant essentially took on the lead role and Mr Shedden was 'sort of maybe doing one or two days a week. Ms Hogfress considered, in her interview for the grievance, that the Claimant was not fully undertaking all of the lead role, but she was filling a gap. Mr Shedden had not completely gone and he was available to help her. The grievance interviews were consistent with Mr Shedden's evidence to the Tribunal.

Involvement of Hazel Hogfress

37. In late 2017/January 2018, Hazel Hogfress, Application Support Senior Manager (who oversaw the platform managers) took over responsibility for the M&O and Retail platforms and Mr Shedden reported to her. The Claimant said in cross-examination that before Ms Hogfress became her senior manager they had known each other well because their teams sat alongside each other. She suggested for the first time that Ms Hogfress refused to acknowledge her value to the team, this was not put to Ms Hogfress in cross-examination and we rejected the Claimant's evidence on this point. We accepted Ms Hogfress's evidence that before the move in January 2018 she went on a business trip to India, on which the Claimant also attended. We accepted that otherwise Ms Hogfress had no real involvement with the Claimant until she was in her chain of command. The Respondent had two buildings in Swindon and Ms Hogfress was based in Nationwide House. The IT Support Partners were based in the other building and the Transition consultants and leads spent a large amount of time at the other site.

Applications for lead roles in 2018

38. In January 2018 a role of Application Support Lead on the Retail Platform was advertised. The Support Consultants across all the platforms were on friendly terms and they all knew, including the Claimant, that David Waylen was the best candidate. The Claimant, Mr Waylen and other consultants applied.

39. On 23 February 2018 the Claimant was interviewed by Ms Hogfress, and Marc Pugh Platform Manager (Retail). The Claimant did not object to Ms Hogfress being on the panel. The interview was competencies based. There were 3 options as a result of the process: offer, decline or talent bank. Each competency was marked out of 5. To be talent banked at least a 3 needed to be scored against each competency. The Claimant was scored 15/30 by Ms Hogfress, which included 2 scores of 3 and one score of 2/3. The Claimant was scored 15/30 by Mr Pugh, which included 2 scores of 3 and one score of 4. The Claimant did not reach the benchmark and was not talent banked. Mr Waylen was appointed.

40. When asked in cross-examination about why Mr Waylen had not been included as a comparator for her claim, the Claimant said it was probably an oversight. Her witness statement, however was clear that she considered he was the best candidate. When this was put to her she agreed and said it was his area of expertise and he was the obvious good candidate.

41. The Claimant's evidence was that she interviewed well and relied on the interview for the role when she started her second period of employment. Mr McKee described the Claimant in that interview as 'fantastic, enthusiastic and ticked all of the boxes' when he was questioned as part of the grievance [p956].

42. Ms Hogfress's evidence was that the Claimant did not perform well in the interview. We accepted her evidence that when consultants apply for a lead role for the first time, they often do not perform well. We accepted that the step up between a 2.1 and 2.2 role was large. The interview was competency and evidence based. The candidates needed to provide examples and evidence as to how the met the competencies. The interviewers were looking for explanations as to what had been done, who was spoken to, how obstacles were overcome and how the outcome was achieved. Ms Hogfress's unchallenged evidence was that there was a lack of examples given by the Claimant, and we accepted her evidence. We accepted that Ms Hogfress was surprised by the lack of examples given, but she considered it was not unusual due to consultants not often performing well at their first attempt to obtain a lead role. We accepted Ms Hogfress's evidence that the Claimant's stance had been that she had been doing the role for years and should be appointed, however Ms Hogfress considered that she had not taken the time to consider the particular competencies being assessed.

43. Mr Pugh's evidence was that the Claimant had been unable to convey her leadership skills or experience or provide explanations about how she had found resolutions to challenging problems and a number of answers had been that she had escalated things to someone more senior. In cross-examination he was not challenged on his evidence that the Claimant had not provided sufficient examples. We accepted the evidence of Mr Pugh.

44. In cross-examination the Claimant said that she did not consider Mr Pugh was a racist and he would not have set out to underscore her. She suggested in cross-examination, for the first time, that Mr Pugh might have been intimidated by Ms Hogfress. She had not made such suggestions when asking Mr Pugh for information after she had raised her grievance and examples were not given in her evidence. Mr Pugh's evidence, which we accepted, was that he had not been influenced by Ms Hogfress and had not seen her do this to others. We rejected the Claimant's evidence.

45. The Claimant said in oral evidence that Ms Hogfress was difficult with others and was a 'horrible horrible person'. Further, that Ms Hogfress had made other employees, who were white, leave because of the way she treated them. The Claimant accepted that there could have been a personality clash between her and Ms Hogfress. The Claimant accepted in oral evidence that she and her other colleagues, who were white and had applied and been

unsuccessful, considered that all had been undermarked and should have been bench marked and talent banked [p709]. The Claimant accepted that it was possible her score was not because of her race but because Ms Hogfress is a bad marker.

46. We concluded that at the interview the Claimant did not provide evidence based examples to show how she met the competencies and that Ms Hogfress and Mr Pugh considered that she had not performed well.

47. Ms Hogfress's unchallenged evidence, which we accepted, was that she informed the Claimant that she had been unsuccessful by telephone and suggested that they set some time aside to talk through what had happened and for feedback to be given by her and/or Mr Pugh. The Claimant did not seek any feedback. We accepted that the feedback would have included how to better provide evidence about the competencies and how applications could be improved. In cross-examination the Claimant said she did not ask for feedback from Mr Pugh and it was because she did not respect him enough, it would not have been valid and would have been a waste of time

48. When it was suggested in cross-examination that the Claimant was not unduly concerned at the time, she said she was. The Claimant was taken to her grievance document [p631] in which she said she was not unduly concerned about this because the post went to the right consultant. We concluded the Claimant was not unduly concerned at the time.

49. We accepted the Respondent's evidence that Mr Waylen, who was white, was appointed to the role. He had previously been interviewed for a lead roles and had performed poorly, following which he had been given feedback and had addressed the gaps identified in his earlier interviews. We accepted Mr Pugh's evidence that Mr Waylen's interview was the best he had ever scored while working for the Respondent.

50. It was put to Ms Hogfress that the scores the Claimant received was because of her race, which was denied.

51. On 28 March 2018, the Claimant's manager, Mr Shedden (Application Support Lead) moved to the role of Platform manager on a secondment basis. His lead role became available on a secondment basis for which the Claimant wanted to apply.

52. Ms Hogfress did not think the Claimant should apply for the role on the basis that her unsuccessful application for the retail lead role was a month before and that she would not have had time to build up the necessary experience and she had not sought feedback. She did not have a direct conversation with the Claimant and spoke to Mr Shedden. The Claimant accepted that

Ms Hogfress was probably correct about what she said regarding Ms E Gough's application for a later role when she also had previously failed to benchmark in an interview.

53. The Claimant's evidence was that she had a conversation with Mr Shedden who told her that Ms Hogfress had said she did not have the necessary managerial support to apply for the role. She understood that this was on the basis that she had been unsuccessful in her application for the Application Support Lead Role the previous month. Mr Shedden, in cross-examination could not remember the exact words used by Ms Hogfress, in terms of whether the Claimant could not or should not apply. He recalled that the reasoning was that the Claimant had not acted upon earlier feedback for a previous application in which she did not benchmark and it was advised it was worth looking at a development plan so she would be in a better position for future roles and could evidence the competencies. We accepted his evidence. We concluded that the Claimant was told that Ms Hogfress thought she should not apply for the role and was given the explanation by Mr Shedden. At the time, Mr Shedden considered that the Claimant was ready for the role, however he was unable to comment on whether she had the capabilities to be successful at interview.

54. The Claimant accepted in cross-examination that if Ms Hogfress's reason was that she had not addressed the reasons for her marks at the last interview, namely by accepting feedback and building up necessary experience, that it would not indicate a racial motivation.

55. The Claimant was told that it was standard practice that after being declined for a role, when the benchmark was not met, an internal applicant should wait 6 months before re-applying for the same role. Ms Hogfress believed that this was the policy of the Respondent in order for the applicant to get feedback and gain development. There was flexibility if the employee could show they had sought feedback and given evidence as to how they had developed.

56. On 29 March 2018, the Claimant met Ms Hogfress and asked for the decision to be reconsidered. There was a dispute as to who referred to the Claimant being a strong woman. The Claimant said Ms Hogfress said they were both confident strong women and they would clash, which she maintained in cross-examination. Ms Hogfress said in the grievance interview, to which she referred in her witness statement and in oral evidence, that the Claimant said she knew why she did not want to employ her which was because she was a strong woman and they would clash. This was not challenged in cross-examination. The Claimant in cross-examination referred to Ms Hogfress being intimidated by her and that it was clear she and Ms Hogfress were strong and dominant. We concluded that it was the Claimant who made the remark about strong women.

57. In her witness statement, the Claimant said that she told Ms Hogfress that she was being discriminated against and she was being constructively dismissed. In her grievance interview [p738] the Claimant said that she told Ms Hogfress that she was forcing her to resign and it was called constructive dismissal and there was no mention about discriminating against her. The Claimant accepted in cross-examination that she had not mentioned that it was racist, but said that she made it clear that if she was treated differently she would take action for constructive dismissal. We accepted that she said if she was not allowed an interview she would take action for constructive dismissal. We were not satisfied that she suggested she was being discriminated against.

58. Ms Hogfress tried to explain why she thought the Claimant should not apply and referred to getting feedback and a need to explain how examples worked and what they were looking for. The Claimant said she did not want feedback and wanted to be interviewed anyway. Ms Hogfress said she would interview her, but strongly advised the Claimant to get feedback from her or Mr Pugh beforehand. We did not accept this was done grudgingly.

59. The Claimant did not seek feedback from Ms Hogfress or Mr Pugh. In cross-examination the Claimant said that even with hindsight it would not have been sensible because “it would give credibility for what they did in the first interview” and she was “not going to justify the fiasco with a cap in hand response.”

60. Prior to the meeting the Claimant e-mailed Jason Thomson and said that she was about to have her first run in with her senior manager. He responded by saying he had passed on a positive recommendation to Ms Hogfress before her previous interview and could speak to her. He had not been privy to her reason for not allowing her to apply and asked if she had been given detailed feedback and asked if anything had come of the discussion. The Claimant responded by saying she had a full and frank discussion and stood her ground and gave as good as she got. She said she felt a lot better for it and there was no need for him to speak to Ms Hogfress. She concluded by saying that they left it well [p369-370]. In cross-examination the Claimant said that this was not the position and he had given her a pathetic response to her initial e-mail (which was after the meeting had happened), she was fobbing him off and he was a pathetic little child.

61. The Claimant’s witness statement said the reason was because Ms Hogfress did not want her to progress to a higher grade because of her race. It was put to Ms Hogfress that the reason for what she had said was because of the Claimant’s race, which she denied. It was not suggested to Ms Hogfress that she did not want the Claimant to progress.

62. The general practice was that candidates for a role on a platform were interviewed by the hiring manager and a platform manager. At about this time, Mr Thomson, Senior Manager in the Application Support Team informed Ms Hogfress that he had received an e-mail from the Claimant making allegations against her because she had suggested that the Claimant should not interview for the Lead Role.

63. Ms Hogfress spoke to her line Manager, Mr Marsden (Head of IT Operations) and asked if he would interview the Claimant with her. We accepted Ms Hogfress's explanation that she had not excluded herself because it would be unusual for the hiring manager not to be involved. Further she was aware that she had been accused of being unfair and manipulating and she wanted someone who could give an objective view and would tell her if she was wrong. Ms Hogfress accepted, in her witness statement, that with hindsight it would have been better to get someone else to interview the Claimant with Mr Marsden. We accepted that she thought she needed to take responsibility and that Mr Marsden would be impartial.

64. Mr Marsden was told that the Claimant had unsuccessfully interviewed for the retail lead role earlier in the year. Ms Hogfress asked him to co-interview to ensure that she was being fair to the Claimant and was not taking into account the previous outcome. Mr Marsden's evidence, that he went into the interview with an open mind, was not challenged. We accepted Mr Marsden's evidence that he had not interviewed people for a lead role on the platforms before or after, but he had interviewed people for the same grade (2.2) in other areas of the IT organisation under his control.

65. The Claimant said she was told that Mr Shedden would not interview her, because she was his friend. She said it should have been Mr Shedden interviewing her because it was a technical role and it was custom for everyone to be interviewed by the platform manager. We were not shown any evidence that Mr Shedden interviewed any of the candidates. The other candidates were interviewed by Ms Hogfress and Mr Thomson and it was later upheld in the grievance that what happened was bad for consistency, however it was not found it was motivated by race [p882].

66. On 4 May 2018, the Claimant was interviewed for the Application Support Lead role and was scored 12/30 by Ms Hogfress and Mr Marsden.

67. The notes of the Claimant's interview were incomplete. Mr Marsden made notes and gave them to Ms Hogfress who sent them on to HR, however they have been lost. There was also at least a page missing from Ms Hogfress's notes. Mr Marsden's unchallenged evidence was that the Claimant had brought pre-prepared responses and read them out and it did not enable her to bring to life examples of how she met the competencies.

Ms Hogfress's unchallenged evidence was that the Claimant read out examples and read from the document when questions were asked about the examples given and that the examples were not current. The Claimant, in cross-examination, said she had deviated from the notes, however we rejected that evidence Mr Marsden was aware that the Claimant was the consultant on the platform and had been stepping up to the lead role to some extent, however he confirmed that it was the information given in the interview which was used to see if the Claimant met the benchmark.

68. Ms Hogfress was cross-examined on the basis that it appeared odd the Claimant was scored low because she had been working on the platform. Mr Marsden was cross-examined on the basis he would have been surprised at the scores given the Claimant's experience. It was suggested to both witnesses that the scores were low because of the Claimant's race, which was denied. Specific incidents which could suggest that there was a racial motivation were not put to either witness. We accepted the evidence of Ms Hogfress and Mr Marsden that the Claimant did not perform well at the interview and that she did not give examples of how she met the competencies which were sufficient to demonstrate that she met the benchmark.

69. On 10 May 2018, Ms Hogfress telephoned the Claimant and told her that she had not been successful. The Claimant says that she was told she was not ready. The Claimant accepted that Ms Hogfress offered to go through the interview notes with her and she should book a meeting. Ms Hogfress also offered to mentor the Claimant and help her with a development plan.

70. The Claimant considered that a development plan was something Ms Hogfress used to make employees compliant. She said other employees, specifically Zoe Roberts and Sarah Cummins (both white) had been put on them by her and then it led to a Performance Improvement Plan (PIP), long term sickness absence and the end of their careers. She considered that its purpose was to set objectives and if they were not met you could be managed out of the job. The Claimant did not take up the opportunity for feedback or the creation of a development plan. Mr Shedden had explained to the Claimant that a development plan was different to a PIP and he could help with creating one and that he had also had a development plan to help him move to his new role and it was a good idea. Ms Zerebecki told the Claimant that she had used a development plan as a tool to help her advance. Mr Marsden offered to help the Claimant with her development. The Claimant misunderstood the purpose of a development plan and refused to listen to or accept what others told her about its purpose, namely it was a tool designed to help her progress.

71. Greg Smith was initially appointed to the secondment lead role, his role was a transition consultant. He had provided good examples of how he met the

competencies and was very well prepared. At the same time a permanent lead role was advertised in another team. Penny Martin was an external candidate and came from a strong project manager background and was appointed in that role. Ms Hogfress was concerned about the Claimant's reaction to not getting the secondment role and did not want to allocate Mr Smith to it in order to avoid antagonising her. It was agreed that Mr Smith and Ms Martin would swap teams.

72. When asked by the Judge what it was that tended to show that the treatment alleged was because of her race, the Claimant said the little bit extra was her interview was different and that the white employees were interviewed by a platform manager.

Claimant's performance in 2018 to 2019.

73. On 6 September 2018 Penny Martin was appointed into the Application Support Lead role. We accepted Mr Shedden's evidence that the Claimant struggled with someone else being appointed. Between April and August 2018, Mr Shedden continued to fulfil some elements of the Application Support Lead role. The Claimant took on some elements pending Ms Martin's appointment.

74. The Claimant said in her witness statement that she had coached and mentored Ms Martin. We accepted Mr Shedden's evidence that the Claimant was not the only person providing assistance. Ms Martin was given support and training by Mr Shedden, the other platform leads and the Claimant was providing knowledge and experience. The Claimant's evidence was that Ms Martin shadowed her and rarely left her side, she was intimidated by the scale of the role and was mismanaging a regulatory project which she referred to Mr Shedden. These matters were not put to Mr Shedden and we did not accept the Claimant's evidence.

75. In March 2019 Mr Shedden undertook the Claimant's performance appraisal for the year 2018 to 2019. The Claimant scored herself as 'exceeding' for each category, whereas Mr Shedden scored her as 'achieving'. The Claimant's evidence was that Mr Shedden was not racist but he was under the coercive control of Ms Hogfress. She could not say what his genuine view was and accepted that she should not get an 'exceed' every year. It was put to Mr Shedden in cross-examination that he was under the influence of Ms Hogfress, which was denied. No examples of how he was under such control were put to him. We rejected the Claimant's evidence that he was under the coercive control of Ms Hogfress and accepted Mr Shedden's evidence.

76. The Claimant's evidence was that she was operating as the lead for 9 months of the year. Mr Shedden's evidence, which we accepted, was that

he initially returned to the lead role, however he was appointed to secondment role as the platform manager and he was fulfilling both elements of the lead role and platform manager role. Mr Shedden accepted that the Claimant undertook some lead activities. We concluded that the Claimant undertook some lead activities but she was not carrying out the lead role. Mr Shedden was aware that the Claimant had received some Pride Awards for work she had done and he confirmed that they were a thing of note. We accepted Mr Shedden's evidence that it was common for someone to receive an 'exceeding' rating and then drop to an 'achieving' rating the next year and that this had happened to him. Further we accepted that to be scored as 'exceeding' for a second year he expected to see that additional responsibility had been taken on and that lead activities were owned. His unchallenged evidence was that the Claimant had not looked for lead opportunities that year. We accepted Mr Shedden's evidence that he considered 'achieving' was the right score for that year. It was suggested to him that the reason was because of the Claimant's race, which he denied. In cross-examination he was not questioned about any examples by which it was suggested that that race could be a motivating factor.

77. In March 2019 the Claimant was interviewed for a scrum master role, she did not have scrum master experience. On 27 March 2019 she was informed that she was unsuccessful but met the benchmark score for the role and her details would be kept in the team's talent bank and they could be in touch again should another role become available and if she saw other vacancies she was invited to apply. In June/July 2019 the Claimant applied for a scrum master role, however she was not selected for interview. The Claimant had initially alleged this was an incident of direct discrimination, but withdrew the allegation.

Secondment opportunity in 2020

78. On 9 July 2019 Ms Martin went on long term sick leave. An external consultant, Deborah Russell was engaged to cover her role from 27 August 2019 to 28 February 2020. She was on fixed term contract and had worked in the team before.

79. In September 2019, Hayley Zerebecki became platform manager for the M&O platform. She had a discussion with Mr Shedden who told her the Claimant had been unsuccessful in applications for two lead roles in 2018, Ms Martin had been appointed to the role the Claimant had applied for and had been taken ill and that Ms Russell was brought in to cover on a temporary basis. Ms Zerebecki spoke to the Claimant in an introductory 1:1 meeting on 1 October 2019. Ms Zerebecki's unchallenged evidence was that the Claimant was very vocal that she was performing higher than her role as consultant. Ms Zerebecki asked the Claimant if she had

implemented a development plan after her unsuccessful interviews and was told she did not need one as her performance did not need to improve.

80. On 9 December 2019, the Claimant e-mailed Ms Zerebecki and said her workload was dwindling and was interested in moving to the digital platform [p598].

81. The Claimant was off sick between 11 December 2019 and the end of January 2020, with what was later thought to be covid-19.

82. When the Claimant returned from sick leave, on a phased return, she was informed by Ms Zerebecki that Ms Russell would be leaving at the end of February 2020. Ms Russell worked Tuesdays, Wednesdays and Thursdays. Ms Russell's contract was subsequently extended to the end of March. On 3 February 2020 Ms Zerebecki held a return to work meeting with the Claimant, at which she asked the Claimant to try and work in the office on Tuesday, Wednesday or Thursday to facilitate a handover from Ms Russell. The Claimant's witness statement said that she was asked to do the lead work, giving the impression that she was asked to do the whole role. Mr Shedden's unchallenged evidence was that he was doing Ms Russell's work on her non-working days. Mr Shedden met with Ms Zerebecki and discussed whether there were any projects that the Claimant could work on after she left and the MLR (Money Laundering) project was specifically mentioned and the Claimant agreed to undertake work on that project. The Claimant relied upon the finding in the grievance that there was a plan for the Claimant and Ms Zerebecki to temporarily cover Ms Russell's work, but that the contract was extended and Ms Martin returned on 1 April 2020. It was accepted in the grievance that there was going to be some extra work given to the Claimant when she was on reduced hours, that she had applied for the role twice and it was not appropriate to ask her to pick up the work. We concluded that the Claimant was asked if she would pick up some extra work and she agreed to undertake work on the MLR project.

83. On 3 March 2020, a secondment opportunity for the IT Operation Transition Lead, Ms Russell's role, was advertised for the time Ms Martin was recovering, for which the Claimant and Ms E Gough, a white employee, applied on about 10 March 2020. Ms Hogfress advertised for the role and Ms Zerebecki was delegated to undertake the recruitment for it. Ms Hogfress's and Ms Zerebecki's evidence, which we accepted, was that Ms Gough's application was poor and that she had previously not hit the benchmark for the role in a previous interview and she was rejected without an interview.

84. The Claimant's application was also considered by Ms Zerebecki and Ms Hogfress. In her witness statement Ms Zerebecki said that based on the Claimant's CV she would have interviewed the Claimant. Ms Hogfress, in

her witness statement said that she did not consider the Claimant's CV met the criteria to be interviewed, however when cross-examined when it was put to her that the Claimant's CV had met the minimum requirement on two previous occasions and she accepted that, with hindsight, she should have met the minimum requirement. We accepted Ms Zerebecki's evidence that she was concerned about the Claimant's ability to undertake the role and that this was based on the conversations she had with the Claimant about getting feedback from her earlier interviews and the use of a development plan. She was also concerned about a lack of interaction she had seen between the Claimant and Ms Russell. Ms Zerebecki accepted that at interview, only what was said could be taken into account, however she was suggesting a different process could be followed when deciding when to interview. We did not accept this evidence and concluded that interviews were offered on the basis of meeting the minimum requirement. However, we accepted that Ms Zerebecki did not think that the Claimant was ultimately capable of doing the job at that point in time.

85. At about the same time, Ms Zerebecki was in communication with Ms Martin who indicated that she wanted to return to work at the beginning of April 2020. The secondment role was withdrawn.

86. There was a dispute as to whether the role was withdrawn before or after the Claimant was rejected. We were referred to messages between Ms Hogfress and Ms Zerebecki on 12 March 2020.

87. They discussed that they only really had the Claimant as an applicant for the role and Ms Zerebecki asked Ms Hogfress if her view had changed, however they then discussed the unfolding covid-19 situation. Ms Hogfress said her view had not changed. Ms Zerebecki said that her view had not changed but "given the current pressures, we should suspend the process." Ms Hogfress said she did not want the Claimant to feel like she was doing the lead role by default and asked how likely she thought that Ms Martin would return on 1 April 2020 and it was said she was likely to return as soon as possible.

88. Ms Hogfress said "Really not sure about that. (Fathima proving herself) We did that before – she was minus a lead before Penny came along and Barry gave her an exceed for "doing the lead role" which really she wasn't – which is why her expectations are so out of kilter now. I feel the message needs to be that she's not ready for the lead role and won't be unless she's willing to embark on a development plan and take feedback on board." Ms Zerebecki replied, "I can't help feeling that might be easier feedback to give, if we actually did do the interview. I have no intention of giving her that based on her current performance – I meant that we would need to draw up a plan that gave her stretch objectives in her current role, on the understanding that she wasn't actually in the 'lead' position." Ms Hogfress said, "if she

really wants it she needs to be open to the idea of development and feedback use the period before Penny comes back fully to take on some stretch objectives, which, while not operating in the lead role should give her the opportunity to bridge the gaps." It was agreed that they needed to suspend the recruitment anyway and Ms Hogfress said that the feedback would need to be that she did not meet the criteria and it was not just about a good CV but how they saw her perform day in day out.

89. The Claimant suggested that Ms Zerebecki was subtly trying to suggest they should interview her, however this was based on splitting what she had said and looking at the part referring to interviewing in isolation, we concluded that Ms Zerebecki was not suggesting the Claimant should be interviewed, she was saying it might be easier to give her feedback if they did. We rejected the suggestion by the Claimant that Ms Zerebecki was the puppet of Ms Hogfress.

90. Ms Zerebecki said in her witness statement, which we accepted, that there was cause for concern when someone interviews for a role and is unsuccessful, does not take feedback and then applies again and if the Claimant had been interviewed that she would be unsuccessful again. Ms Zerebecki could not see, without a development plan, how the Claimant was going to hit the benchmark.

91. Ms Zerebecki asked the resourcing team to tell the Claimant that the role had been suspended and that she had not met the required criteria. The Claimant was sent an automated message on 12 March that she had not met the eligibility criteria. The Claimant asked for feedback and Ms Zerebecki responded on 16 March 2020. Ms Zerebecki apologised for the way the e-mail had been sent by HR and said that the position had been suspended because of: discussions with Ms Martin about her impending return, the demise of the SAE squad and reduction of transition activities and the current climate and uncertainty in relation to coronavirus. She said that the secondment was to fill a specific need and that she did not think the Claimant was ready for a lead role. She referred to having had many discussions about her desire for the Claimant to create a development plan and that she had offered to work with her on stretch objectives to evidence her growth towards a lead role and gave the example of the MLR Strategic programme of work as a platform to show key evidence of stepping up. She said she would support her in developing towards any future lead vacancies in the team. The Claimant accepted that the explanation was consistent with the messaging on 12 March 2020. The Claimant also accepted in cross-examination that Ms Zerebecki and Ms Hogfress thought she needed a development plan.

92. We concluded that the decision to suspend the process did not occur after the Claimant was rejected. A decision was taken to suspend the process

before it was decided to tell her that she would not meet the criteria. We accepted that the role was suspended because of the impending return of Ms Martin, a reduction of work and due to the unfolding situation with Covid-19.

93. On 26 March 2020, the Claimant suggested that development plans were used on the team as a subtle form of control to make employees submissive and compliant. Ms Zerebecki responded by saying that she thought the Claimant was confusing a development plan with a PIP. The development plan was a way to help the Claimant identify and drive skills to be effective in her role and to identify opportunities for stretch if she wanted to further her career. All members of the team had been asked if they had one. They were not necessary for progression, but they helped immensely [p699-700].

The Claimant's grievance

94. On 12 March 2020, the Claimant raised a grievance (Protected Act 1) in which she said she was Asian and had been unsuccessful in many attempts to progress and she was starting to think that her face did not fit. She detailed the job applications and that the only feedback she was getting was that she was not ready.

95. Michelle Christmas, Practice Leader and who was white, was appointed to chair the grievance. She was from a different area of the business and was independent. Leanne Pearce, Senior Case Consultant with HR, was assigned to provide advice to the chair in relation to polices, employment law and best practice. We accepted that Ms Pearce's role was not as decision maker. In terms of the decision making Ms Pearce needed to make sure that all of the evidence had been considered and to ensure the decision maker was aware of the potential outcomes they could reach.

96. In cross-examination the Claimant confirmed that she was alleging that Ms Conwell, People Director (Head of HR Business Partnering) was racist and was behind the treatment that she received as consequence of raising her grievance and she directed her subordinates. She was asked what she based this on and said Ms Conwell had told her Asian people were not good enough, when she had asked why Asian people were not being promoted to roles with a car allowance. This had not been referred to in the claim form, grievance or witness statement. The Claimant referred to p1058, an e-mail she sent following the meeting with Ms Conwell. The Claimant recorded that she had raised BAME employees did not seem to reach car allowance level by internal progression and Ms Conwell said, "this didn't necessarily mean it was down to racism, it could just be that they were not good enough." The Claimant suggested that this was a racial slur and that Ms Conwell was saying Asian employees were not good enough. This suggestion and the e-mail were not put to Ms Conwell in cross-examination.

We did not consider that Ms Conwell was saying Asian people were not good enough and the Claimant was taking it out of context. The Claimant confirmed that this was the only alleged racial slur.

97. We accepted Ms Conwell's evidence that she did not normally get to see grievances and was not involved in them. She was only aware of the contents of the Claimant's grievance because of the first Tribunal claim and she was unaware of it at the time. She became aware that the Claimant was alleging race discrimination in June 2020 when the CEO informed her. Ms Conwell did not speak to Ms Pearce about the grievance and her only involvement was to ask the team leaders to ensure that all of the Claimant's concerns and e-mails were kept in one place. She denied orchestrating anything and no suggestions of how she orchestrated matters were put to her. We accepted that Ms Conwell had no involvement with and did not see the evidence in the grievance. She had no involvement in the decision making process.

98. On receipt of the grievance Ms Pearce read it and understood that the Claimant was alleging that she had not progressed because of her race. On 16 April 2020, the Claimant attended a grievance investigation meeting.

99. On 20 April 2020, Ms Christmas e-mailed the Claimant setting out her understanding of the grievance [p775]. The Claimant responded by setting out 28 allegations against, Ms Hogfress, Ms Zerebecki, Mr Marsden and Mr Shedden. The Claimant did not refer to race in the e-mail. She later confirmed that allegations were not made against Mr Shedden.

100. In the Claimant's grievance, she said that Ms Hogfress treated her badly in meetings. In oral evidence she said that she was singled out. As part of the investigation Mr Shedden, Mr Moore, Ms Zerebecki, Mr Marsden, Ms Hogfress and Mr Conway were interviewed. The Claimant asked for Mr Conway to be interviewed.

101. Mr Conway was asked if he had seen any behaviour towards her that he had seen that was unfair. Mr Conway said he had not seen anything and had only heard things from the Claimant. He saw nothing that would have contradicted the pride values [p869-870].

102. Mr Moore said if there was a challenge to anything it was professional. He did not see any unfair treatment of the Claimant and thought she would have come to him if it had happened [p800-801].

103. Mr Shedden said he never thought she was being discriminated against. He did not say he had seen anything inappropriate.

104. Mr McKee in his interview as part of the appeal said "… Hazel is an interesting character. I wouldn't describe her as friendly. She has a very unique style in terms of how she manages her Team and her people. I've seen and been on the receiving end of a lot of passive aggressive behaviour which is very difficult to prove or challenge, right, because it is easy to deflect it off as not aggressive. There have been a few people within her Team who have left, based upon that behaviour. So Sarah Cummins, Zoe …" He had not observed that behaviour towards the Claimant and said, "But the feedback that Fathima got when she didn't get the interview is very interesting. So, the feedback that Fathima got that she lacked confidence, needed some support and some coaching … was so wide of the mark. I relate Fathima, maybe to be a bit like Sarah, a bit like Zoe; a sort of outspoken passionate woman and I don't think that necessary sat right with Hazel in term of her Team fit and her dynamic…"

105. We accepted Ms Pearce's evidence that the decision in the grievance outcome was taken by Ms Christmas. The outcome was sent to the Claimant on 21 May 2020. The evidence given by the various witnesses was summarised, including that of Mr Shedden and that he said she had taken on the majority of the lead tasks, there were aspects consultants would have no experience in, she was capable and he had never witnessed discriminatory behaviour. The 28 allegations were separately addressed and some were upheld. In relation to whether the Claimant was treated differently by Ms Hogfress the allegation was not upheld and the evidence of Mr Moore was relied upon. It was recommended that an independent person should mentor/coach the Claimant and help her understand development plans are a vehicle to help with career progression. It was said that the claimant had alleged her face did not fit and that led to her being unsuccessful and some statistics were attached for her. The allegations in relation to her scoring in the interviews in 2018, regarding the interview for the second application in 2018 were not upheld. It was considered that the decision for Mr Marsden to interview the Claimant was bad for consistency and the allegation was partially upheld. In relation to the 2020 secondment it was considered an interview should have been offered, but the withdrawal of the position was not due to the Claimant applying and the allegation was partly upheld.

106. Ms Pearce was cross-examined on the basis that the outcome report did not really address the concern of racial discrimination. She said that the allegations raised were answered and the focus had been on the 28 points, but nothing in the investigation had suggested race had been a factor. It was acknowledged that it should have been addressed in the outcome, but that the outcome would not have been any different.

107. On 24 May 2020, the Claimant appealed against the grievance outcome (Protected Act 2). Jagdeb Bassi was appointed to chair the

grievance appeal and Carly Kincell, Senior Case Consultant, was asked to provide HR support. Mr Bassi interviewed the Claimant, Mr McKee, Ms Zerebecki and Ms Hogfress. Mr Bassi was called to give evidence, however he was not asked any questions in cross-examination and therefore his evidence was taken to be accepted. Mr Bassi did not find that discrimination had occurred nor any evidence that the incidents occurred due to racial prejudices, however he upheld some aspects of the appeal. The outcome was sent on 3 September 2020.

Moving the Claimant out of the Transition team between 12 March 2020 and 14 September 2020

108. The Claimant alleged that she had not been moved out of the transition team because she had raised her grievance on 12 March 2020 and that the relevant period ended on 14 September 2020.

109. We accepted Ms Pearce's evidence that it was not unusual for requests to be made by employees who have raised a grievance to ask to move teams. However there was a difference between people in specialist roles and those doing more common work such as cashiers who could easily be moved to another branch on a temporary basis. We accepted that HR could not move people and that HR would not know what role someone in a similar role as the Claimant could be moved to.

110. The Claimant was signed off work on sickness absence from 20 April 2020 to 17 July 2020. In the first two months of the period complained about the Claimant was waiting for the outcome of her grievance and for most of the rest of the period she was waiting for the appeal outcome

111. The Claimant said in her witness statement that she made repeated requests to be moved to a different team. However the only requests she referred to were at pages 689 to 690. The Claimant said in evidence, that everything after 12 March 2020 was related to her grievance. She said everyone else wanted her to move but Ms Pearce and Ms Conwell wanted her to suffer so that she would leave the business and it was Ms Conwell who wanted her to stay in the team. This was not put to the witnesses and no evidence was suggested by the Claimant which tended to suggest that this was the case. We rejected the Claimant's evidence on this issue.

112. On 18 March 2020 the Claimant e-mailed Ms Pearce and said it might be time to assign her an interim line manager away from her current line of command. Ms Pearce responded by saying that she had seen later e-mails between the Claimant and Ms Zerebecki and it sounded like she was comfortable to continue being managed by her. The Claimant responded on 19 March 2020 saying she was not comfortable with her managing her and wanted an interim manager who would sympathise with

her situation and asked if it was possible. She asked if it could be someone away from Mr Marsden's line. On 20 March 2020, Ms Pearce said that usually when they make temporary adjustments they kept line management within their area. It was suggested she could report to Mr Endicott and then bypass Ms Hogfress and go straight to Mr Marsden. It was understood she was off sick. The Claimant responded by saying that Mr Endicott was an ally of Ms Hogfress and needed someone completely away from Ms Hogfress's line.

113. Ms Pearce replied that she was looking for a short term solution and had checked with Mr Marsden about an alternative manager, however most managers were wrapped up on continuity activities due to Covid-19 and could not accommodate it. She also said it would be very unusual to go out of Mr Marsden's area completely [p689-691].

114. The Claimant accepted in cross-examination that Ms Pearce was looking for a short term solution and that during this time she was sending many e-mails of support to her. We accepted Ms Pearce's evidence that she did all that she could, at the time, by changing the Claimant's line manager to Mr Endicott on 23 March 2020 and ensuring that Ms Hogfress was not involved in the line management of the Claimant in that she was bypassed and it went straight to Mr Marsden. We accepted that she made enquiries as to whether someone outside of the team could line manage the Claimant, however they were two weeks into the first lockdown and no one could be used and Mr Endicott understood the work she did. We accepted that the normal process in such circumstances was to find a different line manager, which Ms Pearce did. The Claimant accepted that on the face of it the e-mails about this were constructive and reasonable.

115. On 11 June 2020, the Claimant presented her first claim to the Tribunal (Protected Act 3).

116. In June 2020, the Claimant communicated with the CEO about her situation and said she had experienced 14 years of racism [p908]. The CEO contacted Ms Conwell and asked her to speak to the Claimant. At this stage Ms Conwell found out about the Claimant's grievance and then spoke to her on 17 June 2020. The Claimant followed it up with an e-mail asking for assistance with a number of matters, however she did not ask to be moved from her team. Ms Conwell responded to the questions [p926-927]. We accepted that it was not within Ms Conwell's remit to move the Claimant and that any move would require there to be a vacancy. We accepted that exploring whether moves could be undertaken was not part of Ms Conwell's role and that it was the responsibility of others in the team. We also accepted that it was not normal procedure to move someone because they raised a grievance and she was unaware of any such occurrence. Ms

Conwell accepted that a move might occur if there was a significant risk to the person.

117. On 9 June 2020, Mr Marsden discussed a list of the Claimant's transferable skills with Ms Zerebecki, who had drawn them up, with the aim of trying to find an opportunity outside of the team. He discussed a potential transfer with James Stroud

118. On 12 June 2020, Mr Marsden e-mailed the Claimant saying that Ms Pearce had told him she was keen to look at opportunities outside of the transition team and said he was keen to understand what she was considering so he and Mr Endicott could work with James Stroud to identify opportunities and look to support her. The Claimant accepted in cross-examination that on its face it was constructive and reasonable and it appeared Ms Pearce had been trying to do things.

119. The Claimant identified a 2.2 change manager role she was interested in. James Stroud, Gareth Endicott and Mr Marsden offered their assistance with an application and Mr Stroud offered to help with her CV and preparing for an interview. On 15 June 2020, Mr Stroud made some suggestions and prompts for the Claimant to address in relation to the application [p915]. The Claimant accepted he was trying to assist and had appreciated it. On the same day Mr Endicott offered his assistance with the application [p909] and the Claimant accepted in cross-examination that he was trying to help her move.

120. The Claimant said that the reason she was given assistance was because she had been in contact with the CEO. It was suggested to Ms Pearce that she had not helped because the Claimant raised a grievance. We accepted Ms Pearce's evidence that the usual process had been followed and alternative manager had been found whilst the allegations were investigated. Mr Stroud and Mr Marsden had offered help and the same process was followed for anyone who raised a grievance. She said there might have been something in another area but to ascertain suitability was a task for someone who understand the skillset.

121. On 17 June 2020, the Claimant sent an e-mail to Tracy Conwell, Director of Employee Relations asking for evidence and statistical information (Protected Act 4) [p926-927] Ms Conwell replied on 26 June 20 as set out above.

122. On 29 June 2020, the Claimant e-mailed Marc Pugh and requested evidence that she thought would support her grievance appeal and race discrimination claim (Protected Act 5).

123. On 3 July 2020, the Claimant's sick pay reduced to half pay. The Claimant returned to work on 17 July 2020 on a phased return.

124. On 4 July 2020, the Claimant e-mailed Leanne Pearce about the removal of her IT access (Protected Act 6)

125. On 14 September 2020, the Claimant presented claim 2 (Protected act 7).

126. The Claimant requested a new line manager who did not report to Ms Hogfress. On 28 September 2020, the Claimant was allocated Neil Griffiths, who was outside of her team, but understood the work she was doing. We accepted that this was an unusual step. At their initial meeting Mr Griffiths raised the issue of race discrimination and said if she ever thought he was using language or actions which were discriminatory she should immediately call it out to him. This was well received by the Claimant, who thanked him for his openness. The Claimant said in evidence she did not believe he was racist.

127. In about October 2020 Mr Walsh became Head of IT Operations.

128. In about October 2020, Hazel Hogfress, Hayley Zerebecki and Gareth Endicott raised an internal complaint/concern about the behaviour of the Claimant, in terms of e-mails she had sent to them about her Tribunal claims which they found threatening. James Stroud, HR Community Partner and George Fisher interviewed the complainants and some others who were named or had worked with the Claimant. They were aware that the Claimant had raised a grievance and some allegations had been upheld or partially upheld and that there had been an appeal. They were not aware of the specifics. Mr Stroud and Ms Fisher attempted to understand the facts as to what was happening and were aware that Ms Hogfress, Ms Zerebecki and Mr Endicott felt as if they were walking on eggshells. A report was produced and the draft was given to Mr Walsh, which he reviewed and he did not agree with the findings. Mr Walsh considered that the situation was very challenging and he tried to give everyone breathing space. He considered that there should be no formal action. The Claimant was not interviewed about the matters raised. Mr Walsh wanted to use the Claimant's skills elsewhere and this coincided with the Claimant's interest in a fresh start away from the Team.

<u>Secondment opportunity suggested to the Claimant</u>

129. Mr Walsh considered that there was a breakdown in the relationship between the Claimant and Mr Endicott, Ms Zerebecki and Ms Hogfress and looked for solutions. He looked for opportunities within the Respondent. On 12 November 2020, he was sent a list of transferable skills the Claimant

had, which had been prepared by Ms Zerebecki. Mr Walsh was aware that the organisation which he had left, when he became Head of IT, had been looking to increase headcount and he made enquiries. He considered that it was relatively easy to create an opportunity and fit it to the Claimant's skill set and came up with a proposal.

130. Mr Walsh had a meeting with the Claimant and was accompanied by Mr Stroud on 8 December 2020. Notes were not taken, however what was discussed was recorded in an e-mail of the same date [p1090-1091] and it set out a summary of the key responsibilities and tasks. The Claimant would maintain her grade and rate of pay and we accepted it was role she could take as far as she wanted in that there were a significant number of projects she could work on, which were both large and small. The Claimant appeared excited by the prospect.

131. The Claimant undertook some research and considered that the role had previously been done by a corporate graduate, that it was an entry level role and would damage her career. On 10 December 2020, the Claimant e-mailed Mr Walsh and said she appeared to be overqualified and that it was an analyst role and the graduate was leaving the team. Mr Walsh replied on 14 December 2020 that although the graduate was leaving she would not be replacing him and would be expected to pick up and fulfil work in line with her grade and capability. They expected her to be operating in a 2.1 role and said that with wider organisation changes there were limited options for secondments. We accepted that Mr Walsh considered that the role was a 2.1 role they had created for the Claimant. The Claimant still considered the role was too junior and said she would wait for something more suitable and would continue to apply for 2.2. roles. The Claimant suggested that the e-mails were subjecting her to pressure, we rejected her evidence, the e-mail of 8 August 2020 set out the role and it invited her to take time to consider and if she was interested he could set the wheels in motion or look for an alternative.

132. The Claimant attended a further meeting with Mr Walsh and Mr Stroud on 15 December 2020 at which the proposed role was discussed. Mr Walsh said that before he left the team he had been trying to increase headcount and he thought it was a role in which she could expand and develop her career. The Claimant was asked to give it further consideration during the Christmas break.

133. On 11 January 2021, Mr Walsh had a meeting with the Claimant and was accompanied by Lia Gash, HR Manager. The meeting lasted 5 minutes and the Claimant confirmed that she did not want to take the role and that she felt it was too junior. The Claimant did not accept that it was an equivalent grade. Mr Walsh followed the meeting up with an e-mail and said that he would continue to review options.

134. The Claimant's evidence was that pressure was applied to her to accept the role, however she was unable to explain what that pressure was. Mr Walsh, Mr Stroud and Ms Gash were cross-examined and it was suggested pressure was applied, however no specifics or examples of that pressure were put to them. We accepted the Respondent's evidence that no pressure was put on the Claimant to accept the role and that Mr Walsh continued to look for alternative roles for the Claimant to do.

135. We further accepted Mr Walsh's evidence that due to a wider change programme within the Respondent that there were limited opportunities to move generally and in the case of the Claimant he was unable to find anything suitable.

The redundancy of the Claimant

136. In April 2021, the Respondent as part of its 'Change Programme proposed a series of changes in its IT Service Delivery Function, involving a significant reduction in headcount. The proposal included reducing the existing seven IT Operations Consultants to one person. In total 50 people were affected. The Nationwide Staff Group union was consulted from 22 April 2021.

137. The proposed new structure was announced to staff on 27 April 2021 and the Claimant and other consultants were informed they were at risk of redundancy.

138. On 1st May 2021, the Claimant presented claim 3 (Protected Act 8)

139. On 13 May 2021, the Claimant attended a redundancy consultation meeting with Neil Griffiths. The Claimant had no specific comments about the proposal but asked various questions. On 18 May 2021, the Claimant attended a second redundancy consultation meeting at which the questions were answered and Mr Griffiths explained that being on sick leave would not disadvantage her and she could use occupational health. She was assured that the selection process would be fair.

140. Following the second consultation a desktop scoring process against the section criteria was conducted and this was evidence based, this was an application for the remaining role. Each employee scored themselves and was then scored by two managers. Each criteria had scores of between 1 and 15 the range of score were divided into 5 equal levels [p1320]. The Claimant scored herself at 65. The Claimant was scored by Mr Griffiths and Sally Basting, an independent manager, who gave her a score of 36. Mr Griffiths scored the Claimant on the basis of the evidence supplied by the Claimant.

141. On 6 June 2021, the Claimant was given feedback by Mr Griffiths, the evidence was discussed and suggestions made as to how to improve it by explaining that describing how she did things was needed, not just what she did. The Claimant agreed to rework her examples and a further meeting was arranged for 7 June 2021. The Claimant had not sent her reworked examples in time for Mr Griffiths and Ms Basting to review them before the meeting. The Claimant had reduced her score to 62. Mr Griffiths and Ms Basting provided the Claimant with further feedback and suggestions. The Claimant made further changes and scored herself at 65. As a result of the improvements Mr Griffiths and Ms Basting revised their scores to 44, but thought the Claimant still was not grasping what was required.

142. Mr Griffiths, in cross-examination, said that he thought, as line manager, the Claimant's ability to perform was adequate and that she was not below par, but that she was not an outstanding consultant. He accepted that she was experienced and he had been told that she had carried out some lead activities. They had taken into account feedback from others when undertaking the scoring. We accepted his evidence that he was looking at the specific evidence against the competencies and was expecting evidence as to how the Claimant had done and achieved things. Mr Griffiths was not involved in scoring the other consultants at risk. Mr Griffiths denied being influenced by anyone else and no evidence was put to him which suggested he had been and we accepted his evidence. It was put to Mr Griffiths he had scored the Claimant as he did because of her race or because she had complained about discrimination, which he denied.

143. On 8 July 2021 the scores were submitted to Emma North who was leading the consultation process, following which a separate panel, Jacqui Gough, Anna Hull and Emma North calibrated all the employees scores. By this stage there were four employees being considered, two others accepted voluntary redundancy and one other secured a role elsewhere within the Respondent.

144. We accepted the evidence of Jacqui Gough, who described her ethnicity as mixed black African and white British, as to the process which was followed. The information which was provided to the calibration panel was anonymised. Ms North had copied and pasted the relevant sections of each candidates application into a blank document and nothing was written into them that could identify the candidates. When the calibration process was undertaken much more attention was paid to how the employee had scored themselves rather than the scores of the managers. They cross-referenced the way they scored each candidate to ensure parity. The Claimant's final score was 56, Mr Spencer was scored 59 and the other two candidates were scored 42 and 47. In preparation for the Tribunal hearing Ms Gough said in her witness statement that the Claimant had not put

information about her inner thought processes, the information was factual but did not set out how she did things. We accepted that Ms Gough did not know the identities of the people subject to the calibration exercise.

145. It was not put to Ms Gough that the scoring was influenced by the Claimant's race or that she had brought a claim. We accepted Ms Gough's evidence that she did not know the racial background of the Claimant or that she had raised grievances or presented claims to the Tribunal.

146. The Claimant was scored in second place and therefore Mr Spencer was selected for the remaining role. On 15 July 2021 Mr Griffiths met the Claimant and informed her that she had been unsuccessful in securing the role and she remained at risk and was encouraged to engage with redeployment. The Claimant said that she thought the decision was unfair and her grievance and Tribunal claim were the cause.

147. On 28 July 2021, the Claimant was given notice of termination of her contract with an effective date of termination of 15 September 2021.

Applications for alternative roles

148. The Claimant applied for a number of alternative roles, in order to avoid redundancy, however she was not selected for interview. The roles applied for were as follows:

(a) Delivery Manager. Ms Palframan's unchallenged evidence was that this vacancy was withdrawn and was not filled.

(b) Two Service Designer roles, which were upper 2.2 roles. Mr Yau was the main hiring manager. We accepted Mr Yau's evidence that the role centred on design techniques to improve the service from end to end and it included all touch points between the customer and the Respondent. It involved much more than digital interactions. The requirements included that the person had previous service designer experience, expertise in creating industry standard design artefacts (e.g. blueprints), ability to research in design field, experience in working in agile environments and experience in prototyping. When the Claimant applied the vacancy had already been advertised and Mr Yau had seen some CVs. He was aware she was on the redeployment register and reviewed the CV when he received it and understood she was entitled to preferential treatment. We accepted that the Claimant's CV was not geared towards the role and the information provided did not meet the minimum criteria. The Claimant had no service design experience. Both roles were filled by mixed race employees who had significant service design experience.

(c) Operations Team Manager, which was a 2.1 role on lower pay than the Claimant was paid. The minimum requirement included management or step up management experience, the ability to plan and forecast to meet the needs of the business and analytical ability that enables options to be addressed and recommendation to be made. The vacancy was open not to just people working in Swindon but also those wanting to work remotely. 47 applications were received for 4 positions and 16 people were interviewed, all of whom met the 10 minimum requirements and at least some of the desirable attributes. 8 applications were from people on the redeployment register, 5 of whom were interviewed. The hiring manager was Ms Dyer. She created a spreadsheet for the candidates and included the name, whether they were at risk and whether they met the benchmark. We accepted Ms Dyer's evidence that she considered the Claimant's CV showed she had vast amounts of IT and change experience, but there was no evidence of her managing an operational team and that she did not meet the minimum benchmark and she had particular concern about planning and forecasting the capacity management of people. This involved forecasting the appropriate resources to different work queues. The Claimant's application was rejected. The rejection was communicated to the Claimant by Ms Gash (HR Manager). The Claimant disagreed with the outcome and said she had the skills to meet the minimum benchmark and said she had experience in management and mentoring. Those skills were not in the Claimant's CV. The Claimant was given permission to resubmit her CV incorporating the skills. The Claimant responded by saying she had updated her cover letter but she did not need to update her CV because it was mentioned. The CV and cover letter were resubmitted to Ms Dyer and she reviewed it again, but struggled to see any difference and the Claimant was rejected again. The four successful candidates all had experience of managing a team previously and had been involved in forecasting and planning workloads and could deal with operational queues and issues which would crop up during the role. We accepted Ms Dyer's evidence that there was no comparison to the Claimant's application which clearly demonstrated experience in IT and not management or operations.

(d) Senior Technology Governance & Control Framework consultant. This was a 2.2 upper role. The role involved writing standards for the technology teams in order to monitor and adhere to compliance and to protect the Chief Financial Officer from claims by the regulator. The hiring manager was Ms Powell. We accepted Ms Powell's evidence that the role did not necessarily lend itself to an IT background, but awareness of how the technology was built would give a good grounding. Ms Powell was aware the Claimant was on the redeployment register and reviewed her CV before anyone else. There were 8 key areas of experience and the Claimant only met the minimum criteria for

4 of them. In particular the Claimant had provided little information about the governance aspects. The CVs were subject to a second review by Ms Powell's line manager. The Claimant was not selected for interview. The successful candidate had been in a senior grade, had understanding of control requirements and had been working in governance control and he had become his line manager's 'fixer' for complex problems requiring a delicate resolution.

(e) Scrum Master, a lower 2.2 role. The hiring manager was Ms Wagstaff. We accepted her evidence that for the particular role they were looking for someone with extensive scrum master experience and they needed to have strong IT, technical (cloud experience), and delivery skills. It was considered if there was not previous scrum master experience the candidate would not be suitable. Ms Wagstaff was made aware the Claimant was on the redeployment register, however the application was sent after other CVs had been viewed. To assess candidates for interview there were 7 essential criteria which were marked as yes or no. the Claimant scored yes on 2 of the 7 essential criteria. The Claimant did not have scrum master experience which was an essential criteria. Ms Wagstaff was also aware the Claimant had previously talent banked for a scrum master role in 2018 and understood that someone remained on the register for 6 months. Nobody was recruited at the time the Claimant applied. The role was readvertised and the successful candidate had extensive and relevant scrum master experience.

(f) 3 Senior Change Manager 2.2 roles (1 secondment and 2 permanent). A new team was being created. Mrs Moore was the hiring manager. They were looking for people with experience in leading portfolios of change, previous management experience and managed change projects/teams on a large scale. They were looking for someone who could hit the ground running. Two other teams were recruiting for similar positions and the process was merged. The three managers went through the applications as a panel to decide if they met the minimum criteria. They were made aware the Claimant was on the redeployment register. Mrs Moore accepted in cross-examination that the Claimant had some change experience. It was considered she lacked evidence of end to end business change knowledge and there was no reference to methodologies, it lacked delivery of large scale change, there was no people leadership and there was no experience of delivery of change in to any missions. The Claimant was rejected. The successful candidates had experience in their current roles and were leading change on a wide scale including large deliveries.

(g) Senior Delivery Manager, an upper 2.2 role. The hiring manager was Mr Agnew. The role was to lead a project and help launch a new pension product. The successful candidate was required to have extensive

experience of running projects, managing risk, issuing and managing their own budgets and much experience working with stakeholders. Mr Agnew was sent the Claimant's CV on 20 August 2021 and informed she was in the change programme. On reviewing the Claimant's CV he considered that the Claimant was from a very technical IT and service desk background, but she did not have any obvious project management experience which was essential. The Claimant did not meet many of the minimum requirements and her application was rejected. The successful candidate was also at risk of redundancy and had been working in a 3.1 role and was a senior project manager and was accepting a demotion by way of alternative employment.

Appeal against dismissal

149. On 4 August 2021, the Claimant appealed against her dismissal, in which she also alleged she had been discriminated against and had been victimised within the meaning of the Equality Act.

150. The Claimant's appeal was heard on 28 September 2021 by Ms Cooper at which the Claimant explained her grounds of appeal. following the appeal hearing further investigation was carried out and Ms Palframan, Mr Griffiths, Ms Wagstaff and Ms Dyer were interviewed.

151. The Claimant was sent a written outcome on 19 November 2021. It was noted that in respect of her applications for alternative roles, 40% of the shortlisted candidates were from a BAME background. Although the Claimant believed she had been acting in a lead role and had lead experience it was not evident on her CV and it was understandable why she had not been shortlisted. Ms Copper focused on the roles at which the Claimant was at the same level. She considered that it was significant the Claimant had been talent banked for a scrum master position and considered that she should have been offered an interview. It was evident that the claimant did not adapt her CV to the roles applied for and it was considered it was not evident she met the minimum criteria. Although the covering letters provided some further evidence it was not always specific as to how her skills would lend themselves to the essential criteria. It was considered that the Claimant was not given adequate support during the process when she was absent on sick leave and that she may have been worn down by the process. It was considered that she should have been shortlisted for at least one of the roles, although that was not guarantee of success although it was possible she might have been.

152. It was considered that the information provided to the calibration panel had not been completely anonymised, however it was concluded she had not been treated unfairly by the panel. It was concluded she had not been victimised for raising grievances or bringing claims.

153. The claimant suggested if she had been promoted she would not have been at risk of redundancy. This was rejected, 10 people in lead roles were at risk of redundancy with there being only 4 lead roles available.

154. It was further concluded that the Claimant's race had not been a factor in the decision of the calibration panel or the selection panels for alternative roles.

155. The appeal was upheld, however Ms Cooper considered that the Claimant had not wanted reinstatement.

156. The Respondent subsequently admitted that the dismissal was unfair.

157. The Claimant subsequently sought reinstatement. The Respondent sent the Claimant an open letter on 24 January 2022 (incorrectly dated 2021) [p1132-1133]. Reinstatement could not be achieved because the consultant role had been filled. An offer of £30,000 was made (and paid), which covered loss of earnings until the Claimant started new employment and to allow for a shortfall in salary and pension contributions for 4 years.

Time limits

158. The Claimant did not address time limits in her witness statement. In answer to questions from the Judge the Claimant said that she had raised her grievance in March and got the outcome in May and she thought she had 3 months to bring a claim from the last act so brought the first claim in June. She accepted that at the time she was being advised by her trade union. In answer to questions by the Respondent, the Claimant confirmed she had access to union advice from 2006 and had access to the union's solicitors.

The Law

Unfair dismissal

159. The reason for the dismissal was redundancy which is a potentially fair reason for dismissal under section 98 (2) (c) of the Employment Rights Act 1996 ("the Act").

160. The statutory definition of redundancy is at section 139 of the Act. This provides that an employee shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to (section 139(1)(b)) "the fact that the requirements of (the employer's) business for employees to carry out work of a particular kind, or for employees to carry

out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish"

161. We considered section 98 (4) of the Act which provides "…. the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and – (b) shall be determined in accordance with equity and the substantial merits of the case".

162. The Claimant conceded that there was a genuine redundancy situation and the Respondent conceded that the dismissal was unfair. We had in mind the guidance in the cases of Williams & Ors v Compair Maxam Ltd [1982] IRLR 83; Safeway Stores v Burrell [1997] IRLR 200 EAT, and Morgan v Welsh Rugby Union [2011] IRLR.

163. In order to act fairly in a redundancy situation an employer is obliged to look for alternative work and satisfy itself that it is not available before dismissing for redundancy. It has been emphasised by the case law that the duty on the employer is only to take reasonable steps, not to take every conceivable step possible to find the employee alternative employment. In Thomas and Betts Manufacturing Co v Harding [1980] IRLR 255, the Court of Appeal ruled that an employer should do what it can so far as is reasonable to seek alternative work. This does not mean, however, as the EAT pointed out in MDH Ltd v Sussex [1986] IRLR 123, that an employer is obliged by law to enquire about job opportunities elsewhere and a failure to do so will not necessarily render a dismissal unfair.

164. The decision in Polkey-v-AE Dayton Services [1988] ICR 142 introduced an approach which requires a tribunal to reduce compensation if it finds that there was a possibility that the employee would still have been dismissed even if a fair procedure had been adopted. Compensation can be reduced to reflect the percentage chance of that possibility. Alternatively, a tribunal might conclude that a fair of procedure would have delayed the dismissal, in which case compensation can be tailored to reflect the likely delay. A tribunal had to consider whether a fair procedure would have made a difference, but also what that difference might have been, if any (Singh-v-Glass Express Midlands Ltd UKEAT/0071/18/DM).

165. It is for the employer to adduce relevant evidence on this issue, although a tribunal should have regards to any relevant evidence when making the assessment. A degree of uncertainty is inevitable, but there may well be circumstances when the nature of the evidence is such as to make

a prediction so unreliable that it is unsafe to attempt to reconstruct what might have happened had a fair procedure been used. However, a tribunal should not be reluctant to undertake an examination of a *Polkey* issue simply because it involves some degree of speculation (Software 2000 Ltd v Andrews [2007] ICR 825 and Contract Bottling Ltd v Cave [2014] UKEAT/0100/14).

166. In Software 2000 Ltd v Andrews [2007] IRLR 568 the EAT reviewed the authorities and gave the following guidance regarding the correct approach to 'Polkey' and in particular the difficulties inherent in what is a predictive exercise:

'(1) In assessing compensation the task of the Tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.

(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the Tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future.)

(3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.

(4) Whether that is the position is a matter of impression and judgment for the Tribunal. But in reaching that decision the Tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence.

(5) An appellate court must be wary about interfering with the Tribunal's assessment that the exercise is too speculative. However, it must interfere if the Tribunal has not directed itself properly and has taken too narrow a view of its role".

Equality Act claims

167. S. 13 of the Equality Act 2010 ("EqA") provides:

13 Direct discrimination
(1) 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.
(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.
(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.
(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.
(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.
(6) If the protected characteristic is sex—
(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;
(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.
(7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).
(8) This section is subject to sections 17(6) and 18(7).

168. S. 27 EqA provides:

27 Victimisation
(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.
(2) Each of the following is a protected act—
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.
(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.
(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule

Direct Discrimination

169. With regard to the claim for direct discrimination, the claim will fail unless the Claimant has been treated less favourably on the ground of her race than an actual or hypothetical comparator was or would have been treated in circumstances which are the same or not materially different. The Claimant needs to prove some evidential basis upon which it could be said that this comparator would not have suffered the same allegedly less favourable treatment as the Claimant.

170. 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."

171. 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 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 needed to have been of a different quality, but a claimant did not need to have to find positive evidence that the treatment had been on the alleged prohibited ground; evidence from which reasonable inferences could be drawn might suffice. As to the treatment itself, we 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).

172. In Madarassy v Nomura International Plc [2007] EWCA Civ 33 Mummery LJ stated: "The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a

tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an act of discrimination". The Supreme Court in Royal Mail Group Ltd v Efobi [2021] UKSC 33 confirmed that Igen Ltd and Ors v Wong and Madarassy v Nomura International Plc remained binding authority.

173. In Denman v Commission for Equality and Human Rights and ors [2010] EWCA Civ 1279, CA, Lord Justice Sedley made the important point that the "more" which is needed to create a claim requiring an answer need not be a great deal.

174. The function of the Tribunal is to find the primary facts and then look at the totality of those facts to see if it is legitimate to infer that the acts or decisions were done/made on prohibited grounds (Qureshi v Victoria University of Manchester [2001] ICR 863). In terms of drawing inferences, in Efobi v Royal Mail Group Ltd [2021] ICR 1263 Lord Leggatt, after referring to Wisniewski v Central Manchester Health Authority [1998] PIQR 324, said that, "Tribunals should, as far as possible be free to draw, or decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books before doing so."

175. In every case the tribunal has to determine the reason why the Claimant was treated as she was (per Lord Nicholls in Nagarajan v London Regional Transport [1999] IRLR 572 HL). This is "the crucial question." It is for the claimant to prove the facts from which the employment tribunal could conclude that there has been an unlawful act of discrimination (Igen Ltd and Ors v Wong), i.e., that the alleged discriminatory has treated the claimant less favourably and did so on the grounds of the protected characteristic. Did the discriminator, on the grounds of the protected characteristic, subject the claimant to less favourable treatment than others? The relevant question is to look at the mental processes of the person said to be discriminating (Advance Security UK Ltd v Musa [2008] UKEAT/0611/07). The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the claimant unreasonably. The mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one (London Borough of Islington v Ladele [2009] IRLR 154).

176. In Greater Manchester Police v Bailey [2017] EWCA Civ 425, Underhill LJ held at paragraph 99:

"I would not accept … that material showing discriminatory conduct or attitudes elsewhere in a particular institution is always inadmissible in considering the motivation of an individual alleged discriminator. Authoritative material showing that discriminatory conduct or attitudes are widespread in the institution may, depending on the case, make it more

likely that the alleged conduct occurred, or that the alleged motivations were operative. Or there may be some more specific relevance… But such material must always be used with care, and the Tribunal must in any case identify with specificity the particular reason why it considers the material in question to have probative value as regards the motivation of the alleged discriminator(s) in any particular case: as Elisabeth Laing J put it, [in the EAT] there is no "doctrine of transferred malice""

177. "Could conclude" must mean that "a reasonable Tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the Claimant in support of the allegations of discrimination. It would also include evidence adduced by the Respondent contesting the complaint.

178. 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 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).

179. We needed to consider all the evidence relevant to the discrimination complaint, that is (i) whether the act complained of occurred at all; (ii) evidence as to the actual comparator(s) relied on by the Claimant to prove less favourable treatment; (iii) evidence as to whether the comparisons being made by the claimant were of like with like; and (iv) available evidence of the reasons for the differential treatment.

180. Where the Claimant has proven facts from which conclusions may be drawn that the respondent has treated the Claimant less favourably on the ground of the protected characteristic then the burden of proof has moved to the Respondent. It is then for the Respondent to prove that it did not commit, or as the case may be, is not to be treated as having committed, that act. To discharge that burden it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic. That requires the Tribunal to assess not merely whether the Respondent has proven an explanation, but that it is adequate to discharge the burden of proof on the balance of probabilities that the protected characteristic was not a ground for the treatment in question.

181. The circumstances of the comparator must be the same, or not materially different to the Claimant's circumstances. If there is any material

difference between the circumstances of the Claimant and the circumstances of the comparator, the statutory definition of comparator is not being applied (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337). It is for the Claimant to show that the hypothetical comparator in the same situation as the Claimant would have been treated more favourably. It is still a matter for the Claimant to ensure that the Tribunal is given the primary evidence from which the necessary inferences may be drawn (Balamoody v UK Central Council for Nursing Midwifery and Health Visiting [2002] IRLR 288).

182. 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.

183. 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.

Victimisation

184. There was also a claim to consider under s. 27. Although the Respondent did not dispute the fact that the Claimant had performed protected acts within the meaning of s. 27 (1), it disputed the allegation that she had been subjected to detrimental treatment because of those acts.

185. A detriment is something that is to the Claimant's disadvantage. In Ministry of Defence v Jeremiah 1980 ICR 13, CA, Lord Justice Brandon said that 'detriment' meant simply 'putting under a disadvantage', while Lord Justice Brightman stated that a detriment 'exists if a reasonable worker would or might take the view that [the action of the employer] was in all the circumstances to his detriment'. Brightman LJ's words, and the caveat that detriment should be assessed from the viewpoint of the worker, were adopted by the House of Lords in Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL, in which Lord Hope of Craighead, after referring to the observation and describing the test as being one of "materiality", also said that an "unjustified sense of grievance cannot amount to 'detriment'". In the same case, at para 105, Lord Scott of Foscote, after quoting Brightman LJ's observation, added: "If the victim's opinion that

the treatment was to his or her detriment is a reasonable one to hold, that ought, in my opinion, to suffice"

186. Detriment is to be interpreted widely in this context. It is not necessary to establish any physical or economic consequence. Although the test is framed by reference to a reasonable worker, it is not a wholly objective test. It is enough that a reasonable worker might take such a view. This means that the answer to the question cannot be found only in the view taken by the ET itself. The ET might be of one view, and be perfectly reasonable in that view, but if a reasonable worker (although not all reasonable workers) might take the view that, in all the circumstances, it was to his detriment, the test is satisfied. It should not, therefore, be particularly difficult to establish a detriment for these purposes. (see Warburton v The Chief Constable of Northamptonshire Police [2022] EAT 42paragraphs 48 to 51)

187. 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*' she 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. The protected act must have had a significant influence on the outcome.

188. In Martin-v-Devonshire Solicitors [2011] ICR 352 a claim of victimisation failed because the motivation for the unfavourable treatment had not been the fact of the Claimant's complaints, but the way in which they had been made. The Claimant had been dismissed as a result of an irretrievable breakdown in the working relationship between her and her employers. The Tribunal dismissed her claims, holding that there were several things about the Claimant's behaviour in relation to her grievances (their frequency, repetitive nature and untruthful) which affected the employer's view and which owed nothing to the fact that the grievances had raised allegations of sex and disability discrimination. Having reviewed the law in this area the then President of the EAT, Underhill J, encouraged tribunals to concentrate upon the statutory language on causation (in the context of this case, the word '*because*') and he referred back to Lord Nicholls' test in *Nagarajan-v-London Regional Transport* [1999] ICR 877; "*whether the prescribed ground or protected act 'had a significant influence on the outcome'*" (paragraph 36).

189. In Woodhouse-v-West North West Homes Leeds Ltd [2013] UKEAT/0007/12 the EAT countenanced against using the case of *Martin* "*as a template into which to fit the factual aspects of a case in which victimisation was alleged.*" It was said that the circumstances in that case

had been exceptional and that tribunals needed "*to be cautious about regarding features such as a multiplicity of grievances and obsessive over-reaction by an employee as exceptional*". The EAT (His Honour Judge Hand QC presiding) referred back to paragraph 23 of the decision in Martin in which the Tribunal's finding in respect of the reason for dismissal had been dealt with. Within paragraph 98 of its own decision, the EAT then clearly accepted that an employee's conduct or behaviour might be a reason to separate (or stand between) the conduct complained of and the protected act.

190. In Warburton v The Chief Constable of Northamptonshire Police [2022] EAT 42 the EAT held, after considering and applying Chief Constable of West Yorkshire v Khan [2001] 1 WLR 1947 HL and Nagarajan v London Regional Transport [2000] 1 AC 502, at paragraph 64 that:

The "but for" test is clearly not applicable, setting the bar too low. But the "operative" or "effective" cause sets it too high if it leads to the error of looking only for the main or principal cause. Lord Nicholls' formulation - whether the protected characteristic or protected act "had a significant influence on the outcome" - is the correct test. And "the reason why" is to be preferred to "causation".

And then said that the strands are tied together in Chief Constable of Greater Manchester v Bailey [2017] EWCA Civ 425.

191. In order to succeed under s. 27, the Claimant needs to show two things; that she was subjected to a detriment and, secondly, that it was because of the protected act(s). We have applied the 'shifting' burden of proof s. 136 to that test as well. in Chief Constable of Greater Manchester v Bailey, it was said, "*It is trite law that the burden of proof is not shifted simply by showing that the claimant has suffered a detriment and that he has a protected characteristic or has done a protected act…*".

Time

192. Under section 123 of the Equality Act 2010 a complaint of discrimination may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates (s. 123 (1)(a)). For the purposes of interpreting this section, conduct extending over a period is to be treated as done at the end of the period (s. 123 (3)(a)) and this provision covers the maintenance of a continuing policy or state of affairs, as well as a continuing course of discriminatory conduct.

193. It is generally regarded that there are 3 types of claim that fall to be analysed through the prism of s. 123;

a. Claims involving one off acts of discrimination, in which, even if there have been continuing effects, time starts to run at the date of the act itself;
b. Claims involving a discriminatory rule or policy which cause certain decisions to be made from time to time. In such a case, there is generally a sufficient link between the decisions to enable them to be joined as a course of conduct (e.g. *Barclays Bank-v-Kapur* [1991] IRLR 136);
c. A series of discriminatory acts. It is not always easy to discern the line between a continuing policy and a discriminatory act which caused continuing effects. In *Hendricks-v-Metropolitan Police Commissioner* [2002] EWCA Civ 1686, the Court of Appeal established that the correct test was whether the acts complained of were linked such that there was evidence of a continuing discriminatory state of affairs. One relevant feature was whether or not the acts were said to have been perpetrated by the same person (*Aziz-v-FDA* [2010] EWCA Civ 304 and *CLFIS (UK) Ltd-v-Reynolds* [2015] IRLR 562 (CA)).

194. It is clear from the following comments of Auld LJ in Robertson v Bexley Community Service IRLR 434 CA that there is no presumption that a tribunal should exercise its discretion to extend time, and the onus is on the claimant in this regard: "It is also important to note that time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so the exercise of discretion is the exception rather than the rule". These comments have been supported in Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT and Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA. However, this does not mean that exceptional circumstances are required before the time limit can be extended on just and equitable grounds. The law does not require exceptional circumstances: it requires that an extension of time should be just and equitable - *Pathan v South London Islamic Centre EAT 0312/13*.

195. Per Langstaff J in Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0305/13 before the Employment Tribunal will extend time under section 123(1)(b) it will expect a claimant to be able to explain firstly why the initial time period was not met and secondly why, after that initial time period expired, the claim was not brought earlier than it was.

196. However, As Sedley LJ stated in Chief Constable of Lincolnshire Police v Caston at paragraphs 31 and 32: “In particular, there is no principle of law which dictates how generously or sparingly the power to enlarge time

is to be exercised. In certain fields (the lodging of notices of appeal at the EAT is a well-known example), policy has led to a consistently sparing use of the power. This has not happened, and ought not to happen, in relation to the power to enlarge the time for bringing ET proceedings, and Auld LJ is not to be read as having said in Robertson that it either had or should. He was drawing attention to the fact that the limitation is not at large: there are statutory time limits which will shut out an otherwise valid claim unless the claimant can displace them. Whether a claimant has succeeded in doing so in any one case is not a question of either policy or law: it is a question of fact sound judgement, to be answered case-by-case by the tribunal of first instance which is empowered to answer it."

197. In exercising its discretion, tribunals may have regard to the checklist contained in S.33 of the Limitation Act 1980 (as modified by the EAT in *British Coal Corporation v Keeble and ors 1997 IRLR 336, EAT*). In *Department of Constitutional Affairs v Jones 2008 IRLR 128, CA*, the Court of Appeal emphasised that these factors are a 'valuable reminder' of what may be taken into account, but their relevance depends on the facts of the individual cases, and tribunals do not need to consider all the factors in each and every case. In Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23, the Court of Appeal did not regard it as healthy to use the checklist as a starting point and that rigid adherence to a checklist can lead to a mechanistic approach to what is meant to a very broad general discretion. The best approach is to assess all factors in the particular case which it considers relevant to whether it is just and equitable to extend time including in particular the length of and reasons for the delay. If the Tribunal checks those factors against the list in Keeble, it is well and good, but it was not recommended as taking it as the framework for its thinking.

198. The EAT in Miller v Ministry of Justice UKEAT0003/15, observed that there were two types of prejudice including forensic prejudice a Respondent may suffer if the limitation period is extended by many months or years, caused by fading memories, loss of documents and losing touch with witnesses. It was further said that "*if there is forensic prejudice to a Respondent, that will be "crucially relevant" in the exercise of discretion, telling against an extension of time. It may well be decisive."*

199. A tribunal considering whether it is just and equitable to extend time is liable to err if it focuses solely on whether the claimant ought to have submitted his or her claim in time. Tribunals must weigh up the relative prejudice that extending time would cause to the respondent on the one hand and to the claimant on the other: Pathan v South London Islamic Centre EAT 0312/13 and also Szmidt v AC Produce Imports Ltd UKEAT 0291/14.

200. No one factor is determinative of the question as to how the Tribunal ought to exercise its wide discretion in deciding whether or not to extend time. However, a claimant's failure to put forward any explanation for delay does not obviate the need to go on to consider the balance of prejudice

Conclusions

General conclusions

201. Before addressing the specific allegations there are some general conclusions which are applicable to all of them. The Claimant was very keen to impress on the Tribunal the nature of the environment in which she worked, in particular that BAME employees were underrepresented at senior level. It was submitted on her behalf that there was difficulty, from her point of view, to penetrate level 2.2 and above. She had applied for many roles since 2015 and had been unsuccessful. It was accepted by Counsel for the Claimant that there was no doctrine of transferred malice and if an organisation is predominately white that did not necessarily mean that anything said or done was discriminatory and matters needed to be looked at on an individual basis. The Claimant asserted that decisions were made by white individuals in a white organisation and that raised issues of subconscious bias. We were urged not to consider the allegations in complete isolation from the surrounding circumstances.

202. The Claimant made reference to the Respondent being a white supremacist organisation and specifically she said that Ms Hogfress and Ms Conwell were racist. There were not any conversations or documents, apart from one, which the Claimant said had overtly or implicit racial remarks, connotations or undertones. The only suggestion of a racial slur was in a conversation between the Claimant and Ms Conwell. The Claimant's initial oral evidence was that she was told, Asian people were not good enough. However, on being referred to the e-mail the Claimant sent following the conversation, it was apparent that her more contemporaneous record was different. The Claimant had taken a line out of context, something she also had done in respect of the conversations between Ms Zerebecki and Ms Hogfress on 12 March 2020. Ms Conwell had acknowledged that the Claimant thought there could be racism and said, "this didn't necessarily mean it was down to racism, it could just be that they were not good enough." This was with reference to applying for roles. This was not put to Ms Conwell and we considered that it showed Ms Conwell was alive to the possibility of racism but also that there could be an innocent explanation. We did not consider that there was a racial slur or that there was a racial motivation behind what was said. This was the only thing said or done, other than the allegations themselves, which the Claimant said tended to show race was a motivating factor. Counsel for the Claimant accepted in submissions that other than that document, there was not a document which tended to show a racial motive. There was also no evidence that Ms

Conwell was orchestrating things behind the scenes and we concluded no such orchestration took place.

203. We took into account the statistical evidence, however it was of limited assistance. The statistics were for the Respondent as a whole and were a snapshot in time. There was very little information contained within the single page and it was a global view. There was no evidence as to what had occurred historically or the reasons behind it. We also accepted that the Respondent had been aware that there was a lack of diversity and had been trying to address the issue, by means of recruitment and equality and diversity training, including training in unconscious bias. We reminded ourselves of the need to examine the motivation of the alleged discriminators.

204. It was also relevant that the Claimant had a fundamental misunderstanding about the purpose of a development plan. A development plan was a tool used to help and support an employee to prepare themselves and gain evidence to support an application for a promotion role. Such plans were used by many of the Claimant's colleagues, including those who were in more senior positions. The Claimant considered that it was a performance improvement plan, which was something to be used when an employee's performance was unsatisfactory. There was never a suggestion that the Claimant's performance was less than was expected and she was always appraised as achieving the required standard. The Claimant refused to accept the explanations of her colleagues as to its purpose. Similarly the Claimant declined opportunities to receive feedback on her applications for roles. The Respondent operated competency based criteria when interviewing to fill roles within it. Applicants needed to provide evidence of how they met the competencies and this included the thought processes they had used in their examples and how they overcame problems. The Claimant believed that her CV provided sufficient evidence, however this was not the opinion of the various managers who were hiring for positions. If the Clamant had accepted the offer of feedback it was very likely that she would have received advice as to how better demonstrate how she met the competencies. When scoring candidates at interview, it was the answers given in that interview and the information in the application which was taken into account and not any other knowledge the manager had of the applicant.

205. The Claimant accused Ms Hogfress of being racist and that there was a racial motivation for the decisions she took. The Claimant adduced no evidence that Ms Hogfress had said anything, in writing or orally, which overtly or implicitly was derogatory towards those from a non-white background or that had any racial undertone or connotation. The Claimant relied upon the accumulation of the allegations as being evidence of a racial motive. It was significant that the Claimant said that Ms Hogfress had made

white employees leave and was difficult with others. further the Claimant and the other unsuccessful consultants for the Retail Lead role considered they all had been undermarked and should have been talent banked. This evidence strongly pointed away from a racial motive. The Claimant did not agree with Ms Hogfress's assessment of how she performed at interview, however it was notable that the reasons given by Ms Hogfress remained consistent. The Claimant effectively relied upon a belief that Ms Hogfress had a racial motivation, however a belief is different to evidence tending to show something. It was also significant that the Claimant's colleagues had not witnessed bad behaviour towards her in meetings. The bare facts of a difference of treatment only indicates a possibility of discrimination and something more is needed to tend to show that things occurred because of race and the Claimant was unable to demonstrate any evidence which tended to show a racial motive by Ms Hogfress.

206. In terms of the comparators relied upon, it was important to remember that a comparator must be in the same or not materially different circumstances to that of the Claimant. In terms of actual comparators, Ms Zerebecki, Mr Shedden and Mr Endicott, they were in positions which were more senior to the Claimant, which was a differentiating feature. Mr Shedden and Ms Zerebecki had used development plans for their own careers which was a significant difference. The Claimant adduced no evidence which tended to show that these alleged comparators were in the same circumstances as herself. None of the alleged comparators applied for the same roles as the Claimant at the material times. We were not satisfied that they were appropriate comparators.

207. In terms of Ms Martin, she came from a strong project manager background, whereas the Claimant had a different skill set. The previous experience of applicants is relevant when considering whether they are an appropriate comparator. An appropriate comparator for the purposes of the Claimant's claim would be someone who had the same or similar experience and qualifications and who had undertaken the same or similar roles. The Claimant and Ms Martin had different experiences and work history and in the circumstances we were not satisfied Ms Martin was in the same or broadly similar circumstances as the Claimant.

208. For the purpose of the victimisation claims the Respondent accepted that the matters asserted to be protected acts were such within the meaning of the Equality Act.

<u>D1. On 23 February 2018, Hazel Hogfress and Marc Pugh gave the Claimant an unwarranted low score in her interview for an Application Support Role which meant that she was not talented banked. Perpetrator: Hazel Hogfress (Direct Discrimination).</u>

209. The Claimant alleged that she had been given an unwarranted low score and had not been talent banked for the role. It was significant that the other consultants, who were white, also considered that they had been underscored and should have been talent banked. It was conceded by the Claimant that the successful candidate, Mr Waylen was the obvious good candidate. We accepted that there was a big step up from level 2.1 to 2.2 and it was not unusual for consultants to be unsuccessful in their first application for a lead role. The Claimant considered that she had demonstrated she met the competencies, however we accepted that evidence based assessments require careful thought so that the required competencies are demonstrated. We accepted that there was a lack of examples given and this was consistent with the way the Claimant applied for other roles in the subsequent redeployment process. The unchallenged evidence of Mr Pugh was that the Claimant did not provide sufficient examples. It was significant that the Claimant did not take up the opportunity of feedback, which would have assisted her for future applications.

210. The Claimant did not adduce any evidence which tended to show that the score she received, was because of her race or that a white comparator would have received a better score and she failed to discharge the initial burden of proof.

211. In any event we were satisfied that white consultants were also deemed not to have met the benchmark and not talent banked. We were satisfied that the Respondent proved that the reason for the score was that the Claimant failed to provide sufficient examples which were explained in enough detail to evidence why she had met the benchmark criteria for the role. We were satisfied that the Claimant's racial background played no part whatsoever in the scoring. The allegation was therefore dismissed.

D2. In March / April 2018 Hazel Hogfress initially refused to allow the Claimant to apply for a secondment to the M&O Platform Lead role (which the Claimant says is effectively the role she had been performing since June 2017. The Claimant met with Mrs Hogfress to challenge her decision as discrimination. Mrs Hogfress grudgingly agreed during this meeting to allow the Claimant to be interviewed. Perpetrator: Hazel Hogfress. Comparator: Penny Martin, Barry Shedden & Hayley Zerebecki (Direct Discrimination).

212. The Claimant believed that she had been undertaking the lead role, however we concluded that although she was undertaking the majority of the role, in particular the day to day matters, she was not undertaking the whole role. She was filling a gap and Mr Shedden was undertaking the parts she could not do. We accepted that Mr Shedden and Ms Hogfress did not consider that the Claimant was undertaking the lead role, but that she was undertaking parts of it. It was communicated to the Claimant, by Mr Shedden, that Ms Hogfress did not consider that the Claimant should apply

for the role. This was in the context that the Claimant had applied for the retail lead role a month before and not met the benchmark. The Claimant had not taken up the opportunity of feedback. The Claimant accepted in cross-examination that if the reason was that she had not addressed the reasons for her marks at the previous interview by accepting feedback and building up necessary experience that would not indicate a racial motivation. There was a general practice that if an employee did not benchmark for a role that they should wait 6 months before re-applying for the same role, although there was flexibility. The Claimant adduced no evidence which tended to suggest that a white employee in the same circumstances as herself would have been treated differently. Ms Hogfress applied the same logic to a white employee, Ms Gough, when she applied for the secondment opportunity for the Transition lead role in March 2020. We were not satisfied that the Claimant had discharged the initial burden of proof.

213. In any event we were satisfied that Ms Hogfress had said the Claimant should not apply, because she had not benchmarked for a similar role about a month before, she had not sought feedback and had not taken the time to gain further experience so that she could demonstrate the competencies. We were satisfied that the Claimant's race played no part in the decision by Ms Hogfress.

214. The Claimant had a meeting with Ms Hogfress, however she did not challenge the decision as discrimination and there was no mention of the Claimant's race. The Claimant said she was being treated differently and it was constructive dismissal. At the meeting Ms Hogfress tried to explain the need for feedback and to explain how examples worked and what was being looked for. The Claimant declined that opportunity. Ms Hogfress agreed to interview the Claimant, however it was not done grudgingly. The Claimant did not adduce any evidence which tended to suggest this was done because her race and the initial burden of proof was not discharged.

215. The allegation was dismissed

<u>D3. In April / May 2018 Hazel Hogfress refused to allow the Claimant to be interviewed by the Platform Manager Barry Shedden for the position referred to in para 5.b (as would have been usual practice) and decided that the interview would instead be conducted by herself and Darren Marsden because she knew that Barry Shedden valued her abilities. Perpetrator: Hazel Hogfress. Comparator: Penny Martin, Barry Shedden & Hayley Zerebecki (Direct Discrimination)</u>

216. It was the general practice that an interview for a lead role was by a platform manager and the recruiting manager. We accepted that Ms Hogfress was concerned that the Claimant had made allegations against her. The Claimant was the only person not to be interviewed by a platform manager and Ms Hogfress. It was notable that Mr Shedden was not

involved in any of the interviews. The appropriate comparator would be someone with the same professional background and experience as the Claimant, and who had also made complaints about the recruiting manager. There was no evidence that any of the actual comparators had made such complaints and therefore the only appropriate comparator would be a hypothetical one.

217. The Claimant relied upon a general belief and assertion and that Ms Hogfress had undertaken various adverse decisions against her. There was no evidence, either oral or documentary, that Ms Hogfress had uttered a racially motivated remark or done something similar. The reliance on the ethnic diversity of the Respondent did not give any insight into the mindset of Ms Hogfress and was of very limited assistance. The Claimant relied upon a difference of treatment with her colleagues, however a difference of treatment without something more is not sufficient to shift the burden of proof. We rejected the submission the totality of the allegations tended to suggest the reason was racially motivated. As explained under allegations D1 and D2 Ms Hogfress treated white colleagues in a similar manner to the Claimant. Further there were non-racial motivated explanations for the other allegations in which Ms Hogfress was alleged to have been the perpetrator. A difference in treatment alone is insufficient without something more. We were not satisfied that the Claimant had proved primary facts that tended to show that the reason for the decision was because of her race.

218. In any event we were satisfied that Ms Hogfress, as hiring manager, genuinely believed that she should remain on the panel. Further that because the Claimant had alleged she had manipulated matters Mr Marsden, who was more senior would give an objective view and tell her if she was wrong. She thought Mr Marsden would be impartial. We were satisfied that the Claimant's race played no part in Ms Hogfress's thought process.

219. The allegation was dismissed.

D4. On 4 May 2018 Hazel Hogfress and Darren Marsden rejected the Claimant's application for the M&O role following an interview in which Claimant was given an unwarranted low score.5 The only feedback received at this time from Mrs Hogfress was that the Claimant was 'Not Ready' to be promoted to Lead, even though she had been carrying out the role. Perpetrators: Hazel Hogfress and Darren Marsden. Comparator: Penny Martin, Barry Shedden & Hayley Zerebecki.

220. The Respondent had lost Mr Marsden's notes of the interview and at least a page of Ms Hogfress's notes was missing. It was disputed as to how well the Claimant performed at interview. The Claimant had pre-prepared examples for the competencies and when questioned about them did not deviate from her notes. As such she did not give current examples

and the examples did not sufficiently demonstrate she met the competencies. It was notable that the Claimant had not sought feedback which would have assisted her in preparing for the interview. Other than a general assertion to Ms Hogfress and Mr Marsden, no examples were put to them that tended to suggest a racial motive. There was no evidence to suggest that Mr Marsden was influenced by Ms Hogfress. The Claimant did not perform well at the interview and we were satisfied that the Claimant was scored on the basis of that performance. This was consistent with her performance the month before and how her applications for roles, during the subsequent redeployment process, appeared to the respective hiring managers.

221. We were not satisfied that the Claimant had adduced any evidence that a white candidate, in the same circumstances as herself, would have been scored differently and she failed to discharge the initial burden of proof. In any event we were satisfied that the Respondent proved that the reason was because the Claimant failed to demonstrate sufficient evidence in respect of the competencies and that was the reason for her scores and her race played no part whatsoever.

222. In terms of the feedback, the Claimant was not simply told she was not ready. Ms Hogfress offered to go through the interview notes with her, offered to mentor her and help her with a development plan. The Claimant declined to take the opportunity. We considered that this was due to the Claimant's misunderstanding as to the purpose of a development plan and refusal to accept from others what its purpose was. The Claimant failed to adduce facts which tended to show a white colleague would have been treated differently or that her race was the reason. There was evidence that white colleagues had used development plans as tools to help with progression.

223. The allegation was dismissed.

<u>D5. In March 2019 the Respondent awarded the Claimant only a standard rating in her annual appraisal in circumstances where her performance warranted a higher rating, failing to acknowledge her achievements. Perpetrator: Barry Shedden.</u>

224. The Claimant, in her grievance had said that Mr Shedden should be interviewed as a credible witness and in cross-examination she said that he was not a racist. Mr Shedden was said to be the perpetrator as part of the allegation, although the Claimant's case was that he was under the influence of Hazel Hogfress. Other than Ms Hogfress being Mr Shedden's line manager, Counsel for the Claimant accepted that she had adduced no examples of how Mr Shedden was influenced by Ms Hogfress. We did not accept that he was coerced or influenced by Ms Hogfress.

225. It was notable that in the grievance process Mr Shedden acknowledged that the Claimant had been undertaking a large part of the lead role. We accepted Mr Shedden's evidence that it was common after receiving an 'exceeding' rating that the following you the rating dropped to 'achieving'. The Claimant had not taken on additional responsibility and 'owned' lead activities and she had not sought lead opportunities for that year, which was necessary to be scored as exceeding. Other than an assertion that the reason was because of the Claimant's race, which was denied, no evidence was adduced which tended to show that Mr Shedden had a racial motive, let alone that a white colleague, in the same circumstances would have been treated differently. The Claimant failed to discharge the initial burden of proof. In any event we were satisfied that the reason was that additional responsibility had not been taken on and that Mr Shedden considered it was the correct rating and the Claimant's race played no part in his decision making process. The allegation was dismissed.

D7. In February 2020, the Claimant was asked to cover the M&O Platform Lead. role (which the Claimant says is effectively the role she had been performing previously). When the role became vacant, she applied for it. On 12 March 2020 Hayley Zerebecki and Hazel Hogfress rejected the Claimant's application for the vacant M&O Platform Lead position by refusing to interview the Claimant for the reason that she did not meet the criteria, and also withdrew the vacancy. Perpetrators: Hazel Hogfress and Hayley Zerebecki. Comparator: Penny Martin, Barry Shedden & Hayley Zerebecki (Direct Discrimination)

226. Ms Zerebecki accepted that on paper the Claimant met the minimum requirement for the role. Ms Hogfress at the time did not accept this, but in cross-examination accepted that with hindsight and that the Claimant had met the minimum requirement before she did meet it. By this time the Claimant had not sought feedback from her earlier interviews and not set up a development plan. The Claimant was told by HR that she had been rejected because she had not met the minimum criteria. We found that Ms Hogfress and Ms Zerebecki were considering whether to suspend the vacancy on the basis of the imminent return of Ms Martin, the unfolding covid-19 situation and that there had been a reduction of work. The decision to suspend the process was taken before the decision to reject the Claimant. The Claimant did not adduce any evidence which tended to suggest that the vacancy was withdrawn because of her race, or that if a white candidate had been in her position they would have been treated any differently and the initial burden of proof was not discharged in that respect. We accepted that the reason that was put forward by the Respondent and the Claimant's race played no part whatsoever.

227. We accepted that it was difficult for the Claimant to see why she had been rejected. She was sent an automatic response by HR. In the circumstances the response she received was unreasonable, in that Ms Zerebecki accepted that on paper the Claimant met the minimum requirements. However unreasonable treatment does not of itself found an inference of discrimination. The Claimant needed something more to discharge the initial burden of proof. We accepted Ms Zerebecki's evidence that she could not see how the Claimant was going to meet the benchmark for the role without putting in place a development plan and that she did not think she was ready. We were satisfied that the decision had already been taken to suspend the process and that the Claimant's race played no part whatsoever in the reason given for the rejection.

228. The allegation was dismissed.

D8. On 12 March 2020, the Claimant lodged a grievance alleging, amongst other matters, race discrimination and on 21 May 2020 the Respondent's grievance outcome was delivered to her by Leanne Pearce and she had failed to consider the Claimant's allegations of race discrimination. In particular, the Respondent's Case Management team and / or Leanne Pearce did not consider the evidence from Barry Shedden that the Claimant had been carrying out his role for an extended period of time. Perpetrators: Leanne Pearce, Carly Kincell and Tracy Conwell. (Direct Discrimination)

229. The Claimant withdrew the allegation that Carly Kincell was a perpetrator. She maintained that Ms Pearce and Ms Conwell had discriminated against her. The chair of the grievance was Ms Christmas and Ms Pearce was assigned to provide HR support. It was not alleged that Ms Christmas had discriminated against the Claimant. Ms Christmas was the decision maker and Ms Pearce advised on process. It was notable that in the months that followed, Ms Pearce sent the Claimant numerous supportive e-mails. Ms Pearce had to ensure that all evidence had been considered and Ms Christmas was aware of the options that she had when making a decision. Ms Conwell had no involvement in the grievance and was unaware of its existence at this time.

230. The allegation was put on the basis that Mr Shedden's evidence had not been considered in respect of the role the Claimant had been carrying out. Mr Shedden's evidence was summarised in the outcome report, including that she had undertaken the majority of the lead tasks. We were not satisfied that the Claimant had proved facts which tended to show that Mr Shedden's evidence had not been taken into account. Further we were not satisfied that in this respect the Claimant proved facts which tended to show a hypothetical comparator would have been treated differently. It was also suggested that the allegations of race discrimination had not been considered. The Claimant did not adduce evidence as to why she said this

was because of her race and in closing submissions it was said the Claimant felt as if the organisation was closing in on her and she had accused Ms Conwell of being racist. The interviews with the witnesses included questions about behaviour towards the Claimant and no evidence was forthcoming which tended to suggest a racial motive. It was not accepted that the Claimant was treated differently by Ms Hogfress. The outcome did not directly deal with racial discrimination. There needed to be something more than an assertion and the Claimant was unable to point towards anything which tended to suggest that it was motivated by race. In any event we were satisfied that the Respondent proved that the focus had been on the 28 specific allegations made by the Claimant and nothing in the investigation had shown race was a factor. The decision was taken by Ms Christmas and the lack of direct reference was oversight and we were satisfied that the Claimant's race played no part whatsoever. The allegation was dismissed.

V1. From 12 March 2020 (date of Protected Act 1) to 14 September 2020 (date of Second Claim), not moving the Claimant out of the Transition Team (alleged to be on the grounds of Protected Act 1). Perpetrator: Leanne Pearce and Tracy Conwell. (Victimisation)

231. The Claimant was not moved out of the Transition team during the relevant period. The Claimant considered that this was to her disadvantage given the grievance she had raised and we accepted that a reasonable employee could have reached the same conclusion and that there was a detriment.

232. However, this was against a background in which it was unusual to move someone from a team because they had raised a grievance and it was necessary for there to be a vacant role to be moved into. What occurred took place with the background of covid-19 and that the country was initially in a state of uncertainty and then it went into a national lockdown. The Claimant did not receive an outcome to her grievance until May 2020. The normal approach, which was adopted in this case, was that there was a change of line manager, but the line management was kept in the same area. Mr Endicott was appointed as line manager on 23 March 2020 and allegations had not been made against him. The management of the Claimant bypassed Ms Hogfress and went straight to Mr Marsden. In that time, enquiries were made to see if an external manager could line manage the Claimant, but due to the unfolding covid-19 situation one could not be found. From June attempts were made to see if the Claimant could be transferred to a different team. The Claimant applied for a 2.2 role and was offered assistance with her application by Mr Endicott, Mr Stroud and Mr Marsden. The Claimant accepted in cross-examination that the e-mails sent at this time appeared to be constructive and reasonable. Ms Conwell had no involvement until she was made aware of the situation in June 2020 and

she responded to the Claimant's queries but was not asked to move her. At this time the Claimant was provided with a large amount of assistance and support in trying to effect a move. We accepted that Ms Pearce had done all that she could in the circumstances.

233. In closing submissions, it was said, on behalf of the Claimant, that what tended to show what had happened was because she raised the grievance, was that from the Claimant's perspective HR was not assisting with the less favourable treatment in the heat of the moment. It was accepted there was nothing in terms of documentary evidence. In evidence the Claimant said that everyone wanted to her to move, but that it was Ms Pearce and Ms Conwell who wanted her to stay so that she would suffer, this was not put to those witnesses. The Claimant did not adduce any facts which tended to suggest that the motivation for her remaining in the team was because she had raised a grievance and the initial burden of proof was not discharged.

234. In any event we were satisfied that external options were looked at and could not be found. There was a change of line manager and the normal process was to keep someone in their normal area of management. We also accepted that it was not for HR to move people and that they did not have the necessary knowledge to place technical people in different teams. We accepted that the Respondent did all it could in the circumstances and that the fact the Claimant had raised a grievance played no part in the decision making whatsoever. The allegation was dismissed.

V6. James Stroud collaborated with the management team offer in mid December 2020 to move her into a junior, unsuitable Analyst position. There were meetings in which attempts were made in December 2020 and January 2021 by James Stroud / Ms Gash to force her to accept that role after she refused it. (Protected Acts1, 2 and 3) Perpetrator: James Stroud and Ms Gash. (Victimisation)

235. There was a difference in opinion between the Claimant and Mr Walsh as to whether the proposed role was a 2.1 level role or more junior. We accepted Mr Walsh's evidence that he had created the role for the Claimant and it was a 2.1 role and not a replacement for a graduate. The role was found against a background where a change programme was on ongoing in much of the Respondent, but Mr Walsh's old team had been trying to increase headcount. There were very limited opportunities for anyone to move with the Respondent at the time. The e-mails sent by Mr Walsh set out the role and invited the Claimant to take time to consider and there was nothing within them that suggested pressure was being applied. The Claimant, when giving evidence, was unable to explain what the pressure was and when the Respondent's witnesses were cross-examined no examples of how pressure was exerted was put to them. We did not

accept pressure was applied to the Claimant and no detriment occurred. The allegation was dismissed.

D13/V9 Not being appointed to the remaining one IT Operations Consultant role, which then resulted in her being put at risk of redundancy. And D17/V13 Being dismissed. (Direct Discrimination and Victimisation)

236. We accepted that not being appointed to the remaining consultant role and being dismissed was to the Claimant's detriment. The Claimant relied upon bringing her Employment Tribunal Claims as protected acts, which was conceded by the Respondent.

237. The Claimant's case in relation to the dismissal, for the purposes of the direct discrimination and victimisation claims, was that it was dependent upon the failure to appoint her being because of her race or that she had brought a claim. If allegation D13/V9 failed it was accepted that D17/V13 would fail.

238. The scores given by Mr Griffiths and Ms Basting were much lower than the scores the Claimant gave herself. The management based their scores on the evidence provided by the Claimant in her application for the remaining role. It was significant that Mr Griffiths sought to help the Claimant to improve her application and that he made suggestions and gave feedback on two occasions before the application was submitted. Mr Griffiths was not involved in scoring any of the other Consultants. Mr Griffiths was not influenced by anybody in relation to how he scored the Claimant. The Claimant adduced no evidence which suggested that Mr Griffiths had made a racial offensive comment or remark or one which had a racial undertone. The Claimant accepted that when he started his line management of her, he had asked her to call out anything that she considered was racist. The Claimant did not adduce any facts which tended to suggest Mr Griffiths had been influenced by someone else or that she had brought a claim or raised a grievance against the Respondent. The Claimant also did not adduce facts which tended to show that Mr Griffiths would have scored a hypothetical comparator differently or that the scores were motivated by her race.

239. The scores by Mr Griffiths and Ms Basting were not the scores used to rank the candidates. The validation panel looked at the four candidates and focused on how the candidates had scored themselves and when scoring them cross-referenced each application with the others. The management score for the Claimant was increased, however she was second in the ranking. We accepted that Ms Gough did not know who the candidates were or that the Claimant had brought a claim or raised a grievance. There was no evidence that the panel was aware of the claims or grievance or the racial background of the Claimant. It was not put to Ms

Gough that the scoring had been motivated by race or that a protected act had been done. The only evidence was that that the scoring was undertaken on the basis of the evidence supplied by the candidates and it had been anonymised.

240. The Claimant submitted that if Mr Griffiths had scored the Claimant higher then the calibration score might have been higher. We rejected that submission. The focus of the calibration panel was on how the applicants had scored themselves and the evidence they had supplied.

241. We were not satisfied that the Claimant had discharged the initial burden of proof and the claims were dismissed.

Time limits for the Equality Act claims

242. In the circumstances none of the allegations were found to be direct discrimination or victimisation and it was therefore unnecessary to consider whether the claims were brought in time.

243. In any event, if allegations D1 to D5 only had been proven we would not have found it was just and equitable to extend time. The last allegation would have been presented a year outside of the time limit. The Claimant had access to and was being advised by her trade union and she would have been familiar with the process as evidenced by the signing of a Settlement Agreement. It was also apparent that some of the Respondent's witnesses had difficulty in recollecting everything which occurred in 2018 and 2019 and that there was some forensic prejudice.

Unfair dismissal

244. The Respondent conceded that the dismissal was unfair and therefore the only issue between the parties was whether if a fair procedure had been followed would the Claimant have been dismissed in any event. The burden of proof, in this respect was on the Respondent. The appeal found that the information given to the calibration panel had not been fully anonymised, however we were satisfied that the panel did not know who the applicants were or their ethnicity. We were satisfied that the Respondent had proved that the calibration panel's scoring had been based on what the individuals had scored themselves and the evidence they provided. We were satisfied that if the anonymisation process had been conducted to satisfaction of the appeal officer that the outcome of that process would not have been any different.

245. The appeal officer also considered that the Claimant should have been shortlisted for at least one role. The scrum master role was specifically mentioned and we also interpreted this to possibly mean the level 2.1

Operations Team Manager role. In relation to the other roles, we accepted the evidence given by the Respondent's witnesses that specific criteria was being applied to each role and that the applications made by the Claimant did not demonstrate she met all of the essential criteria. A reasonable employer could have reached those conclusions.

246. It was found on the appeal that the Claimant should have been offered at least one interview. We accepted the evidence of Ms Wagstaff about the essential criteria for the particular role and that no-one was initially appointed and the ultimate successful candidate had extensive scrum master experience, whereas the Claimant did not. We considered that the Respondent had proved it was highly unlikely that if the Claimant was interviewed, she would have been appointed.

247. Similarly in relation to the Operations Team Manager role, we accepted that there were a significant number of applicants for four positions and five of those interviewed were on the redeployment register. There was a dispute between the parties as to whether the Claimant met the minimum requirement. The successful candidates had been involved in planning and forecasting in previous roles and we accepted that the Claimant's forecasting experience was different to that which the role required. We considered that the Respondent had proved that it was highly unlikely that if the Claimant had been interviewed she would have been appointed.

248. We were mindful that if the Claimant was interviewed she could have performed extremely well and that this needed to be taken into account. However it was also relevant that the successful candidates, on paper, appeared to be much better qualified for the roles than the Claimant. We considered that there was a small chance that the Claimant could have been redeployed if offered an interview, however that chance was no greater than 10%. In the circumstances if a fair procedure had been followed there was a 90% chance that the Claimant still would have been dismissed.

249. Therefore the claims of direct discrimination and victimisation were dismissed. The Claimant was unfairly dismissed and remedy will be determined at a separate hearing. The parties shall provide proposed directions for a remedy hearing within 21 days of receipt of the Judgment and Reasons.

250. Both parties asked the Tribunal to give an indication about the likely award for the unfair dismissal claim. At the remedy hearing credit will need to be given for the £30,000 paid to the Claimant by the Respondent. Our provisional view is that once credit is given for the £30,000 and a deduction

of 90% is made to reflect our finding on Polkey, it is highly unlikely that the Claimant will receive any additional sum.

Employment Judge J Bax
Date: 26 January 2023

Judgment sent to Parties: 26 January 2023

FOR THE TRIBUNAL OFFICE