Case No: 1406053/2020

EMPLOYMENT TRIBUNALS

Claimant: **Miss P Sullivan**

Respondent: **The Isle of Wight Council**

PRELIMINARY HEARING

Heard at: **Bristol** **On: 12, 13, 14, 15 and 16 December 2023**
Writing 9 January and 1 February 2023

Before: Employment Judge Midgley
Mr E Beese
Mrs C Lloyd-Jennings

Representation
Claimant: In person.
Respondent: Mr F McCombie, Counsel

Judgment having been handed down verbally on 16 December 2022 and a request for written reasons having been made, the following written reasons are provided in accordance with Rule 61.

JUDGMENT

The claims of direct sex discrimination and victimisation are not well founded and are dismissed.

REASONS

Claims and Parties

1. By a claim form presented on 14 November 2020, the claimant brought claims of sex discrimination and victimization. The former claim related to comments which the claimant alleged had occurred during two job interviews on 31 October and 5 December 2020 respectively, the latter claim related to the respondent's decision not to offer the claimant a stage 2 review in respect of the grievance she had raised about that conduct. The claimant alleged that that decision may also have been influenced by the fact that the claimant had previously presented claims in the Tribunal against the Post Office Ltd for sex discrimination and Solent Composite Systems Ltd for equal pay.

2. Specifically, the claimant made the following allegations of direct discrimination which we have had to determine:

   2.1. At a job interview on 31 October 2020 at which Miss Martin and Mr Philbrick were present, as the claimant removed her coat and turned her back to the panel to place her bag and coat on the floor, Mr Porter stated loudly, "I'm just looking at the arse" before stating repeatedly to the claimant as she began to turn around "don't turn around, don't turn around, don't turn around;"

   2.2. At a job interview on 5 December 2020, at which Miss Martin and Mr Philbrick were present, Mr Higginson banged his hand on the table and said to the claimant, apropos of nothing, "get some contraception," a remark which the claimant believed was addressed to her.

3. The claimant also brought claims of having suffered an unlawful detriment on the grounds of having made a protected disclosure arguing within the claim form that the definition of worker within s.47B ERA 1996 should be extended to include job applicants, relying on Gilham v Ministry of Justice [2019] UKSC 44 and Day v Health Education England & Ors [2017] EWCA Civ 329. The protected disclosures she relied upon included a disclosure concerning alleged tax and accounting irregularities with the Shanklin Chine Trust, in circumstances where one of the respondent's employees was a Trustee of the Trust, and a police report.

4. ACAS early conciliation began on 18 September 2020 and a certificate was issued on 18 October 2020.

5. The respondent defended the claims. It argued that the direct discrimination complaints were out of time, but disputed that the conduct alleged occurred. It averred thta the claimant's allegations were considered within its complaints process, as the claimant was not an employee and was not therefore entitled to use its grievance process.

6. The case was listed for a case management hearing on 14 July 2021. At that hearing it was set down for a two day preliminary hearing to determine whether:

   6.1. the claimant was a worker within the definition in section 47B(1) and 48(1) ERA 1996,

   6.2. the claimant was an applicant within the meaning of s.39(3) EQA 2010 for the purposes of her complaint of victimisation regarding the decision not to offer her a stage 2 review in the complaints procedure,

   6.3. the claims were within time,

   6.4. the claimant should be permitted to amend her claim to add a claim of discrimination on the grounds of perceived disability.

7. The Judge identified the allegations pursued as discrimination and detriment and made orders for further clarification of the claims and an amended list of issues and for preparation for the preliminary hearing.

8. The preliminary hearing to determine the issues above was held by video on

29 and 30 November 2021. In a reserved Judgment dated 4 January 2022 EJ Goraj determined that the claimant was not a worker within the meaning of ss.47B or 48 ERA 1996 but was an applicant within the meaning of section 39(3) EQA 2010 and the Tribunal therefore had jurisdiction to hear the complaint under s.27 EQA 2010.

9. The case was listed for this final hearing.

Procedure, Hearing, and Evidence

10. The Tribunal was provided with the following documents for the hearing:

    10.1. An agreed bundle, split into four parts: A (Pleadings, Orders and Statements), B (contemporaneous documents), C (correspondence), D (other documents). The claimant provided a statement, and the respondent provided statements from Mrs Esther Martin, Mr Daniel Philbrick, Mr Scott Higinson, and Mrs Claire Shand.

    10.2. An agreed cast list, chronology and list of issues.

    10.3. An opening written argument from the respondent.

11. At the outset of the hearing, we clarified what we had received and indicated that we would take time to read the statements and the documents referred to in them. Surprisingly, the claimant had arranged to work in her current role for each day of the hearing, working a late shift, and requested an early finish so that she could begin work at 4:30pm.

Rule 50

12. Mr McCombie initially indicated that the respondent might apply for a restricted reporting order, but as the hearing was conducted by video and there were no members of the public observing, the respondent took a pragmatic approach and did not pursue the application.

Claimant's application to add documents to the bundle

13. The claimant indicated that she wished to adduce Facebook pages relating to some of the respondent's witnesses. Those documents were not in the bundle and the respondent objected to their inclusion. The claimant was able to provide them to the Tribunal to enable the Tribunal to better assess their relevance and their probative value and prejudicial effect. The claimant alleged that the Facebook posts contained evidence of social drinking which did not comply with the social distancing regulations which were then in force as a consequence of Covid-19. In addition, the claimant wished to adduce evidence of a Facebook post of one witness so as to suggest to that witness that they had not conducted themselves in a manner which was consistent with the need to recover from the health condition they detailed in their witness statement.

14. Lastly the claimant complained that the completed interview pro-formas for one of her interviews (containing the interviewers' handwritten notes) was not contained within the bundle. Additionally, she noted that the handwritten notes for one interview were very difficult to read.

15. The respondent agreed to locate and disclose the missing notes so that it could be added to the agreed documents and to provide a typed version of the illegible notes; these were added at D22-35.

Adjustments for the hearing

16. The claimant informed the Tribunal that she had asthma, for which she used steroid inhaler, and that she had a heart condition which could cause tachycardia type symptoms. She suggested that the latter condition had a tendency to flair up when she was stressed with the result that she had to pause and wait for it to abate. The Tribunal suggested that she should think of a non-verbal sign she could make to demonstrate that she was affected by those symptoms which would be used to indicate that she needed a brief adjournment. Furthermore, regular breaks of 10-15 minutes every hour were built into the Tribunal's timetable as an additional reasonable adjustment.

17. The Tribunal then took time to read the statements and the documents referred to in them. Having read the statements and obtained an understanding of the issues in the case, we heard and considered the claimant's application to adduce the Facebook posts. For reasons that were given orally at the time of the hearing, we refused the application. In summary, the claimant did not have the documents in a form which could be added to the bundle and thus if granted the application would cause delay which was incompatible with the overriding objective, we could not see their relevance and, insofar as the claimant wished to suggest to witnesses that there was a permissive attitude within the respondent to sexualized behaviour, she was able to do so without the documents. (In the event, the claimant did not make this suggestion to the respondent's witnesses when cross-examining them).

The progress of the hearing

18. The claimant began giving evidence in the afternoon of the first day. We found her evidence to be slightly evasive in the sense that on occasion she only made what were clearly reasonable admissions of facts where there was no other option but to do so, and all avenues of obfuscation and avoidance had been closed down. At times she became distressed, and breaks were offered to enable her to recover her composure.

19. The evidence finished at 4:05pm

20. On the morning of the second day the claimant informed the Tribunal that she had not gone to work as she had experienced symptoms of arrhythmia the previous evening and before the hearing commenced that day. She stated it felt like a flu. Consequently, I asked whether the claimant believed she was sufficiently well to participate effectively in the hearing. She confirmed that she was a bit groggy but was content to proceed.

21. When the claimant's cross-examination concluded the claimant was afforded the opportunity to clarify any answers which she had given which she believed required further context or explanation or were confused and required clarification.

22. Prior to the commencement of the respondent's case, Mr McCombie clarified (at the Tribunal's request) the witness order for his witnesses. The claimant

was not ready to cross-examine the first witness, Miss Martin, and therefore the Tribunal took an early lunch and adjourned until 2pm to enable the claimant to consider her questions. Prior to adjourning I advised the claimant that it was necessary for her to challenge those parts of the statements with which she disagreed and to put to the witnesses the specific conduct which she alleged was done because of her sex or because she had done a protected act, so that they could comment on those allegations.

23. We note that given that the claimant had participated in previous Tribunals it was strange that she had not prepared to question the witnesses.

24. At 2pm the claimant was not ready to proceed and appeared to have technical issues with joining the video platform. When she connected to the platform she requested more time to prepare her questions. A further extension until 2:35pm was granted by the Tribunal. The respondent's case began at 2:35pm when Miss Martin was called.

25. During the claimant's cross examination it was necessary to intervene on occasion to prevent irrelevant questions; for example, one of the claimant's first questions for Miss Martin was whether any panel member was married to another at the time of the 31 October 2020 interview. I intervened to indicate that I could not foresee how the question might be relevant and might help us to resolve the issues, but I invited the claimant to explain the relevance if she wished to pursue the line of questioning. She did not pursue it. Later the claimant asked whether Miss Martin had reasonable adjustments made for her at work. Again, we could not see the relevance of that matter to the allegations of discrimination; again, the claimant did not pursue the allegation when invited to identify its relevance. Consequently, I warned the claimant that whilst she could ask the questions that she wished, the overriding objective required us to complete the case within the hearing, which would necessitate permitting time for deliberation and the production of a judgment. I explained that in consequence, I would need to impose limits on the time for which she could cross-examine, and she might therefore wish to chose to use the time to ensure that she had covered the allegations detailed in the List of Issues, as if her time ran out and she had not, she would not have put her case.

26. The claimant's questions were noticeably focused on the minutiae of what appeared to be largely irrelevant matters rather than her allegations of direct discrimination; for example, whether the claimant had been requested to attend the second interview at 9:00am or at 9:10am. The other unusual feature of the claimant's cross-examination was her decision to refer to herself as 'the claimant' when asking questions.

27. The claimant concluded her cross-examination at 4pm. Following very brief re-examination, we adjourned until the following day. Prior to adjourning, I asked the claimant whether, given her express intention to work after the hearing each day, she wished for a later start than 10am to enable her to ensure that she was ready to cross -examine the remaining witnesses. The claimant stated that she would speak to her employer, but the hearing was supposed to start at 10am, so she would want to start at 10am. I reminded the claimant of the need for her to be able to participate effectively in the hearing and the potential effect that fatigue caused by running a claim and working consecutively might cause. She maintained that she would be able

to proceed at 10am.

28. On the morning of the second third day, the claimant attended at 10am and advised the Tribunal that she had not attended work the previous evening because she had experience moments of arrhythmia. She had not informed the Tribunal the previous day of that fact nor had she requested any break because of it. I therefore proposed that the claimant may benefit from a break between the witnesses to enable her to assist in managing the symptoms of that condition. The respondent did not object to that course and therefore we proposed a break of one hour between the witnesses. Again, I encouraged the claimant to inform the Tribunal if at any stage she believed that the symptoms of the arrythmia were adversely affecting her ability to concentrate on the evidence.

29. Mr Philbrick and Mr Higginson gave evidence on the third day; we adjourned between 11:40 and 1:15pm to enable the claim to rest and take lunch between the witnesses. Mr Higginson's evidence concluded at 2:10pm.

Rule 70 and the Judgment of EJ Goraj in relation to s.39(3) EQA 2010.

30. At that stage I raised with the parties a concern that the Tribunal had as to whether the phrase "the arrangements A makes for deciding to whom to offer employment" in s.39(3) EQA 2010 could be construed to cover a decision not to offer a review in relation to a complaint where the subject of the complaint was the conduct of the interviewees but not that the claimant was not offered the role in question nor that the effect of the conduct prevented the claimant from obtaining the role in question because she was unable to perform to her best level in interview. The Tribunal had not at that stage read the Judgment of EJ Goraj detailed above.

31. I suggested that we would re-read the Judgment and may consider whether it was appropriate to reconsider the Judgment of our own motion. I therefore proposed, if that were the case, that we would invite submissions from the parties as to whether we should exercise our power under rule 70 and, if so, what the outcome should be. I indicated that we had briefly considered the Equal Treatment Directive (identifying the relevant parts of the pre-amble and the Articles) so that they could be addressed by the parties. I also identified the relevant paragraphs from the Equality and Human Rights Commission Code of Practice on Employment ("the Code").

32. We adjourned until 3pm when Mrs Shand's evidence was taken. During the adjournment I consulted with Regional Employment Judge Pirani to clarify whether EJ Goraj might be available to hear any arguments as to reconsideration. The REJ advised that as she was a fee paid Judge and was not scheduled to sit that week, it was not reasonably practicable for her to do so, and that in those circumstances the Tribunal would need to determine whether it was in the interests of justice to reconsider the Judgment.

33. At the conclusion of Mrs Shand's evidence the claimant asked for guidance as to what was expected from her submissions. I explained that she was under no obligation to produce any written submission nor, indeed, to address us. I clarified that the matter which I had suggested it would be helpful to have the parties' submission on was the question of whether or not we should reconsider the Judgment of EJ Goraj as to the scope of section 39(3) EQA

2010. Mr McCombie indicated that he would rely upon the skeleton argument already submitted and would address us orally.

34. We adjourned until 10:00am the following day. The claimant sent written submissions in relation to the Rule 70 issue. She did not wish to address the Tribunal in relation to her claims. In her written submissions she argued that the respondent should have appealed if it wished to challenge the decision made at the preliminary hearing; she did not engage with the fact that the Tribunal was proposing to consider the matter of its own motion.

35. Mr McCombie developed his submissions orally, both in relation to reconsideration and the substantive issues for the final hearing. He conceded that the claimant had done the protected acts alleged. In relation to the question of reconsideration, I clarified with him the extent to which EJ Goraj had been taken to or considered of her own account the ILO conventions, the European Union Fundamental Charter of Rights of and the Equal Treatment Directive when the issue of the construction and scope of s.39(3) EQA 2010 arose.

36. Mr McCombie confirmed that those documents had not been considered or addressed during the preliminary hearing, but the Judge had only considered the EQA and the Code which was referred to in the Judgment. He identified that the respondent's proposed appeal in relation to EJ Goraj's judgment had been likely to be limited to the ground that her determination of the issue was premature as the factual findings upon which it depended were to be made at the final hearing. He did not invite the Tribunal to reconsider EJ Goraj's Judgment, but rather to address the matter on the facts.

37. In the event, we chose to exercise our power under Rule 70 for the reasons detailed in the discussions and conclusions below.

38. We adjourned until the fifth day of the hearing to deliberate and promulgate our reasons which were handed down in the morning. At the end of the hearing the claimant requested written reasons. I explained that the consequence of that decision would be that all of the findings would form part of the Judgment which would be published to the Tribunal's website. The claimant nevertheless requested written reasons, explaining she understood that matter, but did not make any application under Rule 50 or more broadly for a restrictive reporting order.

The Issues

39. In light of the respondent's concessions regarding the protected acts and that the alleged detriments were detriments, the following issues fell to be determined.

Time limits

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about any act or omission which took place more than three months before that date (allowing for any extension under the early conciliation provisions) is potentially out of time, so that the tribunal may not have jurisdiction.

1.2 Were the discrimination and victimisation complaints made within the

time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?

1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

Direct sex discrimination (section 13 of the 2010 Act)

2.1 Did the respondent do the following things: -

2.1.1 At the interview on 31 October 2019 did Mr Porter make inappropriate comments about and/or stare at the claimant's bottom.

2.1.2 At the interview on 5 December 2019 did Mr Higginson of the respondent make inappropriate comments about the claimant taking contraception to help with her skin problems.

2.2 Was that less favourable treatment? The claimant has not named anyone in particular whom she says was treated better than she was and therefore relies upon a hypothetical comparator.

2.3 If so, can the claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic? (The respondent was not relying on a non-discriminatory reason).

Victimisation (s. 27 of the 2010 Act)

3.1 It being accepted that the claimant did following protected acts:

3.1.1 Submitting a "crime report" to the Hampshire Police dated 7 January 2020.

3.1.2 Submitting a report to the respondent's safeguarding team dated 7 January 2020.

3.1.3 Submitting a complaint to Mr Metcalfe of the respondent dated 12 February 2020 (attaching the above report to the Hampshire Police).

3.1.4 Submitting an email to Mr Metcalfe/ Ms Shand of the respondent dated 17 March 2020 with attachments (including the letter to Mr Tomlinson MP dated 17 March 2020).

3.1.5 Submitting the emails to Mr Metcalfe / Ms Shand dated 13 & 14 July

2020 attaching her "reports" of the interviews on 31 October and 5 November 2020.

3.2 Did the respondent believe that the claimant had done or might do a protected act, including did Ms Martin of the respondent make a comment about the Post Office (which the claimant understood to be a reference to the claimant's previous sex discrimination Tribunal proceedings against the Post Office) during the interview on 31 October 2021?

3.5 It was further accepted that the respondent: -

3.5.1 Did not appoint the claimant to the posts of DPSS Accounts officer (4 November 2019) and /or Direct Payments Officer (10 December 2019).

3.5.2 Refused on 18 September 2020 to allow the claimant to pursue an appeal under the respondent's complaints procedure.

3.6 It was further accepted hat by doing so, the respondent subjected the claimant to detriment?

3.7 Was the reason that the respondent took those decisions because the claimant had done the protected acts?

Factual Background

40. We make the following finding on the balance of probabilities.

41. In approximately 2010, the claimant brought a Tribunal claim for unpaid wages and equal pay (among other matters) against the Royal Mail (hereinafter referred to as "the Post Office Claim"). The claim was dismissed. The claimant has alleged in these proceedings that that was because of bias on the part of the Tribunal.

42. The claimant was interviewed on the 22 May 2017 for a Direct Payment Officer role by Miss Martin, the respondent's Business Development Officer, Matthew Porter, then the business and Market Development Service Manager, and Jane Davies, Manager of the Financial Assessment and Charging Team. Mr Porter was Miss Martin's line manager and had been accompanying her to interviews to observe her performance and provide feedback All prior to the interview in question.

43. The claimant was not appointed to the role, but an appointment was made. The claimant makes no complaint about that interview or Miss Martin's conduct during it.

44. In August 2019 Miss Martin undertook the respondent's equality and diversity training.

<u>The interview of 31st October 2019</u>

45. In 2019 the claimant applied for the post of a DPSS (Direct Payment Support Service) Account Officer which had been advertised by the respondent. Neither the claimant's application nor the supporting CV made any reference to the Post Office Claim. The claimant was invited to attend an interview for the role on 31 October 2019. The claimant was interviewed for the position of

by Miss Martin, Matthew Porter and Daniel Philbrick, the Direct Payment Finance Officer. Miss Martin chaired the interview.

46. On the morning of the interview Miss Martin went down in the lift to reception to meet the claimant. She greeted the claimant before escorting her to the lift to the interview room. Miss Martin started the interview by explaining the interview process and the housekeeping arrangements.

47. In preparation for the interview the panel had prepared the respondent's proforma interview questionnaire, which listed generic questions against the skills and criteria that would be assessed. In addition, the panel had identified questions from the claimant's application about which they wished to ask questions. The process the respondent adopted was for the interviewers to note the interviewee's responses which they deemed to be relevant to the skills and criteria for the role directly onto the proforma. There were differing weightings given to the differing criteria, such as skills and experience. At the end of the interviews the panel met to discuss each of the individual interviewees, and to allocate them scores against each of the criteria. The purpose for acting in that way was to ensure that the benchmarks for scores was not set too high or too low as a consequence of responses given by the early interviewees. Once that process was completed, a successful candidate could be identified.

48. The claimant was interviewed in accordance with that process and the panel asked questions in the order shown on the Interview Questions Plan proforma dated 31st October 2019.

49. During the interview, the claimant was asked if she could describe a difficult or challenging situation and the manner in which she had resolved it positively. She described an occasion where the chairman of the company for which she was working had withdrawn large sums of money, causing financial difficulties, and described how she had provided support to reduce the end of year tax returns. The employer in question was Solent Composite Systems Limited (against whom she had brought a Tribunal claim). In addition, she explained that she had not been paid because the chairman had not repaid the funds he had withdrawn, and she was pursuing that matter through a Tribunal.

50. Later in the interview, the claimant was asked about her role for EMRC Ltd; the Panel had noted to question the claimant about any qualifications or certificates that she had obtained whilst in the role, amongst other matters. When asked, the claimant stated that a manager at the company hit her across the back of the head. In giving her answer the claimant became upset and emotional. Miss Martin asked the claimant whether she was alright, and offered her a drink of water

51. The panel asked the questions as detailed in the document and once the interview was completed Mr Philbrick showed the claimant out of the building.

52. At the end of the interviews, the panel considered the appropriate scores. The claimant was not successful and was advised of the outcome by email dated 4 November 2019. The claimant was advised that the successful candidate had the most recent relevant experience required for the role. Miss Martin wrote that the interviewing panel thought that the claimant was an

extremely gifted and bright lady with a wonderful future ahead of her. She observed that the claimant's academic record was of a very high standard, and that she deserved to secure employment that reflected all of her skills and attributes. She suggested the claimant might work on her confidence during interviews, in particular when answering questions, as she had every reason to be bold and confident given the high standard of her CV.

53. The claimant responded by email the same day, stating that it was nice to have met the interview panel and that she would "continue to generalise with other companies." It is unclear exactly what she meant by that latter phrase. She made no complaint about the conduct of the interview or the actions of the panel during it.

The interview of 5 December 2019

54. Approximately 2 months later, the claimant applied for the post of Direct Payments Officer at the respondent. Once again she was successful in securing an interview. Interviews for the position occurred on the 5 December 2019. The interview panel consisted of Miss Martin, Mr Philbrick, and Scott Higginson, Business Development Officer. Mr Higginson had been drafted in at late stage due to the illness of another of the respondent's employees who had been scheduled to form part of the panel. Miss Martin again chaired the panel.

55. The process followed for the preparation for the interview was identical to that used in October 2019.

56. The claimant was due to be interviewed at 9am but had not attended at that time. Consequently, Miss Martin left the interview room and visited her office, which was next door, to check her emails to see whether the claimant had sent a late notification that she was unable to attend or no longer wished to. There was no email and Miss Martin went to reception where the claimant was just arriving. The time was approximately 9:10am. The claimant apologised for being late.

57. Miss Martin allowed the claimant a few moments to collect herself, before taking her up to the interview room.

58. The room which was used for the interview had wooden paneling on the walls. Prior to the claimant's arrival Mr Higginson and Mr Philbrick had joked that the room looked like a court room; it was observation that the claimant overheard when she arrived at the interview room and one which they repeated to put her at her ease as she walked into the room.

59. Once Miss Martin and the claimant entered the meeting room, the claimant was directed to a chair and Miss Martin took her seat between Mr Philbrick and Mr Higginson. The claimant removed her coat and took her place in the chair opposite the panel. After the claimant was seated Miss Martin introduced the panel to the claimant.

60. As before, with the interview of the 31 October 2019, the panel took turns to ask the claimant the prepared interview questions. Miss Martin asked the claimant question 4, requesting information about her role with Gurit, in relation to skills, tasks and systems she used. The claimant told the panel that it had been difficult time because was subjected to sexual harassment by

an employee. That personal information had not been asked for by the panel but was given voluntarily by the claimant. Once again, Miss Martin felt uncomfortable about what she was being told, but also felt very sympathetic towards the claimant because she said she had been assaulted.

61. On the 7 December 2019, shortly before the panel decided who would be the successful candidate for the role, the claimant sent Miss Martin an email with the subject heading of 'Gurit UK Ltd and Rouse Ltd.' In the email the claimant noted that she had been asked about Gurit UK Ltd in her interview, and wrote,

> *"I have attached information that was sent to Hampshire Police. I received a crime number around 2017.*
>
> *I have recently raised an SRA report, which is taking the time to sit down and write.*
>
> *During my first interview there was mention from Daniel Philbrick regarding apparently shouting at [BR]. I have heard this rumour going around the island. Therefore, I have attached a complaint that I emailed to Rouse Limited.*
>
> *I think it is better view to be aware that I do have problems at work. This does not reflect every employment."*

62. The email also had a number of attachments which included the information that the claimant had sent to Hampshire Police, an SRA report and a copy of a letter the claimant had sent to Rouse Ltd in which she made complaints about her twin brother, his partner BR, and BR's sister, who was an employee of Rouse Ltd, J. In that letter she alleged that her brother had screamed at her that she was mentally insane.

63. The second attachment consisted of a word document in which the claimant summarised her allegations against Gurit Ltd. Specifically, she alleged that a claim for sexual harassment against the Finance Director for Gurit UK/Spain had been presented to a tribunal by another employee, and that the claim had been settled. The claimant further alleged that Gurit's Senior Legal Counsel and Financial Controller had indicated that they were having a sexual relationship. Under the heading "problems with my employment, which appear to be associated to Gurit UK Ltd" the claimant made allegations that her employment with Southampton Hospital had been wrongly terminated because it was inaccurately alleged that she was drunk; the claimant alleged that the manager who had sacked her lived on the Isle of Wight and may therefore have been connected to Gurit. The claimant further alleged that Gurit was connected to a company called BD Marine, for which the claimant had worked, and Solent Composite Systems, on the basis that Gurit was a customer of the first and the supplier to the second. In the document the claimant made allegations of sexual harassment by the Credit and Treasury Officer and the Senior Legal Counsel against two other employees of Gurit.

64. In addition, the claimant forwarded documents from Companies House relating to the Shanklin Chine Trust.

65. Miss Martin was startled by the unrequested submission of those documents and their nature and found the claimant's action inappropriate; she could not understand why she had chosen to send that information. She asked

Matthew Porter, her manager at the time, what action she should take, and he advised her to speak to Human Resources for Adult Social Care. Miss Martin called Rosalyn Langley in Human Resources and was advised not to respond, but to contact Human Resources again if there was any further communication.

66. In any event, following evaluation of the applications and the interviewees performance during the interview, the claimant was not the preferred candidate for the role, and Miss Martin advised her that her application had been unsuccessful in an email on 10th December 2019.

67. The claimant responded by thanking her for the email, stated that she had completed her Postgraduate Diploma in Environmental Management, and wished Miss Martin a good weekend. She made no complaint about the conduct of the interview or the actions of the panel.

Events following the interviews: the protected acts

68. On 7 January 2020 the claimant made an online crime report to the police in relation to the interviews, alleging that she had been "harassed and tormented at both interviews." In a four-page document the claimant detailed her concerns about the interviews. In respect of the first interview, she alleged that Mr Philbrick had repeatedly referred to her as "mentally insane", that Miss Martin had referenced the Post Office Claim, that Mr Porter had told claimant that if she got the job "he would slap [her] around a bit," and later yelled at her "when you're having your kids." Lastly, she alleged that Mr Philbrick had said to her "you have ugly lumps on your face."

69. In relation to the second interview the claimant alleged that Mr Philbrick had asked her how other people would describe her, and before she could reply had repeated approximately 10 times "mentally insane." The claimant made other complaints, although they are not strictly relevant to the allegations we have to determine. Amongst those, was an allegation that the Shanklin Chine Trust was registered as a dormant company with Companies House, but had been taking revenue from visitors, and that Mr Porter was a Trustee of the Trust.

70. The claimant did not however make the allegations of sex discrimination which she now relies upon in these proceedings within the police report. Specifically, she made no complaint about references being made to her bottom or to taking contraception which form the subject of her claims here.

71. The respondent accepts that the email amounts to a protected act within the meaning of section 27 (1) EQA 2010 because of the references to the claimant being told that she was mentally insane; we observe that the alleged actions of Mr Porter and Mr Philbrick could objectively be regarded as allegations of sex discrimination or harassment on the grounds of sex.

72. On the same day, 7 January 2020, the claimant submitted a report to the respondent's safeguarding team, again alleging that she had been repeatedly called "mentally insane" during the interviews. She did not identify who it was on the interview panel that she alleged had made those remarks. The email identified that the claimant's purpose in making the report was to ascertain whether anyone, including the respondent's staff, had raised a safeguarding concern falsely stating that she was mentally insane. She directed that her

enquiry should not be disclosed to third parties or more widely within the respondent. She made no complaint that she had been subject to sex discrimination at either interview in that email.

73. Again, the respondent accepts that the email was a protected act because of the reference to mental insanity.

74. On 12 February 2020, the claimant lodged a formal complaint with the then Chief Executive of the Respondent, Mr John Metcalfe. She attached a copy of the 4-page report she had sent to the Hampshire Police on 7 January 2020 and the four pages of the Companies House records relating to the Shanklin Chine Trust. She stipulated that she would permit 28 days for a response before she would progress her complaint to the Local Government and Social Co-Ombudsman. The emails were directed to Mrs Shand who forwarded them without reviewing the attachments to Miss Laura Guadion, the Assistant Director of Adult Social Care, as the members of staff against whom the allegations were directed were employed by that department.

75. The claimant did not expressly make allegations of sex discrimination of the nature which she pursues in these proceedings either within the email or within the documents attached to it. Specifically, she made no complaint about references being made to her bottom or to contraception.

76. In his closing submissions, Mr McCombie accepted that the email was a protected act because the police report contained allegations which could reasonably be construed as allegations of disability discrimination given the references to mental insanity. We observe that the complaint might also objectively include a complaint of sex discrimination or sex harassment for the same reasons as we have given previously and achieve protected status on that basis.

77. On 18 February the claimant's complaint was reviewed by Miss Gaudion, who allocated it to Mrs Helen Babington, the Complaints Officer for the Adult Social Care Department, to appoint an investigator.

78. On 19 February 2020, Mrs Shand emailed the claimant to advised her that as the complaint was one "relating to an employee of the council" it would be investigated under the respondent's complaint's procedure; she provided a copy of that procedure.

79. On 20 February 2020, the claimant emailed Mrs Shand confirming that she had received the the complaints policy. She also provided details of the email correspondence that had been exchanged between herself and Miss Martin which included the email and attachments of 7 December 2019.

80. On 17 March 2020 the claimant forwarded to Mrs Shand an email which attached copies of letters she had sent to Mr Justin Tomlinson MP and the Care Quality Commission ("CQC") customer service centre. In the former, the claimant alleged that she was told that she was mentally insane during the interviews and asked for Mr Tomlinson to contact Mr Metcalfe to improve the council's interview process and repeated her concerns about the Shanklin Chine Trust. The letter to the CQC requested that they should investigate the matters that the claimant had raised with the MP. Mrs Shand forward the emails to Miss Gaudion.

81. The claimant had written to Mr Tomlinson MP, as she told us, because he was the Minister with responsibility for the department which addressed disabilities.

82. The respondent accepts that the emails were a protected act as a consequence of the allegations that the claimant had been told that she was mentally insane in the interviews.

83. Regrettably but entirely understandably, as a consequence of the Covid-19 pandemic and the resulting national lockdown, there was a delay in progressing the complaint. Consequently, on 2 April 2020, Mrs Shand sent an email to the claimant, apologising for the delay and providing that explanation.

84. On the 8 July 2020, Mrs Shand wrote to the claimant to advise her that the investigation would be restarted the following week.

The claimant's account of the interviews

85. On 9 July 2020, the claimant emailed Mrs Shand advising her that she would provide the respondent with her recollections of the interviews, which she described as a 'more complete breakdown of the two interview transcripts.' Additionally, she wrote that had successfully finished the Tribunal case [against Solent Composites Systems Ltd] and had completed her Msc in Environmental Management.

86. On the 13 July 2020, the claimant emailed Mrs Shand and attached two PDFs which contained her written recollections of the interviews. She had produced them from memory (as she accepted in cross-examination) on 12 July 2020, some seven months after the interviews; she had made no notes nor produced any record of the discussions during the interviews beyond those detailed above. She had not recorded the meetings. Three hours later, the claimant emailed Mrs Shand amended versions of the records.

87. The records of the interview are appended to this Judgment to demonstrate the full content, nature, and effect of the events which the claimant alleged occurred. Across the Tribunal's collective experience both in the Tribunal and the workplace, which amounts to 116 years, never have the Tribunal encountered allegations of such bizarre conduct, both in terms of the conduct of the protagonists and the complainant's reaction to it, and so apparently random and incoherent in the series of events they describe. We doubt we will again.

88. By way a precis of some of the most striking allegations we note that the claimant made the following allegations:

89. In relation to the October interview:

    89.1. as the claimant removed her coat and turned her back to the panel to place her bag and coat on the floor, Mr Porter stated loudly "I'm just looking at the arse" before stating repeatedly to the claimant as she began to turn around "don't turn around, don't turn around, don't turn around;" (this was the subject of the first allegation of sex discrimination)

    89.2. immediately thereafter, Mr Porter commented "that's very nice" and

Mr Philbrick stated “we could work on it”

89.3. Mr Philbrick told claimant that she should shave the back of her head or “just leave it hairy”

89.4. Mr Philbrick, apropos of nothing, said “boobs” and no one reacted to the comment

89.5. Miss Martin said to Mr Porter “you know there is nothing on here about her being bisexual. The Equality form seems to be quite blank”;

89.6. Mr Porter began to crawl across the desk at which the panel members were sitting using only his hands.

89.7. Mr Porter said to the claimant that “I’d probably slap you around a bit.”

89.8. The panel members frequently shouted and yelled at each other and at the claimant without reason;

89.9. Mr Porter yelled randomly “Barry, Barry, Barry, Barry,” a refrain which Mr Philbrick then also yelled;

89.10. When the claimant discussed Gurit UK during the interview (which in fact occurred in the second interview, not the first) Miss Martin told the claimant that she could have had a child who would have been five years old at the time of the interview;

89.11. Miss Martin “tenderly” grabbed Mr Philbrick’s hand and asked him “can you even resist?” before “tenderly” grabbing Mr Porter’s hand and stating, “you’re a silver fox.”

89.12. Mr Philbrick said to the claimant “I’d just like to say that I think you’re mentally insane” before repeating the words “mentally insane.”

89.13. Mr Philbrick told the claimant, “you have ugly lumps in your face.”

89.14. Miss Martin instructed the claimant to smile, which she did, and Mr Philbrick told her, “you need braces”

89.15. Mr Porter told claimant that he believed that she was about 12 years old

90. In relation to the second interview, the claimant alleged:

90.1. Ms Martin told the claimant that she “struggled at interview”

90.2. Mr Philbrick repeatedly said “CIMA, CIMA, CIMA, CIMA, CIMA,”

90.3. Miss Martin repeatedly said “outside, outside, outside, outside”

90.4. Mr Philbrick asked the claimant how other people describe her, but before she could reply repeatedly stated, “mentally insane, mentally insane, mentally insane.”

90.5. Mr Philbrick told the claimant that if she were successful in her

application for the role, she would only be permitted to speak to him

90.6. Mr Philbrick repeatedly said "Phyllis" (the claimant's Christian name) before banging the table;

90.7. Mr Higginson banged his hand on the table and said, apropos of nothing, "get some contraception," a remark which the claimant believed was addressed to her (the subject of the second direct sex discrimination claim).

Investigation of the complaints

91. On 21 July 2020, Mrs Sharon Betts, who had been appointed as the investigating officer, wrote to the claimant inviting her to a meeting to discuss her concerns and seek clarification allegations. She proposed a meeting on Monday 3 August 2020.

92. The claimant declined that invitation by email dated 21 July 2020, on the grounds that she was asthmatic with an arrythmia, and that because of being at a higher risk to Covid-19 complications, it would not be advisable for her to travel by public transport unless she was doing work for which she would be paid, but she was seeking to work from home as much as possible. She attached the two PDFs containing her account of the interviews, together with two photos she had taken of herself without make up (presumably because she believed they were of some relevance to the allegation she made against Miss Martin in which she suggested that Miss Martin had instructed her to smile). She also suggested that there were two marks on the right-hand side of her face, which she believed were 'covered' under the Equality Act 2010.

93. Mrs Betts responded on 21 July 2020, acknowledging the email, and offered the claimant the opportunity to telephone her should she wish to clarify or provide any further information about her allegations. She advised the claimant that as her complaint related to an employee of the Council, it would not be possible to keep her informed of detailed progress of the investigation or to advise her of any disciplinary action taken.

94. Mrs Betts interviewed Miss Martin on 31 July 2020, Mr Philbrick and Mr Higginson on 4 August 2020, and Mr Porter on 24 August 2020. The interviews were conducted by Teams and were recorded. Transcripts of the interviews were produced and were available to the Tribunal.

95. During the interviews Mrs Betts carefully identified the conduct which the claimant had alleged against each employee and invited comment upon it. Each of the interviewees asserted that none of the events about which the claimant complained had occurred. They all expressed their shock at bizarre nature of the allegations; they could make no sense of them. They accepted there had been discussions about Gurit, but only in circumstances described in the findings above.

96. On 5 August 2020 Mrs Betts liaised with PC Nicholas Massey in relation to the claimant's police report. He advised Mrs Betts that the claimant was a vexatious complainer, who had submitted a number of complaints covering a range of issues and made various allegations about individuals she had worked with which had been proved to be entirely unfounded. Amongst such complaints were allegations that:

96.1. her brother had been kidnapped, but when investigated it was discovered that he had not been kidnapped but did not want contact with claimant because of her behaviour,

96.2. that the claimant been sexually harassed whilst at Gurit, which was investigated and proven to be unfounded, and

96.3. that the claimant had reported allegations of torture by employees whilst was she employed by AM Labels Ltd, which had been investigated and proven to be unfounded.

97. PC Massey subsequently sent Mrs Betts an email of the same date confirming that the claimant had submitted a number of 'long rambling emails' to the Police, with many attachments, and that she had failed to respond to requests for further information, choosing instead to send further documents. He noted that the claimant's mother had sent similar documents to the Police, the Crime Commissioner and the Queen.

98. On 25 August 2020, Mrs Betts completed her investigation report. The report was a full and thorough document. Having reviewed all the evidence, Mrs Betts concluded that the allegations were entirely unfounded and unsubstantiated. She concluded,

> *"I believe that PS has a mental health condition which manifests itself with her ability to relate to people and situations and I would suggest that hearing voices is tantamount to this condition. I understand there are many significant reasons that can cause hearing voices. The major factors that contribute to this condition are stress, anxiety, depression, and traumatic experiences, PS mentions being stressed at the interviews which I believe may have contributed to triggering her condition and her perception of what took place at the interviews."*

99. She concluded that on the balance of probabilities having reviewed all the evidence she obtained, Miss Martin, Mr Philbrick, Mr Porter and Mr Higginson had simply not acted as the claimant alleged. There was therefore no case for any disciplinary action to be taken.

<u>The decision not to offer the claimant a Stage 2 review</u>

100. On 27 August 2020, Mrs Shand received a copy of the investigation report and notification from Miss Gaudion that the investigation had been completed. Miss Gaudion stressed how detrimental and stressful the allegations had been to the health of those who were the subject of the investigation.

101. Mrs Shand carefully considered the position. The factors that she considered were the following:

101.1. The investigation report had found no evidence or wrongdoing;

101.2. On that basis, Miss Gaudion had concluded that no further action would be taken against the staff involved;

101.3. Mrs Shand had accepted the views of the investigator that there was no evidence of wrongdoing and rejected the complaint;

101.4. if the matter progressed to a stage 2 review, the question for the senior officer to decide would be whether the decision that the complaint was dismissed was correct; that would necessarily require a review of the investigation report and Mrs Shand could envisage no prospect of the investigation report's findings being overturned;

101.5. Mrs Shand had been told by Miss Guadion that the allegations and the process of being interviewed in relation to them had been very distressing for her staff;

101.6. If no review were offered, the claimant's final line of redress was a complaint to the Local Government and Social Care Ombudsman. Refusing to offer a stage 2 review, she believed, was therefore not discriminatory in the sense that it did not preclude the claimant from further redress, and, in any event, the investigation had found that no discrimination had occurred.

102. Those factors alone led Mrs Shand to conclude that she should take a step she had never previously taken in the 20 years of her career with the respondent: that she would refuse the claimant a stage 2 review.

103. On the 18 September 2020, CS wrote to C to inform her of the outcome of the investigation. She explained that after careful consideration, having taken account of the fact that there had been a thorough investigation; that that investigation had concluded the allegations had been unfounded based on the evidence available to the investigating officer; that there had been a significant impact on the wellbeing of the staff affected by the complaint; and that it was unlikely that there would be anything further to be achieved by a further review by another senior officer, she had decided that she would disapply that option on this occasion. She informed the claimant of her rights to complain directly to the Local Government and Social Care Ombudsman if she was unhappy with the outcome of the complaint and provided the contact details to do so.

The Relevant Law

104. The claimant brings two claims under the Equality Act 2010. The first for direct discrimination (s.13 Equality Act 2010 ("EQA")), the second of victimisation (contrary to section 27 EQA 2010).

105. The relevant law is contained in sections 39 and 13, 23 and 27 EQA 2010 which provide respectively (in so far as is relevant) as follows:

39 – Employees and applicants

(1) An employer (A) must not discriminate against a person (B)—
(a) in the arrangements A makes for deciding to whom to offer employment;
(b) as to the terms on which A offers B employment;
(c) by not offering B employment.

(3) An employer (A) must not victimise a person (B)—
(a) in the arrangements A makes for deciding to whom to offer employment;
(b) as to the terms on which A offers B employment;

(c) by not offering B employment.

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.

23. Comparison by reference to circumstances

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

s.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.

Section 13

106. The basic question in every direct discrimination case is why the complainant was subjected to less favourable treatment (Amnesty International v Ahmed [2009] IRLR 884, per Underhill P, para. 32).

107. Once it is established that the treatment is because of a protected characteristic, unlawful discrimination is established and the respondent's motive or intention is irrelevant (Nagarajan v London Regional Transport [1999] IRLR 572 HL).

108. The protected characteristic does not need to be the only reason for the less favourable treatment, or even the main reason, so long as it was an 'effective cause' of the treatment: O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor [1996] IRLR 372, EAT.

The reverse burden of proof

109. The statutory tests are subject to the reverse burden of proof in section 136 EQA 2010 which provides:

(2) If there are facts on 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.

110. The correct approach to the reverse burden of proof provisions in discrimination claims has been the subject of extensive judicial consideration.

In every case the Tribunal has to determine the "reason why" the claimant was treated as he was (per Lord Nicholls in Nagarajan v London Regional Transport [1999] IRLR 572 HL). This is "the crucial question."

111. It is for the claimant to prove the facts from which the Tribunal could conclude that there has been an unlawful act of discrimination (Igen Ltd and Ors v Wong [2005] IRLR 258 CA), i.e., that the alleged discriminator has treated the claimant less favourably or unfavourably and that the reason why it did so was on the grounds of (or related to if the claim is under s.26) the protected characteristic. That requires the Tribunal to consider the mental processes of the alleged discriminator (Advance Security UK Ltd v Musa [2008] UKEAT/0611/07).

112. In Igen the court proposed a two-stage approach to the burden of proof provisions. The first stage requires the claimant to prove primary facts from which a Tribunal properly directing itself could reasonably conclude that the reason for the treatment complained of was the protected characteristic. The claimant may do so both by their own evidence and by reliance on the evidence of the respondent.

113. If the claimant does so, the second stage requires the respondent to demonstrate that the protected characteristic was in no sense whatsoever connected to the treatment in question. 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. If it cannot do so, then the claim succeeds. However, if the respondent shows that the unfavourable or less favourable treatment did not occur or that the reason for the treatment was not the protected characteristic the claim will fail.

114. The explanation for the less favourable treatment advanced by the respondent 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).

115. Furthermore, it is not sufficient for the claimant simply to prove that there was a difference in status i.e. that the comparator did not share the protected characteristic relied upon by the claimant) and a difference in treatment. 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 (see Madarassy v Nomura International Plc [2007] ICR 867 CA; Hewage v Grampian Health Board [2012] IRLR 870 SC and Royal Mail Group Ltd v Efobi [2019] EWCA Civ 18.)

116. The Tribunal does not have slavishly to follow the two-stage process in every case - in Laing v Manchester City Council and anor [2006] ICR 1519, EAT, Mr Justice Elias identified that 'it might be sensible for a tribunal to go straight to the second stage… where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question whether there is such a comparator — whether there is a prima facie case — is in

practice often inextricably linked to the issue of what is the explanation for the treatment." That approach was endorsed by the Court of Appeal in Stockton on Tees Borough Council v Aylott [2010] ICR 1278.

117. 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).

Detriment

118. The test of a detriment within the meaning of section 39 EQA 2010 is whether the treatment is "of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment?" (per Lord Hope in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; [2003] ICR 337, para 35).

Victimisation

119. There is no need for a complainant to allege that things have been done which would be a breach of the Equality Act (see Waters v Metropolitan Police Comr [1997] IRLR 589, per Waite LJ:

> 'The allegation relied on need not state explicitly that an act of discrimination has occurred – that is clear from the words in brackets in s 4(1)(d). All that is required is that the allegation relied on should have asserted facts capable of amounting in law to an act of discrimination by an employer within the terms of s 6(2)(b).'

120. Similarly, there is no requirement for a complaint to identify expressly that the allegation is of discrimination in relation to one of the protected characteristics (see Durrani v London Borough of Ealing UKEAT/0454/2012 (10 April 2013, unreported) per Langstaff J:

> *"22.I would accept that it is not necessary that the complaint referred to race using that very word. But there must be something sufficient about the complaint to show that it is a complaint to which at least potentially the Act applies."*
>
> *23. The Tribunal here thus expressly recognised that the word "discrimination" was used not in the general sense familiar to Employment Tribunals of being subject to detrimental action upon the basis of a protected personal characteristic, but that of being subject to detrimental action which was simply unfair.…*
>
> *27. This case should not be taken as any general endorsement for the view that where an employee complains of "discrimination" he has not yet said enough to bring himself within the scope of Section 27 of the Equality Act. All is likely to depend on the circumstances, which may make it plain that although he does not use the word "race" or identify any other relevant protected characteristic, he has not made a complaint in respect of which he can be victimised. It may, and perhaps usually will, be a complaint made on such a ground*."

Time limits

Conduct extending over a period

121. Section 123(3)(a) EqA 2010 provides that "conduct extending over a period is to be treated as done at the end of the period."

122. An 'act extending over a period' (also known as a 'continuing act') may arise not solely from a policy, rule, scheme, regime or practice but also from 'an ongoing situation or continuing state of affairs' (Hendricks v The Commissioner of Police for the Metropolis [2003] IRLR 96, CA, paras 51-52 per Mummery LJ, approved by the Court of Appeal in Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548, CA).

123. In Coutts & Co plc v Cure [2005] ICR 1098, EAT, the Employment Appeal Tribunal (HHJ McMullen QC presiding), setting out categories into which the factual circumstances of alleged discrimination may fall, found (albeit obiter) that there are two types of situation in which alleged discrimination may constitute an 'act extending over a period':

123.1. where there is a discriminatory rule or policy, by reference to which decisions are made from time to time; and

123.2. where there have been a series of discriminatory acts, whether or not set against a background of a discriminatory policy.

124. In the former case, an act will be regarded as extending over a period, and so treated as done at the end of that period, if an employer maintains and keeps in force a discriminatory regime, rule, practice or principle which has had a clear and adverse effect on the complainant (Barclays Bank plc v Kapur [1989] IRLR 387).

125. In the latter case, the main issue for the Tribunal tends to be whether it is possible to identify some fact or feature linking the series of acts such that they may properly be regarded as amounting to a single continuing state of affairs rather than a series of unconnected or isolated acts (Hendricks). A single person being responsible for discriminatory acts is a relevant factor in deciding whether an act has extended over a period: Aziz v FDA [2010] EWCA Civ 304, CA.

126. Therefore, whether the acts complained of are linked so as to amount to a "continuing act" is essentially a question of fact for the tribunal to determine.

127. In cases where the act complained of by the claimant is not the mere existence of a policy but rather the application of that policy to the claimant, the Tribunal must consider the following question in relation to when that policy ceased to be applied to the claimant: "when did the continuing discriminatory state of affairs, to which the policy gave rise, come to an end?" (Fairlead Maritime Ltd v Parsoya UKEAT/0275/15/DA, HHJ Eady QC).

The just and equitable discretion

128. While employment tribunals have a wide discretion to allow an extension of time under the 'just and equitable' test in S.123, it does not necessarily follow that exercise of the discretion is a foregone conclusion in a

discrimination case. Indeed, the Court of Appeal made it clear in Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434, CA at para 25, that when employment tribunals consider exercising the discretion under what is now S.123(1)(b) EqA, 'there is no presumption that they should do so unless they can justify a 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 the discretion is the exception rather than the rule.' The onus is therefore on the claimant to convince the tribunal that it is just and equitable to extend the time limit.

129. These comments were endorsed in Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT and Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA. 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."

130. 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 (Per Langstaff J in Abertawe Bro Morgannwg University Local Health Board v Morgan).

131. 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.

132. In exercising their discretion to allow out-of-time claims to proceed, tribunals may also 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*, at para 8). S.33 deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice that each party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case, in particular: (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

133. However, although, in the context of the 'just and equitable' formula, these factors will frequently serve as a useful checklist, there is no legal requirement on a tribunal to go through such a list in every case, 'provided of course that no significant factor has been left out of account by the employment tribunal in exercising its discretion' (Southwark London Borough v Afolabi [2003] EWCA Civ 15, [2003] IRLR 220 at para 33, per Peter Gibson LJ).

134. 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. 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.

135. 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.

136. It is always necessary for tribunals, when exercising their discretion, to identify the cause of the claimant's failure to bring the claim in time (Accurist Watches Ltd v Wadher UKEAT/0102/09, [2009] All ER (D) 189 (Apr)). In Wadher Underhill J stated that, whilst it is always good practice, in any case where findings of fact need to be made for the purpose of a discretionary decision, for the parties to adduce evidence in the form of a witness statement, with the possibility of cross-examination where appropriate, it was not an absolute requirement of the rules that evidence should be adduced in this form.

137. A tribunal is entitled to have regard to any material before it which enables it to form a proper conclusion on the fact in question, including an explanation for the failure to present a claim in time, and such material may include statements in pleadings or correspondence, medical reports or certificates, or the inferences to be drawn from undisputed facts or contemporary documents.

138. A delay caused by a claimant invoking an internal grievance or disciplinary appeal procedure prior to commencing proceedings is just one factor to be taken into account by a tribunal when considering whether to extend time: Robinson v Post Office [2000] IRLR 804, EAT, approved by the Court of Appeal in Apelogun-Gabriels v London Borough of Lambeth [2002] ICR 713. As the EAT said in Robinson (para. 25, per Lindsay P): "as the law stands an employee who awaits the outcome of an internal appeal and delays the launching of an [ET1] must realise that he is running a real danger."

139. A failure to provide an explanation for the delay is fatal to an application because there is no evidence upon which the tribunal could exercise its discretion Habinteg Housing Association Ltd v Holleron EAT 0274/14 confirmed in Edomobi v La Retraite RC Girls School EAT 0180/16

Discussion and Conclusions

Sex Discrimination

140. The claimant's allegations are, as we have indicated, made in the context of an alleged series of events which are the most bizarre, improbable, and incomprehensible the Tribunal members have ever encountered. That does not mean that the events which the claimant relies upon cannot have occurred or that we reject them because they are made against such a background. However, it does mean that the weight and cohesion of the evidence required to establish that they occurred on the balance of probabilities would be higher than might be required for other allegations.

141. In this case, the following factors are relevant to that assessment:

141.1. The claimant's emails to Miss Martin after the interviews make no reference to any of the allegations and are inconsistent with them having occurred.

141.2. The allegations which are now pursued were not identified in the police report in January 2020, where the focus was upon the alleged comment that the claimant was mentally insane and Mr Porter's suggestion that he would slap the claimant around a bit.

141.3. The allegations were not made in the initial report to Mr Metcalf in February 2020; the claimant's focus in those complaints was the police report above and her concerns about Mr Porter's involvement in the Shanklin Shine Trust.

141.4. The allegations were not made in the claimant's complaints to the CQC or to Mr Tomlinson MP in March 2020; the claimant's focus in those complaints was again upon the allegation that she had been told that she was mentally insane.

141.5. The allegations were first made in July 2020, seven months after the events; even then the claimant amended her account. The account was a mixture or recollection, comment, and hypothesis.

141.6. The claimant did not make herself available for interview to provide further explanation of or detail in connection to the allegations. Whilst it was understandable that she did not wish to travel for an in-person interview, she did not request a video interview or respond to Mrs Bett's offer that she could telephone her to provide more detail if she wished.

141.7. In contrast, those whom the claimant had made the allegations against were interviewed and each vehemently denied all of the allegations. The overarching sense of their interviews is one of shock; each repeated that the claimant's version of events simply did not happen.

141.8. The claimant did not provide a full account of the events alleged to be discrimination in her witness statement, she relied instead (in the statement) upon the reports she had prepared.

142. The claimant did not cross examine any of the witnesses to suggest that

the interviews had been conducted in the manner suggested in the reports she had prepared. It was noticeable that the claimant did not suggest, with the exception of the post office matter, that they had acted in any of the bizarre or distressing manners alleged. She did not for example, suggest to Miss Martin or Mr Philbrick that Mr Porter had made the comments relied upon as sex discrimination. She did not explore the sequence of events immediately before or after the comment was allegedly made with either witness. She did not seek confirmation of the fact that she had turned round and bent to place her bag on the floor, or what she was wearing. She did not suggest to Mr Philbrick or Miss Martin that she had suggested that her skirt was the wrong way round, or that Mr Porter had acted in any of the ways detailed in her 'transcript' of the interview. She did not suggest to Mr Philbrick that he had acted in any of the ways she alleged, including shouting out "boobs."

143. It was only when we insisted that the claimant put her case to Mr Higginson in relation to the specific allegation of sex discrimination that she levelled at him that she did so. That was despite my explaining very carefully and clearly at the outset of the hearing the need for the claimant to suggest to the witnesses what she said had happened, so that they could comment upon it.

144. Instead, the claimant's challenge was based entirely on the small points by which we infer, although she did not expressly make the connection, she sought to challenge the respondent's witnesses' credibility and thereby to argue that her account should be preferred. Those points were however entirely inconsequential and capable of explanation. By way of example:

144.1. Whether a reference to the Post Office was mentioned during the interview – we found that it was not

144.2. Whether the claimant was late or on time for the December 2019 interview – we preferred the respondent's account;

144.3. Whether Mr Philbrick had made a fourth bullet point on the Scoring Proforma because he was anticipating that the claimant would refer to her employment with Gurit – we unhesistatingly preferred his evidence that he had merely put such a bullet point in readiness for the claimant's next point.

145. There was not, in our judgment, a shred of cogent evidence upon which we could have concluded that the remarks the claimant's alleges were made were in fact made. In reaching that conclusion we have considered that Mr Porter did not give evidence. We did not therefore hear direct evidence from him that he did not make the remarks alleged. However, the claimant did not suggest to Mr Philbrick or Miss Martin, who were present, that he had, and we had evidence in the form of their denials and Mr Porter's denials of the allegations in the investigation; we found those to be genuine and credible.

146. The claimant has therefore not persuaded us on the balance of probabilities that the remarks were made.

<u>Victimisation</u>

147. The respondent accepts that the claimant has proved the protected acts.

However, the claimant accepted that each of the pleaded protected acts occurred after the interviews. She accepted that as a matter of logic and chronology they cannot have influenced the decision. The only remaining potential route for the claimant is therefore to establish that the detriments were done because the respondent believed that the claimant had done or may do a protected act.

148. The claimant did not suggest to Miss Martin, Mr Philbrick or Mr Higginson that they knew or suspected that she had done any protected act, save that she alleged that Mrs Martin had said 'Post Office' and (again by implication because she did not make the connection express to Miss Martin) that that was a reference to her claim against the post office and Miss Martin knew (a) that it included allegations of discrimination and (b) that that had caused or influenced the rejection of her application. We found that Miss Martin did not make such a remark.

149. We take into account the evidence which was available to us of the reason for the claimant's rejection from the posts. That consists of the interview score sheets, the witness accounts of the claimant's bizarre responses to questions which did not answer the questions asked, Miss Martin's email to the claimant after the first interview identifying that the preferred candidate had the most recent relevant experience, and, in relation to the second interview, the agreed fact that the claimant had sent documents to Miss Martin after the hearing but before the decision was made which were unrequested, bizarre and strange.

150. The claimant has not, therefore, adduced evidence from which we could infer, properly directing ourselves that the reason that the claimant was not appointed to either role for which she was interviewed was the respondent's belief that she had done or was likely to do a protected act.

151. In any event, we accept the respondent's positive account for the reason for the claimant's rejection for the roles.

152. Lastly we considered the reason for the respondent's refusal to offer the claimant a stage 2 review. The respondent accepts that this is a detriment – the issue is therefore one of causation: what was the reason that Mrs Shand opted not to offer the stage 2 review? At the time that Mrs Shand made decision the claimant had done the protected acts. We must therefore ask ourselves whether she has adduced sufficient evidence upon which we could, properly directing ourselves, conclude that they were more than a trivial influence on that decision.

153. The claimant argues that she sent the documents which formed the protected acts to Mrs Shand and that therefore it was inevitable that she would have been influenced by them. Again, that was not a point that the claimant put to Mrs Shand during cross examination. Mrs Shand's evidence was that she was not investigator, but rather a conduit for the information to be passed to the appointed investigator; therefore, she did not read the documents in any detail.

154. We note that the allegations which form the protected acts are buried deeply within some of the documents which are often involved and lengthy in their detail. Secondly, they are not directly connected to the allegations which

the claimant made about the conduct of those who interviewed her. It is logical therefore that to the extent Mrs Shand read the documents at all, the elements which constitute the protected acts would not have formed her focus. Mrs Shand's account is therefore inherently plausible. Secondly, we found Mrs Shand to be a truthful and credible witness, we therefore accept her explanation for the decision, which was carefully detailed in her statement, which we also found to be credible and truthful. Thirdly, the claimant did not suggest to Mrs Shand that reason for her decision not to offer a stage 2 review was any of the protected acts or a belief that the claimant had done or may do protected acts.

155. For those reasons, we were not persuaded that the claimant had adduced any evidence upon which we could conclude that the reason for the decision not to offer the stage 2 review was any of the protected acts or a belief that that the claimant had done or would do any of the protected acts.

156. The claims of direct sex discrimination and victimisation are therefore not well founded and are dismissed.

Rule 70 reconsideration

157. We are conscious, because the parties have told us, that this claim has been appealed to the Employment Appeal Tribunal in relation to the determination of the preliminary issue as to the definition of a worker within the meaning of s.47B and 48 ERA 1996. The respondent indicates that it may cross appeal the decision that s.39(3) EQA 2010 can be construed to include a decision not to offer the stage 2 review.

158. Having considered the Judgment and the materials which were considered in its production, it seems to us that it would be in the interests of justice for us to review the decision because it appears that the Judgment was reached without the benefit of consideration of the relevant European legislation which the Tribunal was obligated to consider when construing s.39 EQA 2010. Moreover, there is a benefit to the respondent and to the public at large more generally in the Employment Appeal Tribunal providing binding guidance on the construction of s.39(3) EQA 2010.

159. The relevant national legislation is s.39(3) EQA 2010 which provides that

> *(3) An employer (A) must not victimise a person (B)—*
>
> *(a) in the arrangements A makes for deciding to whom to offer employment;*

160. We note that s.40 EQA provides the right to remedy for harassment and s.39(1) the right to remedy for direct discrimination in relation to such conduct. This allegation however is not about the conduct, but about the process offered to consider that conduct.

European Law

161. The national law in the EQA 2010 was intended to ensure that the United Kingdom complied with its obligations arising from its membership of the European Union as set out below.

162. The European Union and the United Kingdom are signatures to the International Labour Organisation and are therefore bound to give force to its conventions. ILO Discrimination (Employment and Occupation) Convention, 1958 (No. 111) provides as follows:

> Article 1
> 1. For the purpose of this Convention the term discrimination includes--
> (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;
> (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organisations, where such exist, and with other appropriate bodies.
>
> 3. For the purpose of this Convention the terms employment and occupation include access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.
>
> Article 2
>
> Each Member for which this Convention is in force undertakes to declare and pursue a national policy designed to promote, by methods appropriate to national conditions and practice, equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof.

163. From 1 January 1973, the date on which the European Communities Act 1972 ("The 1972 Act") came into force in the UK, until 31 January 2020, the date on which the European Union Withdrawal Act 1998 ("The Withdrawal Act") came into force, the UK ceded its sovereignty over certain areas, including employment and discrimination law, to the EU.

164. It was trite law (until 31 January 2020) that EU law had supremacy over domestic law in areas where the EU had legislative competence under the Treaties (see Van Gend en Loos v Nederlandse Administratie der Belastingen [1963] ECR 1, ECJ). That supremacy was underlined by section 3(2) of the 1972 Act, which required Courts and Tribunals to take judicial notice of the European Treaties, European legislation and decisions of the Court of Justice of the European Union ("CJUE") in deciding cases before them.

165. The 1972 Act was repealed by the Withdrawal Act. However, the supremacy of EU law and the jurisdiction of the CJEU during the transition period is preserved by section 1A of the Withdrawal Act. The transition period ended on 31 December 2020 ("IP Implementation Day" defined in s.39 of the European Union (Withdrawal Agreement) Act 2020 ("the 2020 Act")).

166. The obligation for the meaning of any retained EU law, such as the Equality Act 2010, (post transition) to be decided "in accordance with any retained case law of the CJEU and domestic courts and any retained general principle of EU law" is provided for in section 6 (particularly 6(3) and (7)) of the Withdrawal Act. Section 5(4) of the Withdrawal Act states that after exit

day the EU Charter of Fundamental Rights is not part of UK law. The position appears therefore to be that the Tribunal must apply the principles from EU derived case law when determining matters to which EU-derived law relates, as only the Court of Appeal and Supreme Court are permitted to depart from them.

167. It follows that for the purpose of this claim the effect of the existing decisions of the CJEU and the impact of the Treaties, Directives and other EU jurisprudence remains as described below.

The Treaties

168. In so far as is relevant, the Treaties with which the Tribunal is concerned in the present instance include:

168.1. The Treaty establishing the European Community ("TEC"), which was incorporated into the Treaty on the Functioning of the European Union ("TFEU").

168.2. The Treaty on European Union ("TEU")

168.3. The Treaty on the Functioning of the European Union, which was signed on 13 December 2007 and entered into force on in the UK on 1 December 2009. Article 10 of the TFEU identifies that "the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability age or sexual orientation."

169. Article 19(1) of TFEU, which incorporated Article 13(1) TEC, provides for the general principle of non-discrimination:

> "Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it on the Community, the Council … may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation."

170. The following Directives were established under the enabling Articles of the Treaties, such as Article 19(1) above:

170.1. The EU Equal Treatment Framework Directive (number 2000/78) ("the Framework Directive"), which sets out a general framework for eliminating employment or occupational inequalities based on age, disability, religion or belief, and sexual orientation.

170.2. The Recast EU Equal Treatment Directive (no.2006/54) ("the Recast Directive"), which relates to 'the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation'. It covers sex, pregnancy and maternity, marriage and civil partnership, and gender reassignment.

The Charter of Fundamental Rights of the European Union

171. The TFEU introduced the Charter of Fundamental Rights of the European Union into European primary law ("The Charter"). The Charter was given the same legal values as the Treaties from 7 December 2007, following the Treaty of Lisbon, with the effect that it acquired the definitive status of primary

law within the legal order of the European Union, in accordance with Article 6(1) EU (see Kucukdeveci v Swedex GmbH & Co KG (KC-555/07) [2010] All ER (EC) 867 paragraph 22; 27).

172. Article 21 of the Charter provides as follows:

> "*Non-discrimination*
>
> *Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political any other opinion, membership of any national minority, property, birth, disability, age or sexual orientation shall be prohibited.*
>
> (Emphasis added)

173. Article 21 has direct effect with the consequence that where national legislation conflicts with the Charter rights, a national court must set aside the discriminatory provision of national law to guarantee individuals the legal protection afforded under Article 21 and guarantee the full effect of that Article (see Cresco Investigation GmbH v Achatzi C-193/17 [2019] IRLR 380 at paragraphs 77-78 and 80).

174. That means that, by virtue of the commitment of fundamental rights laid down in Article 51(1) of the Charter, legislative acts adopted by the European Union institutions in this sphere must be assessed by reference to that provision and the Member States are bound by it in so far as they implement European Union Law (see Kucukdeveci at paragraphs 45 - 48).

The Framework Directive

175. The Framework Directive was the enabling provision by which the Fundamental Right of non-discrimination was extended beyond equal treatment on the basis of sex, nationality and race to include age, disability, religion and belief and sexual orientation.

176. The deadline for transposing the Framework Directive into domestic law was the 2 December 2003 and the UK did this initially by way of Regulations (the Employment Equality (Sexual Orientation) Regulations 2003), and subsequently in the primary legislation now incorporated into the Equality Act 2010. The relevant parts of the Framework Directive are set out below.

177. Recital (4) of the Framework Directive establishes "the right of all persons to equality before the law and protection against discrimination," recognising that as a universal right included within the European Convention for the protection of Human Rights and Fundamental Freedoms. It expressly references ILO No 111.

178. Recital (9) identifies that "Employment and occupation are key elements in guaranteeing equal opportunities for all and contribute strongly to the full participation of citizens in economic, cultural and social life and to realising their potential." (emphasis added).

179. Recital (11) identifies that discrimination based on religion or belief, disability, age or sexual orientation undermines the achievement of the objectives of the EC Treaty, particularly "the attainment of a higher level of

employment and social protection".

180. Recital (27) provides, "In its Recommendation 86/379/EEC of 24 July 1986 on the employment of disabled people in the Community (7), the Council established a guideline framework setting out examples of positive action to promote the employment and training of disabled people, and in its Resolution of 17 June 1999 on equal employment opportunities for people with disabilities, affirmed the importance of giving specific attention inter alia to recruitment, retention, training and lifelong learning with regard to disabled persons."

181. Recital (30) provides, "The effective implementation of the principle of equality requires adequate judicial protection against victimisation."

182. Recital (35) provides, "Member States should provide for effective, proportionate and dissuasive sanctions in case of breaches of the obligations under this Directive."

183. Article 1 identifies the purpose of the Framework Directive as creating "a framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect on the Member States the principle of equal treatment."

184. Article 2 identifies that the "'principle of equal treatment' shall mean that there should be no direct or indirect discrimination whatsoever on the grounds referred to in Article 1."

185. Article 3 "Scope" provides that "Within the limits of the areas of competence conferred on the Community, this directive shall apply to all persons… In relation to… (a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion and (b) Employment and working conditions, including dismissals and pay".

186. Article 11 provides

> Victimisation
>
> Member States shall introduce into their national legal systems such measures as are necessary to protect employees against dismissal or other adverse treatment by the employer as a reaction to a complaint within the undertaking or to any legal proceedings aimed at enforcing compliance with the principle of equal treatment. (emphasis added)

187. We pause to note that there is no article with the Framework directive which prescribes victimsation; that is left to national legislation, and, further, the prohibition passed to the national legislature is in respect of victimisation of employees, rather than workers or applicants. The term 'person' could have been used, as it was elsewhere in the Directive, but was not. The choice of 'employees' must therefore be taken to be deliberate and significant.

188. Article 16 provides:

"Member States shall take the necessary measures to ensure that:

(a) any laws, regulations and administrative provisions contrary to the principle of equal treatment are abolished

(b) any provisions contrary to the principle of equal treatment which are included in contracts or collective agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations are, or may be, declared null and void or are amended."

The general principle of non-discrimination

189. If the context of the claim before the court falls within the legislative competence of EU law, the general principle of non-discrimination will apply (see R (Chester) v Secretary of State for Justice [2014] AC 271 per Lord Mance JSC at paragraph 61-62, Mangold v Helm (C-144/04) [2005] ECR I-9991 para 75, Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH (Case C-427/06) [2008] ECR I-7245 para 25, and Kücükdeveci para 23, Römer v Freie und Hansestadt Hamburg (Case C-147/08) [2011] ECR I-3591 para 60).

190. In consequence, where there is "a conflict between EU law and English Domestic law [it] must be resolved in favour of the former, and the latter must be disapplied" (see Mangold at [77]; and see the comments of Sumption JSC in Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs [2017] UKSC 62, [2018] IRLR 123 at 789E - 790A, approving Chester; Kucukdeveci at paragraphs 50 - 51; 53-54 and Romer at paragraph 61).

191. The fact that a treaty or the Framework Directive contains specific provision preserving the discretion of Member States in relation to aspects of national law (see for example Article 17 TFEU and recital 22 of the Framework Directive) does not mean that a difference in treatment under the national legislation is excluded from the scope of the Framework directive, nor that the determination of whether such difference in treatment is compatible with that directive is not subject to effective judicial review (see Cresco at para 31).

192. Where an article or recital to the Framework Directive establishes an exception to the principle prohibiting discrimination it must be interpreted strictly (see Prigge v Deutsche Lufthansa AG (C-447/09) EU:C:2011:573 at [56]).

The Equality Act and the Equality and Human Right Commission Code of Practice on Employment.

193. By the powers afforded to it by s.14 EQA 2010 the EHRC produced the Code. The Code was given force by the Equality Act 2010 Codes of Practice (Services, Public Functions and Associations, Employment, and Equal Pay) Order 2011 SI 2011/857 with effect from 6 April 2011. The Code has to be taken into account by the Tribunal where it appears relevant.

194. The relevant paragraphs of the codes are as follows:

What are arrangements?

10.8 Arrangements refer to the policies, criteria and practices used in the recruitment process including the decision-making process. 'Arrangements' for the purposes of the Act are not confined to those which an employer makes in deciding who should be offered a specific job. They also include arrangements for deciding who should be offered employment more generally. Arrangements include such things as advertisements for jobs, the application process and the interview stage.

16.43 Arrangements for deciding to whom to offer employment include shortlisting, selection tests, use of assessment centres and interviews. An employer must not discriminate in any of these arrangements and must make reasonable adjustments so that disabled people are not placed at a substantial disadvantage compared to non-disabled people (see Chapter 10). Basing selection decisions on stereotypical assumptions or prejudice is likely to amount to direct discrimination

16:47 addresses the desire for the same staff to conduct interviews where possible to ensure consistency

16.48 An employer should ensure that they do not put any applicant at a particular disadvantage in the arrangements they make for holding tests or interviews, or using assessment centres. For example, dates that coincide with religious festivals or tests that favour certain groups of applicants may lead to indirect discrimination, if they cannot be objectively justified.

Discussion and conclusion

195. The claimant argued before EJ Goraj that she was an applicant within the meaning of s.39(3) EQA 2010 because "the outcome of her complaint pursuant to the respondent's complaints procedure was part of the arrangements which the respondent made for deciding to whom to offer employment" (see para 20 of the Judgment). The Judge accepted that argument.

196. The Judge considered paragraph 10.8 above of the code, but none of the other jurisprudence detailed in this Judgment. She was not taken to it because, as Mr McCombie put it, this was an argument which was not advanced with any great force and amounted to more of an afterthought within the context of the applications that were listed for determination.

197. The respondent argued that the complaints procedure did not fall within the meaning of the terms "arrangements" which the respondent made for deciding to whom to offer employment, because (a) the complaint did not relate to the decision not to appoint the claimant to either role for which she had applied and (b) the decision was made prior to the complaint being issued and the arrangements were then at an end.

198. The Judge rejected that argument, relying upon paragraph 10.8 of the Code, observing:

"(a) that it is clear that the word "arrangements" should be widely construed… that they include the interview stage (b) the claimant's complaint relates to the alleged conduct by the respondent's staff at such interviews… (c) (c) as a job applicant (rather than an employee) the only policy available to the claimant to allow her to pursue a complaint

concerning the alleged conduct of the interviews in question was the respondent's Complaints policy."

199. We take each point in term.

200. The Judge's observation that the word 'arrangement' should be widely construed was correct in so far as what was meant by that was that as the relevant statutory provision was one derived from EU law, the interpretative obligation to construe the national law so as to give effect to the purpose of the principle of non-discrimination applies. However, the purpose of the Framework Directive, which identified the possible discrimination in relation to recruitment, was "to ensure positive action to promote the employment and training of disabled people, with a particular focus on recruitment, retention, training and lifelong learning with regard to disabled persons." That as the Code makes clear related specifically to the form of the interview, its timing, and the nature of the questions and assessment.

201. The aim of taking positive action to ensure a level playing field was reflected in Article 3 which brought "conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions" into the scope of European Law. The focus and purpose of the legislation was particular, therefore, and related to preventing discrimination which might prevent disabled people from having a fair *opportunity* to secure employment. The reason for that policy was identified in preamble 9 to the Equal Treatment Directive: employment has a fundamental role in ensuring equal opportunities for all.

202. The question of whether that purpose requires the phrase 'arrangements made for deciding to whom to offer employment' to be construed to include a grievance process is addressed below.

203. Secondly, the judge was also correct to identify that the claimant's complaint related to the alleged remarks of the respondent's employees at the interviews. Discriminatory remarks in the course of an interview are actionable whether through s.39(1)(a) EQA 2010, or s.39(3) EQA 2010 if the protected act predated the comments (see Nagarajan v London Regional Transport, [1999] ICR 877, HL at 896 C-F).

204. Lastly, the Judge was also right that the only policy available to complain about those remarks was the Complaint's policy.

205. However, the Judge appears to have conflated or confused two issues in reaching her conclusion. First, the nature of the interpretative obligation. That obligation:

205.1. Is limited to direct and indirect discrimination, which are prescribed in the Article 2 of the Equal Treatment Directive,

205.2. Applies where there is need to give effect to the policy aim of ensuring that people are not disadvantaged through discrimination in their attempts to secure employment,

205.3. does not extend to victimisation of an applicant, as (a) victimisation is within the competence of national law competence (albeit the national law giving effect to it should seek in so far as possible to give effect to the

policy of the Directive) and (b) the prohibition of victimisation in the Framework Directive is limited to victimisation of employees.

206. The critical distinction between direct and indirect discrimination on the one hand and victimisation on the other, is that whereas for the former national law must be disapplied if it is incompatible with the EU law, for the latter national law must only be interpreted in so far as possible to give effect to the aims of the EU law and does not premit interpretations of UK statutes which lead to a distortion of their words (see Webb v Emo Air Cargo (UK) Ltd [1992] 4 All ER 929, HL). That position is to be contrasted with the approach to the interpretative obligation where the statute falls within an area of EU competence identified in Vodafone 2 v Revenue and Customs Comrs [2009] EWCA Civ 446 at [37].

207. There is no indication that the Judge was referred to the European jurisprudence which identified the distinction, or to Webb. She appears to have believed the interpretative obligation was that in Vodafone above.

208. The second point where the Judge appears to have conflated issues is in her identification that the only means of complaint was through the respondent's Complaints Procedure and the implied (but not expressed) concept of the need for National courts to provide an effective remedy for EU rights (identified in Recital 35 and considered in Marleasing). The claimant had an effective remedy in respect of the comments: ss. 13, alternatively s.26 and section 39(1) EQA 2010. That has no bearing on the proper construction of the phrase in section 39(3).

209. That takes us to the critical issue: whether the phrase "the arrangements A makes for whom to offer employment" can reasonably be construed to include a decision not to offer a stage 2 review in respect of a complaints procedure where (a) the complaint does not relate to the decision not to offer the applicant employment, (b) the complaint does not suggest that what occurred had any impact or influence upon either the applicant's performance at interview or the decision of the panel that determined to whom employment should be offered.

210. In that sense, this case is distinguishable from Brennan v J H Dewhurst Ltd [1983] IRLR 357, [1984] ICR 52; here there was no finding that the panel had a discriminatory mindset, and the complaint focuses not on the mindset of the panel but on the mindset of Mrs Shand who had no role whatsoever to play in the decision to offer employment.

211. We accept that there is a factual link between the comments made in the interview, the complaint about those comments and the decision not to offer a stage 2 review in respect of that complaint. However, the link is not immediate, relies upon many links in a chain of causal connection, and is not one which relates to or relies upon a discriminatory mindset or policy.

212. Weighing all those factors in the balance, we cannot see that the words in section 39(3) can be construed to include a decision not to offer a stage 2 review in a complaints procedure. Such an interpretation would be to torture the language of the statute beyond breaking point, in circumstances were there is no interpretative obligation which permits it.

213. We therefore conclude that it would be in the interests of justice to

reconsider the Judgment of EJ Goraj and to revoke it, substituting our decision that s.39(3) EQA 2010 cannot be construed to cover the facts of this case.

Employment Judge Midgley

Date 1 February 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

8 February 2023

FOR THE TRIBUNAL OFFICE