



EMPLOYMENT TRIBUNALS

Claimant: Mrs M Kasimu

Respondent: The Government Commercial Organisation ("GCO"),
a division of the Cabinet Office

Heard at: London Central

On: 2, 3, 6 – 10, 21
February 2023

Before: Employment Judge H Grewal
Ms H Craik and Mr D Shaw

Representation

Claimant: In person

Respondent: Mr R Moretto, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is:

1 The Tribunal has jurisdiction to consider any complaints under the Equality Act 2021 that were not presented within the primary time limits;

2 The complaints of disability discrimination are not well-founded;

3 The complaint of race discrimination about placing the Claimant in a Vouchers role rather than the Hubs role to which she had been recruited is well-founded;

4 All the other complaints of race and sex discrimination are not well-founded;

5 The complaint of breach of contract is not well-founded; and

6 The complaints of trade union detriments under section 146 of the Trade Union Labour Relations (Consolidation) Act 1992 are not well-founded.

REASONS

1 In a claim form presented on 14 January 2022 the Claimant complained of race, sex and disability discrimination, breach of contract (notice pay) and of having been subjected to detriments under section 146 of the Trade Union and Labour Relations (Consolidation) Act 1992. Early Conciliation ("EC") was commenced on 23 November 2021 and the EC certificate was granted on 22 December 2021.

2 The Claimant drafted her claim form herself and the particulars of her claim comprised 28 typed pages. She attempted in the particulars to set out her complaints of race, sex and disability discrimination against various individuals. The issues to be determined were identified at two preliminary hearings which took place on 4 May 2022 and 8 June 2022. The Claimant was not represented at either hearing. They were identified as set out below. It appeared to us that in some cases the comparators identified were not appropriate and the Claimant was really relying on a hypothetical comparator.

Direct race discrimination

2.1 The Claimant describes herself as black African. Whether the following acts occurred and, if they did, whether they amounted to direct race discrimination (I set out in brackets the comparators it was said that the Claimant relied on for each complaint):

- i. On 4 May 2021 Ryan Lewin placed the Claimant into a junior Vouchers finance role rather than the Procurement Hubs role to which she had been recruited (Michael Jordan);
- ii. Between 4 May 2021 and 16 November 2021 Ryan Lewin did not offer the Claimant training in the work of the Hubs team and development opportunities such as leading at team meetings and Value for Money sessions and any line management responsibilities (Alexander Charlton and Adam Lowe);
- iii. On 28 May 2021 Ryan Lewin did not allocate Amy Watkins' Band A work to the Claimant when Ms Watkins was transferred to another department (Alexander Charlton);
- iv. Between 4 May and 16 November 2021 Ryan Lewin allocated the Claimant the Rural Tech project rather than work relating to one of the Respondent's key strategic suppliers such as Open Reach (Alexander Charlton);
- v. On 10 August 2021 Ryan Lewin refused the Claimant's request to reduce her notice period of three months to two weeks to enable her to take up a new internal post (Amy Watkins);
- vi. On 6 August 2021 Ryan Lewin asked the Claimant forcefully why she had met Sangeeta Mandalla, a former member of the Vouchers team (hypothetical comparator);

- vii. On 10 August 2021 in a one-to-one meeting Ryan Lewin became vocal and aggressive to the Claimant and told her that her job frustrations were starting to show (a hypothetical comparator);
- viii. Laura Battisegola failed to support the Claimant's informal grievance of 10 August 2021 (hypothetical comparator);
- ix. On 25 October 2021 Ryan Lewin and Laura Battisegola rejected the Claimant's application for an ADC panel review(Katy Barker);
- x. On or before 27 October 2021 Ryan Lewin decided to dismiss the Claimant (Andrew Perrone and Katy Barker);
- xi. On 8 November 2021 Ryan Lewin failed to answer the Claimant's email asking him to explain why team members had laughed at a joke about the Black Country during a team meeting on that day (hypothetical comparator);
- xii. On 8 November 2021 Ryan Lewin failed to support the Claimant when her colleagues laughed when she asked for an explanation of a joke made about the Black Country at a team meeting on that day (hypothetical comparator);
- xiii. On 7 December 2021 Marc Bryant and Alison Bradshaw dismissed the Claimant's appeal against the decision to dismiss her (Andrew Perrone and Katy Barker);
- xiv. On 22 December 2021 Jules Blackwell failed to uphold the Claimant's formal grievance against Ryan Lewin and Laura Battisegola.

Direct sex discrimination

2.2 Whether the following acts occurred and, if they did, whether they amounted to direct sex discrimination (I set out in brackets the comparators it was said that the Claimant relied on for each complaint):

- (i) Between 4 May 2021 and 16 November 2021 Ryan Lewin did not offer the Claimant training in the work of the Hubs team and development opportunities such as leading at team meetings and Value for Money sessions and any line management responsibilities (Alexander Charlton and Adam Lowe);
- (ii) On 13 July 2021 Ryan Lewin blocked the Claimant's opportunity to transfer to a procurement role with the Respondent (Michael Jordan and Alexander Charlton);
- (iii) On 10 August 2021 Ryan Lewin made disparaging comments about the Claimant at a one-to-one meeting, including that she lacked emotional resilience and that her frustrations were starting to show (Alexander Charlton and Adam Lowe);
- (iv) On 10 August 2021 Ryan Lewin threatened that he would say in her mid-probation review that she was underperforming referring to issues which had not previously been raised with her (Alexander Charlton and Adam Lowe);
- (v) On 10 August 2021 in a Team Value for Money meeting Ryan Lewin made a critical comment to the effect that she should not pass over work (Alexander Charlton and Adam Lowe);
- (vi) After the Claimant's return to work from sick leave on 29 September 2021 Ryan Lewin talked over the Claimant in the return to work meeting and other one-to-one meetings (Alexander Charlton and Adam Lowe);

- (vii) On or around 25 October 2021 Ryan Lewin and Laura Battisegola withdrew support that had previously been offered to the Claimant on 29 September 2021, namely that he probation period would be extended from 6 to 18 months and they would assist her with her job search for new roles (hypothetical comparator);
- (viii) On 25 October 2021 Ryan Lewin and Laura Battisegola decided to terminate the Claimant's contract early (Andrew Perrone).

Disability Discrimination

2.3 Whether the Claimant was disabled at the material time by reason of anxiety and depression.

Direct disability discrimination

2.4 Whether the following acts occurred and, if they did, whether they amounted to direct disability discrimination (I set out in brackets the comparators it was said that the Claimant relied on for each complaint):

- (i) On 6 August 2021 Ryan Lewin called the Claimant to ask her whether she had completed an anonymous mental health survey the previous week by making allegations of bullying and harassment in the Commercial Team (hypothetical comparator);
- (ii) On 10 August 2021 Laura Battisegola asked the Claimant the same question when discussing her informal grievance against Ryan Lewin (hypothetical comparator);
- (iii) Between 29 September 2021 and 31 October 2021 Ryan Lewin failed to refer the Claimant to Occupational Health, to conduct a risk assessment and to offer her a Wellness and Recovery Action Plan (hypothetical comparator);
- (iv) On 30 October 2021 Ryan Lewin sent the Claimant a formal absence letter following her six week sickness absence between 11 August and 28 September 2021);
- (v) On 7 December 2021 Marc Bryant and Alison Bradshaw dismissed the Claimant's appeal against her dismissal without considering her mental health (hypothetical comparator);
- (vi) On or before 22 December 2021 Samantha Mephram rejected the Claimant's grievance about her being asked whether she had completed the anonymous mental health survey (hypothetical comparator);
- (vii) On 22 December 2021 Jules Blackwell failed to uphold the Claimant's formal grievance (hypothetical comparator).

Discrimination arising in consequence of disability

2.5 Whether any of the matters set out at paragraph 2.4 (i) – (vii) were acts of discrimination under section 15 of the Equality Act 2010. No attempt had been made to identify the "something arising in consequence of disability" which was said to be the reason for the unfavourable treatment.

Failure to make reasonable adjustments

2.6 Whether the Respondent applied a PCP – the PCP had been identified as the Respondent having a discretion to terminate the employment of a fixed term employee who failed to achieve an A Grade at the ADC within the course of their fixed term contract;

2.7 Whether that PCP put the Claimant at a substantial disadvantage compared to someone who was not disabled;

2.8 Whether the Respondent knew, or could reasonable have been expected to know, that the Claimant was disabled and that the PCP placed her at a disadvantage;

Trade Union detriments

(These were not clarified at the preliminary hearings. We identified the issues to be the following.)

2.8 Whether the following acts occurred and, if so, whether they amounted to detriments and whether their sole or primary purpose was to prevent or deter the Claimant from making use of trade union services at an appropriate time or to penalise her for doing so:

- (i) On 25 October 2021 Laura Battisegola failed to offer the Claimant a right of appeal against her decision not refer her to a panel;
- (ii) On 27 October 2021 Hardip Sidhu arranged a meeting to discuss the termination of her contract without the presence of a trade union representative;
- (iii) On 28 October 2021 Ryan Lewin terminated the Claimant's contract and did not offer her a right of appeal;
- (iv) On 2 November 2021 Ryan Lewin afforded the Claimant a right of appeal but no right of representation;
- (v) The dismissal of the Claimant's appeal against her dismissal and her grievance.

Jurisdiction

2.9 Whether the Tribunal has jurisdiction to hear any complaints of discrimination about acts or failures that took place before 24 August 2021.

Breach of contract

2.10 Whether the Respondent breached the Claimant's contract by dismissing her with less than three months' notice (This was not listed in the list of issues but was clearly a complaint that the Claimant had made in her claim form).

The Law

3 Section 13(1) of the Equality Act 2010 ("EA 2010") provides,

"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."

Race, sex and disability are protected characteristics (section 4 EA 2010). On a comparison of cases for the purposes of section 13 there must be no material difference between the circumstances relating to each case (section 23(1) EA 2010)..

4 Section 136 EA 2010 provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred unless A shows that A did not contravene the provision.

5 In **Igen Ltd v Wong [2005] IRLR 258** the Court of Appeal gave guidance on what is required under section 136 to shift the burden to the Respondent. It said,

“(1) ... it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful... These are referred to below as “such facts.”

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has provided such facts that it is unusual to find direct evidence of sex discrimination. In some cases the discrimination will not be an intention but merely based on the assumption that ‘he or she would not have fitted in’.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to bear in mind the word ‘could’ [in section 136] At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage the tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

...

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining such facts ... This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since “no discrimination whatsoever” is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not the ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code

of facts.”

6 In **Madarassy v Nomura International plc** [2007] IRLR 247 Mummery LJ stated,

“The court in Igen v Wong expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent ‘could have’ committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal ‘could conclude’ that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

“Could conclude” ... must mean that “a reasonable tribunal could properly conclude” from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory “absence of an adequate explanation” at this stage ... the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like ...; and available evidence of the reasons for the differential treatment.”

7 In **The Law Society v Bahl** [2003] IRLR 640 Elias J restated the principles to be applied in establishing direct discrimination as follows,

“First, the onus lies on the claimant to establish discrimination in accordance with the normal standard of proof.

Second, the discrimination need not be conscious; sometimes a person may discriminate on these grounds as a result of inbuilt and unrecognised prejudice of which he or she is unaware.

Third, the discriminatory reason for the conduct need not be the sole or even the principal reason for the discrimination; it is enough that it is a contributing cause in the sense of a ‘significant influence’ ...

Fourth, in determining whether there has been direct discrimination, it is necessary in all save the most obvious cases for the tribunal to discover what was in the mind of the alleged discriminator. Since there will generally be no direct evidence on this point, the tribunal will have to make appropriate inferences from the primary facts which it finds ...

Fifth, in deciding whether there is discrimination, the tribunal must consider the totality of the facts ... Where there is a finding of less favourable treatment, a tribunal may infer that discrimination was on the proscribed grounds if there is no explanation for the treatment or if the explanation proffered is rejected ...

Sixth, it is clear from the structure of the statutory provisions that the need to identify a detriment is in addition to finding less favourable treatment on the prohibited ground ... The test for establishing detriment is in general easily met. It was defined by Lord Hope in the Shamoon case as follows ... Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance cannot amount to "detriment".

Elias J then dealt with the relationship between unreasonable treatment and finding discrimination. He said,

"There is clear authority for the proposition that a tribunal is not entitled to draw an inference of discrimination from the mere fact that the employer has treated the employee unreasonably ...

The significance of the fact that the treatment is unreasonable is that a tribunal will more readily in practice reject the explanation given than it would if the treatment were reasonable. In short, it goes to credibility. If the tribunal does not accept the reason given by the alleged discriminator, it may be open to it to infer discrimination. But it will depend on why it had rejected the reason that he has given, and whether the primary facts it finds provides another and cogent explanation for the conduct."

8 Section 6(1) of the Equality Act 2010 ("EA 2010") provides,

"A person (P) has a disability if –

- (a) P has a physical or mental impairment, and*
- (b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to day activities."*

"Schedule 1 of EA 2010 provides,

"2 Long-term effects

(1) The effect of an impairment is long-term if –

- (a) It has lasted for at least 12 months,*
- (b) it is likely to last for at least 12 months, or*
- (c) it is likely to last for the rest of the life of the person affected.*

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if it is likely to recur...

5 Effect of medical treatment

(1) An impairment is to be treated as having a substantial adverse effect on the ability of a person to carry out normal day-to-day activities if –

- (a) Measures are being taken to treat or correct it, and*
- (b) but for that, it would be likely to have that effect.*

(2) "Measures" include, in particular, medical treatment and the use of prosthesis or other aid."

9 In considering whether effects are “likely” to last for at least 12 month or to recur, the test is whether that “could well happen”, not whether it is more likely than not that it will happen. There must be positive evidence to establish that – **SCA Packaging Ltd v Boyle [2009] IRLR 746**. The Tribunal’s assessment must be made by reference to the facts as they pertained at the relevant time (the time when the alleged discrimination took place). The Tribunal is not entitled to take into account subsequent events – **McDougal v Richmond Adult Community College [2008] IRLR 227** and **All Answers Ltd v W [2021] IRLR 612**.

10 Section 123(1) EA 2010 provides,

“Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of -

- (a) the period of 3 months starting with the date of the act to which the complaint relates, or
- (b) such other period as the employment tribunal thinks just and equitable.”

Section 123(3) provides,

“For the purposes of this section –

- (a) conduct extending over a period is to be treated as done at the end of that period;
- (b) failure to do something is to be treated as occurring when the person in question decided on it.”

Section 140B provides for extension of time to facilitate Early Conciliation. The effect of section 140B in this case is that complaints about any acts or failures to act that occurred before 8 March 2021 will not have been presented within the primary time limit.

The Evidence

11 The Claimant and Mr Kasimu (her husband) gave evidence in support of her claim. The following witnesses gave evidence on behalf of the Respondent (their positions given are those that they held at the relevant time) – Ryan Lewin (Head of Commercial, Building Digital UK), Laura Battisegola (Commercial Deputy Director, Building Digital UK), Samantha Mephram (Commercial Business Partner), Jules Blackwell (Head of Professional Services, Research and Media) and Marc Bryant (Commercial Director, Department for Culture, Media and Sport). The documentary evidence in the case comprised a little over 1500 pages. Having considered all the oral and documentary evidence, the Tribunal made the following findings of fact.

Findings of Fact

12 The Government Commercial Office (“GCO”) is a division of the Cabinet Office. It was established in 2017 to be the single employer of senior commercial professionals (at Grade 7 and above) working in central government departments. Over the next few years, those working at Grade 7 and above in commercial roles transitioned in phases to GCO. The Department for Culture, Media and Sport (“DCMS”) was the last government department to transition to GCO. The GCO also recruited new employees externally. All those working in GCO have to be accredited through the Assessment and Development Centre (“ADC”).

13 On 27 August 2019 Andrew Perrone (white, male) commenced employment with DCMS as a Commercial Lead (Grade 7) working within Building Digital UK (“BDUK”) - National Scheme and Programme Development. He was employed on a fixed-term contract which was due to end on 26 August 2021. Ryan Lewin was a Commercial Head (Grade 6) working in BDUK at the time.

14 In December 2020 GCO advertised a Grade 7 Commercial Lead role which would be working within the DCMS business area as part of their BDUK team. In describing what the successful candidate would be doing, the advertisement stated,

“This is a full commercial lifestyle role which will give the successful applicant the opportunity to provide support to the Building Digital UK teams as well as a number of local authorities. Alongside the operational procurement and contract management support will be the opportunity to provide strategic advice with the aim of further streamlining commercial processes. Candidates are likely to need in-depth public contract regulations knowledge, and will have a proven ability to offer innovative solutions which drive value for money throughout the contract lifecycle.”

The responsibilities of the postholder were split into two parts – what the postholder would do for products procured by BDUK and what he/she would do for products procured by local authorities. The main responsibilities in respect of the former were,

*“Own and manage changes to, all contract and ITT [invitation to tender] documentation;
Provide SME [subject matter expert] support to the Procurement and Evaluation Managers and Contract Managers in day to day management of the procurements and contracts;
Identify opportunities to streamline and reduce cost/resource requirements associated with internal and external processes.”*

The main responsibilities of the latter were,

*“Responsible for the creation and promotion of commercial strategies for the respective product;
Lead the development of commercial and procurement strategies to align with both local economics and BDUK delivery objectives;
Lead the assessment and assurance of contracts throughout their lifecycle (including reviewing Total Cost of Ownership modelling) during procurement, change requests and contract closure;
Negotiate and maintain BDUK’s grant agreements with Local Authorities & providing guidance to Local Authority delivery partners regarding procurement strategies, procurement processes and Contract Management, in line with Public Contracting Regulation.”*

Both parts included responsibilities to manage product level commercial risks and issues, driving resolution and escalating as required and to deliver the SRM strategy and delivery for the product ensuring alignment to the broader BDUK SRM strategy. We would have expected those responsibilities to be included in any Commercial Lead role in BDUK.

15 The Commercial team in BDUK was divided into two teams – Hubs and Vouchers. The Hubs team supported local authorities in running their procurement exercises for which the funding was provided by BDUK. It supported the local authorities in seeking suppliers to provide products and to establish and manage the contracts for the provision of those products. The Vouchers team dealt with suppliers who came to BDUK with proposals for a project and sought grant funding from BDUK to deliver the project. The team evaluated the project and decided whether or not it should receive funding.

16 The Claimant applied for the role that was advertised. She is a black African woman. The Claimant had a BA in Marketing and Public Relations and a Masters in Public Administration. In addition, she had the following professional qualifications – MCIPS Chartered (Member of the Chartered Institute of Procurement and Supply) and CCMAP (Contract and Commercial Management Advanced Practitioner). She had six years' experience of working in procurement and contract management roles at a senior level in the public sector.

17 The Claimant attended an ADC assessment on 11 January 2021. Those attending the ADC perform five different types of exercises and are assessed on three attributes – Business Acumen and Commercial Judgment, Leadership Skills and Capability and Technical. The overall scores that can be awarded are A, B(ASR) (Eligible for Accreditation Status Review), B or C. A signifies "full accreditation" and B signifies "need for development – working towards accreditation". There are prescribed minimum scores for each of the attributes to attain the various overall scores. The Claimant's overall score was B. She scored 2.7 for Business Acumen and Commercial Judgment and 2.9 for Leadership Skills and Capability and three Technical scores of 4. In order to achieve an A the Claimant needed minimum scores of 2.7 on Business Acumen and Commercial Judgment and Leadership and Quality, a minimum of 6 for the two of them combined and a highest Technical Score of at least 3. The Claimant did not get an A because her combined score of the first two attributes was 5.6. In order to get B(ASR) the combined score would have needed to be 5.9. The Moderator made many positive comments about the Claimant's performance including, "*Your example of managing an end-to-end procurement process was particularly strong.*" The one failing identified was that in some areas a deeper analysis of the financial information would have been of benefit.

18 The Respondent's ADC Policy deals at section 8 with ADC outcomes for existing civil servants and at section 9 for outcomes for external applicants. Section 9.7 of the Policy states,

*"Any participant scoring a **B** (Need for development):*

- *Will not be invited to a final interview panel unless:*
 - a) *their score was within the tolerances accepted for an Accreditation Status Review (ASR) as defined in Appendix 1*
 - b) *in exceptional circumstances, the selection panel deem it necessary to consider 'high' B candidates – In such circumstances any resultant offer can only be made on a Fixed Term Appointment (FTA) basis, without access to PRP.*

- *They may re-sit the Assessment Centre at the same or higher level after a minimum period of 6 months (and a maximum of once in a 24 month period), unless in exceptional circumstances which must be agreed with the GCO ADC team.*
...
- *A 'high' B may be carried forward to be considered for future commercial roles within government, subject to the conditions set out above, for up to five years (at the level at which they are assessed and any level below that.)*

The policy states that a 'high' B *"is generally considered to be c> 2.7 in both sets of J&L attribute but this can be adjusted up or down depending on the specific nature of the role and the difficulty to fill."*

19 The Claimant was invited for a final panel interview, presumably under the exception at section 9.7(b) (above) and the invitation was for a "Commercial Lead Hubs Interview." At that stage it was known that the Hubs and Vouchers teams would be merging in the near future and that the merged team would initially be managed by Ryan Lewin, who was Head of the Vouchers team, and later by James George, who was Head of the Hubs team. Hence, they were both involved in the interviews but Mr George was the lead interviewer, presumably because the role was in the Hubs team. The Claimant was interviewed on 21 January 2021. She was told that the two teams would be merging and would initially report to Mr Lewin and then to Mr George.

20 The Claimant was successful and sent an offer letter on 9 February 2021. The offer letter stated that she would be working in the Market Stimulation and Supplier Management department, which Ms Battisegola said was a subset of the Hubs team. The Claimant's contract, sent to her on 12 February 2021, at clause 2.1 defined "appointment" in the contract as,

"the employment of the Employee by the GCO as GCO Commercial Lead, GCO T&Cs/Commercial Lead – Hubs, on the terms of the agreement."

The offer letter said that she would report to Ryan Lewin for Q1 to Q3 and to James George from Q4 onwards.

21 Mr Lewin's evidence was that the Claimant had not applied for or been recruited to work in a role in the Hubs team, all the candidates had been told that they would be working in the merged team but had not been told in which of the two teams they would work, he later came to understand that the Claimant's expectations had been that she would work in the Hubs team in a procurement focused role and that she was the only person recruited to those teams at that time who seemed to misunderstand the role. We did not have any evidence about anyone else who applied for the same role as the Claimant and was successful. It is clear from the advertisement that procurement was an important part of the role and that it fitted in within the Hubs team and the offer letter and contract confirmed that the Claimant was being recruited to work in a role in the Hubs team.

22 The ADC Policy provides at Appendix III,

"2. The GCO requires individuals to achieve an A grade result (full accreditation) from the ADC to be eligible to be offered a permanent role in the GCO, therefore employees who applied to a permanent GCO role and scored a 'B' (need for development) will be required to resit an ADC.

3. Employees who are required to resit an ADC, will need to do so within two years of scoring a 'B'."

It also states that standard fixed-term contracts for those who have applied for a permanent role and scored a B are 22 months.

23 The Claimant's offer letter of 9 February 2021 said,

"Your appointment will be on a Fixed Term basis for a period of 22 months from the commencement date, while you work towards full accreditation. GCO will work together with the department within which you are posted, Market Stimulation and Supplier Management to support you in working towards full accreditation over the next 22 months. Full accreditation will require you to achieve an A at ADC within the next 22 months. In the event that you achieve an A accreditation within that time-frame, GCO confirms that you will be eligible to be offered a permanent role of GCO Commercial Lead, GCO T&Cs and access the PRP scheme. If you do not achieve an A within this time frame, your contract will automatically terminate on the termination date in accordance with your contract."

24 The Claimant's contract stated that the commencement date was 4 May 2021 and the termination date was 3 March 2023. Clause 1.2 stated that the job description did not form part of the agreement, and might be amended by the GCO from time to time in line with business needs. The following provisions of the contract are relevant to the issues that we have to determine –

"2. Term of Appointment

2.1 The Appointment shall commence on the Commencement Date and shall continue, subject to the remaining terms of this agreement, until it terminates on the Termination Date without the need for notice unless terminated earlier, in which case notice will be given in accordance with clause 2.2 and 2.3.

2.2 Because of the power of the Crown to dismiss at will, the Employee is not entitled to a period of notice terminating the Appointment. However, unless the Employee's Appointment is terminated by agreement, in practice, the GCO will normally give three months' notice in writing terminating the Appointment subject to clause 2.4 and successful completion of the Employee's probationary period.

2.3 The Employee must give the GCO a minimum of three months' written notice if they wish to terminate the Appointment.

2.4 Probationary period

The first six months of the Appointment will be a probationary period. The GCO may, at its discretion, extend the probationary period for up to a further

16 months. During the probationary period the Employee's performance and suitability for continued employment will be monitored. At the end of the probationary period the Employee will be informed in writing if they have successfully completed their probationary period. Whilst the Employee is in their probationary period (whether during the first six months or at any time prior to successful completion of probation), the Appointment may be terminated GCO at any time by giving the Employee 5 weeks' notice or payment in lieu of notice."

"13. Payment in lieu of notice

13.1 The GCO may, in its sole and absolute discretion, terminate the Appointment at any time and with immediate effect by notifying the Employee that the GCO is exercising its right under this clause 13 and that it will make a payment in lieu of notice (Payment in Lieu) to the Employee. This Payment in Lieu will be equal to the basic salary (as at the date of termination) which the Employee would have been entitled to receive under this agreement during the notice period referred to at clause 2 (or, if notice has already been given, during the remainder of the notice period) less income tax and National Insurance contributions."

25 The last tranche of DCMS BDUK Commercial employees at Grade 7 and above were to transition to GCO on 1 May 2021. They had to attend the ADC prior to that. That included Messrs Lewin and Perrone. Mr Perrone's assessment took place on 29 March 2021. Mr Perrone was awarded a "B". He scored 2.6 for Business Acumen and Commercial Judgment, 2.53 for Leadership Skills and Capability (5.13 for the two combined) and had two technical scores of 3. The Moderator noted that across the ten Judgment and Leadership attributes he had scored slightly below the threshold in all attributes and identified several areas of improvement – "You would have benefitted from a more resilient approach", "Your approach would have benefitted from a more collaborative approach", "Covering risks in more detail and making more use of the financial information would have improved your scores."

26 In April 2021 BDUK extended Mr Perrone's contract which was due to end in August 2021 for a further two years. On 1 May 2021 Mr Perrone's employment transitioned to GCO. Attached to the letter confirming his transfer to GCO was a document setting out the effect of the ADC outcome. It said,

"If you are assessed as a B (working towards accreditation) you will work with your line manager and our Talent team to create a development plan to support you to achieve full accreditation. You will be eligible to join the GCO and you will remain on existing equivalent T&Cs.

- a. Staff will have a personal responsibility to work towards full accreditation by resitting the ADC within two years of joining the GCO.*
- b. ...*
- c. For staff who do not gain full accreditation within a 2 year period there will be a discussion on the way forward between the individual, their line manager and the GCO. They will need to go through a redeployment process and find an alternative role outside Commercial.*
- d. Staff can only retake the ADC once in 24 months and only twice for the same grade.*

If following a second ADC the participant achieves an:

...

B: with the agreement of the Commercial Director, individuals can opt to attend a panel interview with supporting evidence to secure accreditation. If accreditation is not secured as a result of the panel interview, or employees chose not to enter the panel and supporting evidence process or are unable to gain Commercial Director agreement to enter the panel; or are not accredited by the panel – employees will be supported in moving from the GCO into a non-specialist commercial role within 6 months."

27 The Claimant started working for the Respondent on 4 May 2021. By that time the Hubs and Vouchers teams had merged into one team which was managed by Ryan Lewin. Although the two teams had merged, the work of the individuals in the two teams did not change. Those who had worked in Hubs continued doing that work and those who had worked in Vouchers continued doing that work although they were expected in time to learn the skills of the other team. When the Claimant started, there were three Commercial Leads working in Hubs and two Commercial Leads working in Vouchers. The three Commercial Leads working in Hubs were Mr Perrone, Mark Britten and Michael Jordan. There are all white males.

28 Michael Jordan was not employed by the Respondent or any other government department but was an independent contractor providing services. He was first engaged by DCMS to provide services in June 2020 and was described in an HMRC document as a "Commercial Advisor." He was described in the Respondent's organisation chart as a "Commercial Lead". Mr Jordan was a solicitor who had worked for many years in a County Council in Procurement ending up as Head of Strategic Procurement. He had since 2018 been a partner in his own law firm. He was described on LinkedIn as a lawyer and commercial advisor and it was noted that in addition to being a solicitor he provided commercial advisory and consultancy services. Mr Lewin had not been involved in the recruitment of Mr Jordan. His evidence was that Mr Jordan's role was "*entirely different*" from the Claimant's role and that his role was to provide legal advice on multiple different projects. There was nothing in the documents before us to support the evidence given by Mr Lewin. All the documentary evidence indicated that he had been recruited to provide commercial advisory services and that he worked as a Commercial Lead in the Hubs team. The Claimant's evidence was that he had worked as a Commercial Lead and not as a legal advisor. We found that Mr Jordan provided commercial advisory services and not legal services.

29 The two Commercial Leads working in Vouchers were Adam Lowes (white male) and Amy Watkins (white female). Both of them had been in that role for about one year. Mr Lewin had initially stated in his witness statement that Mr Lowes had been in that role "*for a number of years so his competence versus Mitchell's was not comparable*". The documents disclosed showed that he had only been in the role for one year. Mr Lewin corrected his witness statement when he gave evidence. Unlike the Commercial Leads in Hubs, who had no employees reporting to them, the Commercial leads in Vouchers had four Band B Commercial Managers and one Band C Commercial Officer reporting to them. One Commercial Manager reported to Mr Lowes, all the others reported to Ms Watkins. One of the Commercial Managers reporting to Ms Watkins was Alexander Charlton (white male). He had been in that role since March 2020, contrary to Mr Lewin's assertion in his witness statement that he had been "*in the department for years*". Mr Lewin also stated in his witness

statement *"Both Adam Lowes and Alexander Charlton cannot fairly be compared to Michelle because their experience and skill levels were very different."* He did not provide any evidence to support that assertion.

30 Although the Claimant had applied for and had been appointed to a Commercial Lead Hubs role, she was placed by Mr Lewin in the Vouchers team. He described it as *"probably our most simple product to deal with."*

31 The main duties of a Commercial Lead in Vouchers (as can be ascertained from the Claimant's performance appraisal form) were to build relationships and to collaborate with suppliers and other BDUK functions, assess commercial risk and opportunity for voucher products focusing on the core eligibility and Ts and Cs, ensure that the voucher scheme delivered value for money, apply market insight to understand supplier motivations and behaviours to support business decisions, use political insight to recommend decisions for the voucher programme, create new processes and ways of working where required to allow vouchers to work effectively with other BDUK products. That is significantly different from the role for which the Claimant applied. The Commercial Leads in Vouchers were also expected to cross skill and learn about the Commercial Lead role in the Hubs product so that they could in time work across teams. The fact that Commercial Leads in both areas were expected to do that reinforces the fact that the two roles were not the same or very similar. In both roles the Commercial Leads were expected to assess commercial risk and ensure value for money, but the context in which they did that was different.

32 In a document prepared in May 2021 Mr Lewin set out the managers in Vouchers who would be dealing with various suppliers. The suppliers were categorised as primary, secondary, tertiary or developing. Developing clients were ones where there were very large projects in the pipeline (with values of £7m, £10m and £50m). Adam Lowes was the designated Relationship Manager for all of them. The biggest of the primary suppliers (including Openreach described as a key strategic supplier which made up 40% of the budget) were allocated to Amy Watkins and Alex Charlton. Two of the smaller primary suppliers were allocated to the Claimant and the others to the Commercial Managers. The secondary suppliers (described as operational partners) were all allocated to the Commercial Managers. There were nine tertiary suppliers (described as low value suppliers). Four were allocated to the Claimant and the rest to the Commercial Managers. One of the tertiary suppliers allocated to the Claimant was Beacons Telecom (Rural Tech). It had submitted in February 2021. It appears from that that the Claimant was given the same kind of work as was given to the Commercial Managers.

33 One week before the Claimant started work Amy Watkins gave four weeks' notice to terminate her employment. She was contractually obliged to give four weeks' notice. Her last working day was to be 26 May 2021. On 19 May 2021 BDUK sought expression of interest from internal employees to be temporarily promoted to the Commercial Lead role. The advertisement stated that the postholder would be expected to,

"(i) Provide commercial leadership and expertise to BDUK's Gigabit Broadband Voucher scheme, including project assurance and supplier management and engagement;

- (ii) Ensure BDUK's Voucher scheme delivers value for money alongside Commercial Finance colleagues and aligned to BDUK's wider product mix strategy; and*
- (iii) Develop and optimise BDUK's products from a commercial perspective and more widely as required."*

34 Alexander Charlton applied on 25 May. He was the only person who applied. 1On 28 May Mr Lewin announced that Mr Charlton had been appointed on temporary promotion to the role vacated by Amy Watkins. As he was on temporary promotion he did not need to undergo the ADC process. After Ms Watkins left, the Commercial Managers who had reported to her reported to Mr Lowes. Mr Charlton took over responsibility for Openreach when Ms Watkins left.

35 The development programme for someone who had achieved a B at the ADC envisaged a meeting in months 2-3 with the line manager and the agreement of a development plan, starting module 1 in leadership skills around that time, a development review with the line manager at 6 months, starting module 2 in commercial judgment and business acumen in the latter half of the year and doing module 3 in the second year. On 10 May the Claimant signed up to start module 1 on 27 May 2021. It was due to complete on 28 July 2021.

36 Soon after starting the Claimant raised with Mr Lewin that the role she was being asked to perform was different from the role for which she had applied and where her expertise lay. She did not have the expertise and experience in the Vouchers role. Mr Lewin did not accept that she had been appointed to a Commercial Lead Hubs role. He said that there was very limited procurement work available at the time and the business need was for her to work in the Vouchers team. He said that it would provide her a good opportunity to get the development she needed to get the ADC accreditation. He asked her to draft a learning and development plan which she did. On 24 May Mr Lewin set up a plan for the Claimant to be coached by the Commercial Managers that week. In June all the members of the Vouchers team, except for the Claimant, were teamed up with the Hubs team for on the job training. When the Claimant asked Mr Lewin why she had been excluded he said that her core focus was to be the Vouchers role and that the Hubs programme would not be starting until later. He said that there was a greater business need in Vouchers at the time. On another occasion when the Claimant raised concerns about the role and said that it was not for her, Mr Lewin responded that it was too early to judge and that she should give it time. The other Commercial Leads in Vouchers led weekly team meetings and Value for Money meetings. The Claimant did not. Mr Lewin's evidence was that the Claimant "*did not have the basic competencies*" required in the Vouchers role to be given those additional responsibilities. The effect of putting the Claimant in a different role from the one to which she had been appointed was that in essence she was not operating at a Commercial Lead level.

37 On 30 June 2021 the Claimant booked her ADC resit for 27 September 2021. On 6 July ADC informed the Claimant that they would have to cancel her resit as she had not yet completed the Learning and Development programme and all participants needed to complete that before resitting. It was pointed out that at that time she was on Module 1 of the training and still had two other Modules to complete and that she was unlikely to be able to complete the full programme in less than 12 months. The Respondent's ADC policy provides at Appendix III paragraph 6,

“GCO employees are expected to complete all modules of the relevant development programme prior to resitting the ADC and therefore early resits will not be granted for participants who still need to complete the relevant development programme.”

38 On 8 July the Claimant queried why someone else who was on the Learning and Development programme with her had been allowed to resit her ADC. She was referring to someone called Katy Barker who worked for GCO and was based in either the MOD or MOJ. Margaret Saich from ADC responded that there had been technical issues when Katy Barker had sat her first ADC and hence a very small number of people, who had been affected by the technical issues, were being allowed to sit the ADC again as a first sitting. It was not a resit.

39 Katy Barker had done the ADC assessment on 27 Nov 2020. She had achieved a B. On 9 December 2020 it had been discovered that the Commercial Lead scoring scale descriptors on the online assessment system had been set to the next level up and that that had impacted on all ADCs taken between 26 October 2020 and that date. The matter had been reported to the ADC Board on 11 December 2020. As a result a small number of individuals were allowed to do the ADC assessment again. Katy Barker was one of them. Ms Barker did the ADC assessment on 14 July 2021. She achieved B (ASR) – She scored 5.93 on the combined score and her highest technical knowledge score was 4.5. On 15 September 2021 an Accreditation Panel changed her score to A. Under the ADC Policy, if someone achieves a B(ASR) the Panel can be asked to review a portfolio of evidence presented by the sponsor and, if satisfied, can adjust the grading from a B to an A.

40 On 9 July the Claimant met with Lorraine Worthington-Allen, Head of Procurement in DCMS. She expressed her concerns about her current role and inquired whether there were any procurement roles that might be available. Ms Worthington-Allen told her that there was likely to be a Grade 7 role coming up. She said that she had not yet decided what recruitment route she would use. She advised her to speak to Mr Lewin about her concerns about her role because that was the correct process and there might be changes of which she might not be aware. The Claimant spoke to Mr Lewin and he told her that she could not start a new role until she had done her ADC resit. He also said that the Hubs programme that would involve procurement would start at the end of that year. The Claimant informed Ms Worthington-Allen of that and said that she was happy with his suggested approach of waiting until the end of the year. On 15 July the Claimant told Ms Worthington-Allen that she had checked with GCO Development Programme and they had told her that she could apply for other roles with a B. She said that she would be interested in applying for the role in Procurement when it was advertised.

41 On 15 July external consultants carried out an Emotional and Social Competency Inventory of some of the Respondent's employees. The process involves managers and peers scoring the employee on various criteria and making comments about them. Mr Lewin commented on the Claimant's strengths as follows,

“Michelle has recently joined the team and has started with a very positive can do attitude. Michelle has been inquisitive as to why things are done certain ways and this has helped to increase her overall understanding. Michelle has a confident and friendly persona and this has helped her to build relationships with colleagues both inside her direct team and more widely

which will be helpful when getting things done across the organisation. Michelle has also been able to identify ways to improve systems or processes based on best practice seen elsewhere which will be good for the organisation in the longer term."

In identifying improvement areas he said,

"Michelle is quick to learn the specific steps of a particular process or task and should now try to join these different learnings together to ensure the overall bigger picture is understood. Value for money assurance has been a relatively new experience for Michelle and she is picking it up well. Continue to really get to grips and understand this element of your role and it will help not only with your vouchers role, but more widely across your commerce area as well."

42 On 15 July the Claimant sent an email to Lena Patel, Head of People, BDUK. She said,

"I was recruited for a role of the Hubs Team that involves elements of procurement which is where my skills are best utilised as I have always worked in that environment and MCPS qualified."

The Hubs Programme has not started and my line manager has advised that it might start at the end of the year although the timelines are not set and finalized. Currently, I have been placed in the Vouchers Team. My manager explained that the 2 teams have now merged and that I was to be trained on the Vouchers work first and then later work on the Hubs programme when it starts."

My concern is that my procurement skills are not being utilised and the timelines are vague. Also, the job description that led me to apply for this job is not what the role I have landed on entails. My thoughts were to look for a role that is more suitable to my skills and had a conversation with Lorraine the Head of Outside In who advised that she was recruiting for a procurement role at the same level. Once I brought my concerns and intentions to my line manager he advised me that I was not able to move until my ADC was completed of which the time of completion is also vague. I have enquired on the ADC resit timelines with GCO but could not provide me with a definite answer except this was to be within 2 years."

She sought a meeting with Ms Patel to discuss the matter with her.

43 On 20 July, following a conversation with her Talent Coach, the Claimant understood that she could not be moved into a new role until she had completed her probation. The Respondent's probation policy provides that its employees cannot apply for posts advertised internally within GCO or across the Civil Service until they have satisfactorily completed probation but there is no barrier to them applying for Civil Service roles advertised externally. In light of that, the Claimant told Mr Lewin on 20 July that she would remain in her current role for the next three months or so.

44 On 21 July the Claimant sent an email to Philippa Harris, CGO HR, along the same lines as the one she had sent to Lena Patel. Ms Patel met with the Claimant on

23 July to discuss her concerns. She told the Claimant that another ethnic minority employee (Sangeeta) had had similar difficulties working in Mr Lewin's team and had left as a result. She suggested that they should have a meeting with Ms Harris. She also introduced the Claimant to Sangeeta, who was still working for the Government in another department. She told Sangeeta that the Claimant had joined them in May and had *"come up with some of the same issues that you identified in BDUK with some of the personnel."*

45 The Claimant had a meeting with Ms Patel and Ms Harris on 29 July and it was agreed that they would arrange a meeting with Mr Lewin to discuss the Claimant's concerns and whether they could be resolved.

46 On 30 July the Claimant was informed that her module 2 training would start on 24 September and conclude on 19 November.

47 The Claimant met with Sangeeta on 3 August. The meeting was entered on her electronic work calendar which was visible to her colleagues.

48 On 3 August (Tuesday) the Claimant sent Mr Lewin an email to which she attached a document highlighting the differences between her Vouchers role and the role for which she had applied. She said,

"Breaking down the key elements of my role will provide clarity on the reasons why I feel that my current role is not fulfilling what I thought I was going to do or what was originally advertised for when I applied. It is not me just providing generic feelings on the role. I appreciate the support but I think if we agree on defined timelines on the talent move that would be great."

I think the more I stay in the role the more it will have an impact on my mental health and wellbeing as I feel my whole career has been diverted and I have no control of the situation."

49 Mr Lewin responded that some of her document was factually incorrect but they could go through that when they had a meeting later that day. He said that they had discussed her role over the last few weeks and on 20 July she had informed him that she had considered her career options and was content to stay in her role for approximately another three months. He was, therefore, surprised that she had changed her mind so suddenly and had not informed him prior to the email, including not mentioning anything about mental health although he had specifically asked her about it many times. He said that if she wanted alternative employment he would support her but he needed to reiterate that her current role was business critical and she was required to focus on it while she was in it to ensure delivery. The Claimant questioned why he had raised that as she was focused on her work and had ensured that she met all deadlines. The Claimant had a habit of starting most emails by thanking people for their emails and saying how much she appreciated what they had said and thanking them for their support. That was her formal style of communication and we did not attach any great meaning to her use of those words in her emails.

50 The Claimant and Mr Lewin spoke later in the day and he said that he would progress his conversations with HR (Lena Patel and Philippa Harris had arranged to meet with him) and would come back to her with what a timeline might look like.

51 On 6 August Mr Lewin saw in the electronic work diary that the Claimant had had a meeting with Sangeeta. He was aware that the Claimant had raised concerns about him with HR. He was also aware that Sangeeta had been unhappy with him and believed that the Claimant's meeting with her might be connected with that and the Claimant's own unhappiness with him. He was not pleased about the meeting. He asked her why she had had a meeting with Sangeeta and his tone may well have conveyed his displeasure.

52 Later that day the results of an anonymous mental health survey completed by members of the Commercial team were shared with Mr Lewin. It was revealed that someone in the team had made allegations of bullying and harassment. Mr Lewin called the Claimant and told her that serious allegations had been made in the survey and he would be speaking to all members of staff to check on their mental health. He expressed his view which was that such allegations might be made by a new member of the team who did not understand how others in the team operated.

53 On 10 August the Vouchers team had a Value for Money session at about 9 a.m. The Claimant raised the issue of a particular supplier where they had been going back and forth and had not been able to reach agreement. She suggested that the matter be reviewed by Commercial Finance. Mr Lewin responded that projects stayed within their team until they were ready to be sent for approval. Following the meeting the Claimant sent him an email that she wanted to discuss that response at their one-to-one later that morning as she had felt unsupported and misunderstood.

54 At the one-to-one the Claimant and Mr Lewin were both upset and angry and there was a heated exchange between them. They discussed Mr Lewin's response to the Claimant's suggestion at the meeting that morning. The Claimant said that he had been dismissive and had assumed that she was trying to pass work over to others. Mr Lewin said that he had not been dismissive, he had just wanted to ensure that she was aware of the process for approval of voucher projects. The Claimant mentioned his call on 6 August asking her about the mental health survey and said that she felt that she had been singled out. Mr Lewin said that serious allegations had been made in the survey and the matter had to be addressed urgently. He said he was contacting all members of his team to ensure their well-being. Mr Lewin then said that the Claimant's mid-point probation review would take place on 17 August and that he had identified areas of development which he would bring up at that review. The Claimant asked how much notice she would need to give to leave and Mr Lewin said according to the contract she was required to give three months' notice. The Claimant asked why Amy Watkins had given less notice and Mr Lewin said that that was what her contract had required. He said that the Claimant needed more than just procurement to pass her ADC and she would benefit from staying longer in the role. He said that she needed to demonstrate resilience. The Claimant was angry at the suggestion that in order to pass her ADC she had to stay in the Vouchers role and asked Mr Lewin why he was dismissing her previous experience and whether he thought that her job was a dream come true job. Mr Lewin said that they would speak later when the Claimant was calmer and the Claimant said that she would escalate the matter to HR and Ms Battisegola

55 At around 4 p.m. that day Mr Lewin sent an email to all his staff (including the Claimant) in which he set out a list of resources to support mental health and well-

being. At the start of the email he referred to conversations that he had had on Friday with those who “were lucky enough not to be on leave”.

56 On 10 August just after 2 p.m. the Claimant sent an email to Laura Battisegola in which she made various complaints about Mr Lewin. She complained about the fact that she had been recruited for a Procurement role in the Hubs Team but had been placed by Mr Lewin in the Vouchers team. He had not been able to provide her with any definite timelines as to when she would be able to start work in the Hubs team. She had been the only person in the Vouchers team who had not been partnered with someone in the Hubs team to start learning their work. Mr Lewin had told her she could not move to another role with a ‘B’ and before completing her probation. She complained about the conversation that he had had with her about the anonymous mental health survey. She complained about what he had said at team the meeting that morning which she felt had been unsupportive and dismissive. Finally, she complained about his reaction at their one-to-one meeting earlier that day. She said that he had mentioned her upcoming mid-probation review and for the first time had raised that there were areas of development in her work. She said that his behaviour towards her had changed since she had challenged being placed being in a different role from the one for which she had applied.

57 Ms Battisegola replied ten minutes later and arranged to meet with the Claimant at 2.30 p.m. Following the meeting, Ms Battisegola sent the Claimant an email setting out what had been discussed at the meeting. The Claimant corrected a few matters in her email. Ms Battisegola asked the Claimant whether she had completed the mental health survey and raised her concerns in that survey, The Claimant replied that she had not. The Claimant showed her the job description for the role for which she had applied and told her that she was not doing nine of the activities listed for that role (that included the seven responsibilities set out at paragraph 14 above). The Hubs and Vouchers teams had been merged in April and when the Claimant started, she had been told that there was a lower than expected demand for Hubs work and that the business need had been for her to work in Vouchers. The Claimant said that she had had no choice but to accept that. She was now three months through her probation. Previous discussions had been positive about her performance, but since she had expressed a desire to move roles, Mr Lewin’s tone had changed and he had raised performance concerns for the first time, He had suggested that she needed experience in the Vouchers role to pass her ADC which implied she had no experience outside the Vouchers role and ignored the experience she had from having worked in various roles. The Claimant said that she would like to leave BDUK, if possible, via a talent move to a GCO role outside of BDUK. Ms Battisegola said that she would speak to Mr Lewin about language and the working environment and that they would speak to HR about the options of any possible move. She concluded her email by saying,

“I appreciate that the Vouchers role is not the role you applied for. You are concerned that this role is taking you away from your career aspirations and you have no control over your own career path. This is affecting your mental health and wellbeing.

Hopefully we can take some actions quickly to make the situation better and come up with a plan.”

58 On 11 August the Claimant sent Mr Lewin an email that she did not feel well and would not attend work.

59 On 11 August Philippa Harris met with Mr Lewin to discuss the issues that the Claimant had raised with her. She said that the Claimant had approached her and Lena Patel as she was not happy in her current role and that it was not the role to which she had been recruited. Mr Lewin said that the role varied slightly from the role to which she had been recruited but was not significantly different. He said that she had shouted at him at the meeting the day before. Mr Lewin raised performance concerns that he had about the Claimant's "*commercial knowledge and ability*" and said that a move could only take place upon successful completion of probation, which he was unsure would happen if things continued as they were. He said that he had been having twice weekly catch ups with the Claimant in which he had discussed coaching and areas in which she needed to improve.

60 The Respondent's Probation Policy provides that informal review meetings should be held on a monthly basis and a brief record should be kept of the discussion. It makes the point that regular informal review meetings enable the manager to provide the employee with support and allow the manager to identify any concerns early on in the probation period. Mr Lewin did not hold any such informal review meetings with the Claimant.

61 On 12 August Ms Battisegola and Ms Harris both advised the Claimant that there was scope for negotiating her notice period with Mr Lewin if she wished to leave GCO.

62 On 13 August the Claimant sent the Respondent a medical certificate that she was unfit to work for two weeks because of "work related stress". She also informed the Respondent that her doctor had referred her for counselling. On 17 August the Claimant was offered a computerised Cognitive Behavioural Therapy (cCBT) which was a programme designed to help her manage symptoms and of anxiety and depression.

63 On 24 August Steve Warwick from the Public and Commercial Services union ("PCS") wrote to Ms Harris on behalf of the Claimant. He summarised the issues raised by the Claimant as follows – her current role was very different from the job profile of the role for which she had applied, it did not include much of work she found enjoyable and did not give her the opportunity to develop professionally, there had been a change in her line manager's attitude and behaviour since she had raised these issues and he had now raised issues about her passing probation which had not been raised before. He suggested three possible solutions, all of which involved the Claimant being moved to a different role. He said that he and the Claimant wanted to discuss those matters with a view to reaching an informal resolution.

64 Ms Harris was about to leave and hand over to Hardip Sidhu. She shared the email with Mr Lewin. She noted that he had previously told her that he did not believe the Claimant's current role was very different from the job description of the role that had been advertised. She said that she did not believe that any of the proposed solutions were viable but added,

“Had the job been deemed to be substantially different to what she was recruited for then perhaps there could have been some leeway/flexibility to allow an internal move (although probation would still need to be completed.)”

She said that before they could respond to PCS it would be helpful to see his RAG ratings of the job description so that they could be sure that the role was not substantially different.

65 At some stage Mr Lewin prepared a document which dealt with the responsibilities set out in the advertisement for the role for which the Claimant applied. He highlighted the various duties red, green or yellow. He highlighted the first two duties under the heading “For products procured by BDUK” in red. His evidence was that that signified that they were not relevant as services were procured by local authorities and not by BDUK. If that is the case, it is difficult to see why there was a heading “For products procured by BDUK” in that job description. The remaining three responsibilities under that heading were highlighted in green, which he said meant that they would apply equally in a Vouchers role. If that section did not apply to the role, those responsibilities should also have been highlighted red. Under the heading “For products procured by local authorities” he highlighted five responsibilities in green and two in yellow, which he said signified that they applied only to the Hubs role. As we have said earlier some responsibilities appeared in both parts of the job description and we would have expected to see them in any Commercial Lead role in BDUK. There was a duplication of the responsibilities highlighted in green. This document was never shared with the Claimant.

66 On 31 August the Claimant was certified as unfit to work until 14 September because of work-related stress.

67 While the Claimant was off sick she started looking for alternative jobs. She saw an advertisement for a Grade 7 role with GCO working in the Department for Environment, Food and Rural Areas (“DEFRA”) as Commercial Manager on a major science project. They were looking for someone to manage a small team of procurement and contract management professionals and to liaise with the legal team to draft contract terms and conditions. The Claimant applied for the role as an external applicant and decided to sit the ADC again because she felt that she would have a better chance in getting the role if she got an A. The Claimant booked an ADC for 23 September 2021.

68 On 13 September the Claimant was certified as unfit to work for another two weeks (until 27 September) for “*stress at work*”.

69 On 17 September ADC sent the Claimant an email and informed her that her ADC on 23 September would count as a resit and explained to her the possible outcomes if she got a B again. The outcomes were taken from the Respondent’s ADC policy which provides at Appendix III,

“11. If following their second ADC the participant achieves an:

...

B: with the agreement of their Commercial Director, individuals can opt to attend a panel interview with supporting evidence to secure accreditation.

Panel and Supporting Evidence

12. We expect the majority of individuals to achieve full accreditation through the ADC and therefore the number of individuals in the category is anticipated to be low.

- The ADC team will facilitate this process throughout and a decision to pursue this route, or leave core commercial, will need to be taken within 30 days of the second ADC,
- Where an individual chooses to enter the process, agreement of the Commercial Director will be required.
- The Panel will take place within 90 days of the ADC resit. The supporting evidence will cover the period from the first ADC until the Panel. Responsibility for assembling the supporting evidence will belong to the participant and the ADC team will provide guidance to the participant on how to undertake this.
- As a guide, supporting evidence provided should include examples of success at work via the end of year review, 360 feedback, sponsor statements, and the development log. There will be no mandatory evidence but it will be communicated to all staff on the development programme that the log will be considered a very useful addition to the portfolio as it shows engagement with both the GCO and personal development. The statements should include reference to improvements (or otherwise) of scores in the attributes tested at the ADC and the sponsor's view of these possible weaknesses...

Next steps for those who are not successful

13. *Permanent civil servants that choose not to enter the panel and supporting evidence process, or that are not accredited by the panel will not be supported in moving from the GCO to a non-specialist commercial role within 6 months. Individuals that are on a Fixed Term Contract or on loan to the GCO will leave the GCO in accordance with the provisions set out in their contract of employment or loan agreement."*

The Claimant responded on the same day that she still intended to attempt the ADC the following week.

70 It is our understanding that this resit was not cancelled under paragraph 6 of Appendix III, in the same way that as the Claimant's previous attempt to book a resit in September had been cancelled in July, because the Claimant was applying as an external applicant for a new role. In such a situation, the individual is entitled to attempt to take the ADC assessment for that role, but if the individual is already in a GCO role it will count as a resit.

71 The Claimant did the ADC assessment on 23 September. The Claimant achieved a B again. She scored better than she had in her first ADC. Her highest technical score was still 4. She scored 2.97 and 2.87 for the other two attributes, giving her a combined score of 5.83 (although those two figures added up to 5.84).

72 The Claimant was informed of the result on 24 September and was advised that the next step would be to take it to a panel. The Claimant shared her result with

Hardip Sidhu on the same day. She told her that there were HR issues in the background with her role and her line manager and sought her advice on how the panel review could be managed and the options that were available. Ms Sidhu replied that she would look into it and get back to her shortly.

73 On 24 September (Friday) the Claimant sent Mr Lewin an email that she was feeling much better and would be returning to work the following Tuesday.

74 On 28 September the Claimant was invited for an interview on 11 October for the DEFRA job. She confirmed that she would attend.

75 The Claimant returned to work on 28 September and had a return to work meeting with Mr Lewin that morning. The Claimant said that she was feeling much better. She said that she had been seeking alternative employment and had applied for some roles externally. She asked whether her notice period could be shortened if she succeeded in any of her applications, and Mr Lewin confirmed that they would support her as much as possible. The Claimant said that she was happy to return to normal hours and did not require any immediate adjustments. She said that she had had counselling which was helping her. Mr Lewin said that he would send the Claimant information about Occupational Health ("OH") and the Claimant said that she would review that before she consented to a referral. They agreed that Stress Risk Assessment would be completed soon once the Claimant had settled back into work. The Claimant asked for further coaching on project approvals and Mr Lewin agreed to arrange that as part of her ongoing boarding. Mr Lewin explained that the Claimant had reached the trigger point in relation to the absence management policy and that she would be invited to a formal meeting. He also said that due to her absence, in order to give her the best opportunity to successfully complete her probation period, the probation might be extended in line with the policy,

76 Mr Lewin sent the Claimant the notes of the interview on 30 September. He said that he had confirmed with Ms Battisegola that they would support a shorter notice if she found alternative employment. He said that he was aware that she had an interview on 8 October and the formal attendance meeting would take place after that to ensure that she did not have any distraction before the interview. The Claimant responded that the minutes of the meeting were "spot on" and consented to an OH referral.

77 It was not clear whether the Claimant attended the DEFRA interview on 8 October 2021 and, if she did, what the outcome was. All the evidence indicates that she was not offered the role. The Claimant was on annual leave from 11 to 19 October.

78 On 19 October the Claimant wrote to Ms Battisegola that GCO had advised her that she needed to apply for an ADC panel with permission from her current Commercial Director, and asked her whether she would grant her approval. On 20 October Margaret Saich extended the deadline for the Claimant to apply for a panel review to 29 October 2021.

79 On 20 October 2021 Mr Lewin invited the Claimant to a meeting on 29 October to discuss her attendance and said that one purpose of the meeting would be to discuss whether she should continue her probation period/be confirmed in post or whether formal action should be taken. He advised her of her right to be accompanied. The Respondent's Probation Policy provides

“The GCO may terminate employment at any time during probation if it is clear that the new employee will not meet the required standards of conduct, attendance and/or performance.”

The hearing was rescheduled to 5 November because of the unavailability of the Claimant’s trade union representative.

80 On 22 October (Friday) Ms Battisegola spoke with Hardip Sidhu in HR and Mr Lewin to discuss the Claimant’s request for permission to apply for a Panel review. Ms Sidhu advised them that the ADC policy did not allow for an appeal against the decision not to support an employee to a Panel. On 25 October Ms Battisegola sought advice from Ms Sidhu on how to word the email to the Claimant with her decision. Ms Sidhu responded by setting out what the policy said about supporting evidence, and continued,

“I assume you are the sponsor in this situation so in making your decision I’d refer to the ADC reports and identify areas where you consider she hasn’t demonstrated improvement and that have led to your decision. Perhaps focus on some of the key areas where you consider the standard isn’t being demonstrated and you should have clear evidence to support your decision...”

Ryan would also be expected to attend the panel with Michelle which would suggest that he needs to be confident of her skills in supporting her.”

Mr Lewin drafted a response for Ms Battisegola. Ms Battisegola amended his draft slightly. On 25 October Ms Battisegola spoke to the Claimant and sent her an email with her decision. She said that she had spoken with Ms Sidhu and Mr Lewin on Friday. She continued,

“As you will have seen in the ADC policy, the panel reviews evidence such as successes at work, 360 feedback and your development log which candidates usually complete during the development programme, between ADCs, to evidence that that they do meet the standards against the attributes they were unable to evidence at the assessment centre. I don’t have this evidence and therefore, unfortunately cannot support the panel process.”

The Claimant said on the telephone call that she would follow it up with her trade union representative and planned to raise a grievance.

81 On 25 October at 11.50 Mr Lewin sent Ms Sidhu an email in which he said,

“I’ve reviewed the ADC process on Knowledge Hub and I can’t see any links to template letters etc. so that we can issue Michelle with her formal notification – is this something you can share please? The wording just says employees on FTCs will leave the GCO as per their contract. We’d to do it soon as possible” [sic].

82 On 25 October the Claimant raised a formal grievance in which she complained about bullying, harassment and discrimination by her managers. In that grievance she complained of most of the matters that are the subject of this claim – she applied for a Hubs role but was placed in a Vouchers role, the concerns that she raised about

that were dismissed and ignored, Mr Lewin continued to use a consultant in the Hubs role rather than give her that work, when Ms Watkins left Open Reach, a key strategic supplier was given to Mr Charlton who had recently been promoted to act up in a Grade 7 role, the other Grade 7s in Vouchers were given line management responsibilities while she was not, when she complained about having been put in the wrong role to HR Mr Lewin's attitude to her changed and they had refused to support her to proceed to an ADC Panel review although she had done everything that her line managers had asked her to do.

83 On 26 October the Claimant asked to be moved to a different manager and the Respondent started to look into that. On 27 October Hardip Sidhu met with the Claimant to discuss the change of manager. Ms Sidhu told the Claimant that as she had got a B at her resit, the Respondent would be terminating her contract. The Claimant said that in that case there was no need for a change of manager. Following the meeting the Claimant sent Ms Sidhu two emails. In the first one she asked her to share the paperwork and policy concerning the "exit management process" which she said was not clear. In the second one she said that she had looked at the ADC panel and could not find anything that said if her request to proceed with an ADC Panel review was not supported, it would lead to her being dismissed. She said that she had been advised by HR that the ADC would count as a resit, but had not been advised that she would be asked to leave if she achieved a B. She also quoted what had been said in her offer letter (see paragraph 22 above).

84 Ms Sidhu responded on 28 October and her response was copied to the Claimant's trade union representative. She said,

"To confirm, you sat the Assessment Centre as part of a recruitment campaign and scored a B. As set out in your offer letter you were able to take up a role temporarily and on a fixed term basis as you scored a B at your first ADC and whilst you worked towards full accreditation. The offer letter also set out that you would be able to resit the ADC to secure accreditation, but if you aren't then accredited you wouldn't be able to take up the post permanently or continue to be employed by GCO."

The Fixed Term Appointment contract end date was set to provide an opportunity to resit the ADC. In taking the ADC as part of an application for a new role, you undertook your ADC resit but were not accredited and you have therefore exhausted all options to resit the ADC. In line with your offer letter and contract the GCO will now need to progress the end of the fixed term contract as there is no further opportunity to be accredited under the current agreement

... your line manager is now responsible for taking forward the process to end the fixed term appointment. This process can involve a meeting and written communications, but the meeting isn't necessarily required and you can opt not to attend. During our meeting yesterday you confirmed that you did not wish to attend a meeting and that written communications your preference regarding this process. I have advised your line manager accordingly."

She also said that as the Claimant had not secured the support of her Commercial Director, she was unable to opt to go to panel and, therefore Appendix III paragraph 13 (see paragraph 69 above) applied to her.

85 On 28 October Ms Sidhu sent Mr Lewin a draft letter to send to the Claimant. He sent the Claimant the letter on that date. He said that the Claimant had been advised on 17 September that sitting the ADC for recruitment purposes on 23 September 2021 would count as her ADC resit. He continued,

“Unfortunately, you did not achieve the required grade to gain full accreditation at the resit and employees who do not secure ADC accreditation cannot be permanently appointed and are therefore unable to continue employment with the Government Commercial Organisation (GCO).

Taking into consideration that you sat the ADC resit and were not accredited, that there is no further opportunity to resit, and the requirement to gain full accreditation following your resit in order to take up the role permanently and continue to be employed by the GCO, the fixed term appointment contract cannot continue through to 3 March 2023. Your fixed term appointment will therefore end on 16 November 2021 and in line with the contract of employment the GCO will make a Payment in Lieu of Notice (PILON) of 5 weeks.

GCO HR has advised that confirmed that you did not wish to attend a meeting to discuss this further, however, if you now wish to have a meeting to discuss the cessation of your employment, this can be arranged for 09:30 on 2 November 2021.”

The Claimant was advised that she had the right to be accompanied at any such meeting and was asked to let Mr Lewin know by 1 November 2021 if she wished to attend a meeting.

86 The Claimant responded on the same day and said that her trade union representative was on annual leave and that she would be able to let him know before 5 November whether she wanted a meeting or not. Mr Lewin pointed out to the Claimant that she had to let him know by 1 November. The Claimant thanked him for the correction and said that in that case she had no questions.

87 On 1 November the Claimant asked Ms Sidhu whether she was treated as existing staff or an external candidate when she applied for the DEFRA role as she was already working for GCO, albeit in DCMS. Ms Sidhu replied that as she was already employed by GCO she would not have been considered an external candidate.

88 On 1 November 2022 the Claimant was invited to attend the ADC on 5 November in respect of a role at the Metropolitan Police for which she had applied. The Claimant asked Ms Saitch in ADC if the ADC rules applied to a post that was outside the Civil Service. Ms Saitch replied,

“If it is our ADC then the time limits set out in our policy will apply. These state that an individual must wait six months before sitting the ADC again however it can only be sat at one level a maximum of twice in a two year period so you would need to wait until 24 months after your first sitting to sit it again.”

The same point was made in internal email between staff in the ADC. The member of staff said,

“... Michelle sat the Virtual ADC at CL level in September of this year. This was after sitting at CL in January of this year.

As per ADC policy, she will not be able to sit the ADC at CL level until 24 months after her first sitting so January 2023.”

89 On 2 November at 13.21 the Claimant's trade union representative sent an email to Mr Lewin and Ms Sidhu. He said that he was writing to formally query and appeal the decision to terminate early her fixed term contract. He gave the following three reasons for his query/appeal –

“1. It was not made clear to Michelle that she was only able to resit the ADC once, nor that not securing an A would lead to early termination of her employment.

2. The commercial directors refusal to allow Michelle to attend the panel has materially led to a dismissal, this has not followed a process and has not given Michelle the right to appeal a decision to dismiss.

*3. The terms of Michelle's contract and the terms of the GCO ADC do **not** say that her failure at the panel will result in her immediate dismissal.”*

90 Mr Lewin received this email before he sent a letter to the Claimant terminating her contract. At 18.26 he told her trade union representative that he had sent the Claimant a letter terminating her fixed term contract and that his email would be treated as an appeal against that decision.

91 At 18.24 Mr Lewin sent the Claimant the termination letter. In his email he said that as he had not heard from her by 1 November requesting a meeting, the meeting had not gone ahead. In the letter he confirmed that her fixed term contract would terminate on 16 November. He said that the reason for that was that she had not achieved the requisite ADC grade to gain full accreditation and to take up permanent employment with the GCO following her ADC resit. She was advised of her right to appeal.

92 On 3 November the Claimant wrote to Mr Lewin to confirm that she would definitely be appealing the decision to dismiss her and she asked that that be considered together with her grievance.

93 On 8 November the Claimant attended a Vouchers team meeting. She attended remotely as she was working from home. The meeting was chaired by Mr Lewin. At the meeting there was a discussion about a recent Public Accounts Committee hearing at which the CEO of BDUK (or DCMS) had been asked about regional supplier procurements for Birmingham and the Black Country. The CEO had explained that Birmingham and other urban areas were at the back end of the provision of these services. When he was asked specifically about the Black Country he said that they classified it as urban. He was asked whether he had ever been to the Black Country and it was pointed out to him that parts of it were semi-rural. At the meeting on 8 November there was a reference to the CEO's comments about the

Black Country and everyone laughed. The Claimant was not aware that the Black Country referred to an area in the middle of England or of what had been said at the Public Accounts Committee meeting. At the end of the meeting the Claimant asked what the black country was. Mr Lowe responded that it was “the hard to reach area” and people laughed at that.

94 In the course of the meeting the Claimant sent an email to Mr Lewin and Mis Sidhu in which she said,

“I have been disturbed today about a joke that that was made in a meeting without consideration that I share similar characteristics of the people that have been made fun of. Apparently this was a statement made in the Public Account Committee.

I would like clarity on what a black country looks like since I am black.”

Mr Lewin’s laptop was closed during the meeting and he did not see the Claimant’s email until later. He responded at 17.11 and explained that the Black Country was a geographical area and that the discussion at their meeting had been about what had been said at the Public Accounts Committee meeting. He said that no one had made fun of any people. He sent her a link to the Public Accounts Committee meeting and to Wikipedia where it explained that the Black Country was a geographical area.

95 The Claimant’s appeal against her dismissal was heard on 15 November 2021 by Marc Bryant, Commercial Lead in DCMS. Alison Bradshaw, Head of HR Business Partnering & Engagement, was present to provide HR advice to Mr Bryant. The Claimant was accompanied by Steve Warwick, her trade union representative.

96 In a letter dated 16 November 2021 the Claimant’s GP confirmed that she was suffering from anxiety and depressed mood caused by ongoing work-related stress and that she was being treated with Sertraline and on-line therapy.

97 Samantha Mephram, Commercial Business Partner, was appointed to investigate the Claimant’s grievance. She met with the Claimant on 19 November 2021 to discuss her grievance. The Claimant confirmed that she had raised the grievance against Mr Lewin, Ms Battisegola, Ms Sidhu and Margaret Saich and that she was complaining about race and sex discrimination. The Claimant gave details of all her grievances.

98 On 22 November Mr Bryant sent the Claimant the outcome of her appeal against her dismissal. He concluded that the decision to terminate her contract early had not been unfair and rejected her appeal. He responded to each of the three points that had been raised by the Claimant’s trade union representative in his email of 2 November. In respect of the point that it had not been made clear to the Claimant that she was only able to resit the ADC once and that not securing an A would lead to early termination of her employment, he said that the email of 17 September had made it clear that there would be no further resit opportunities if the resit in September were to be unsuccessful. He also said that it would have been clear to the Claimant from the emails that she had received that she would not be able to continue working for the GCO if she resat the ADC and failed to get an “A” grade. The wording in the offer letter did nothing to fetter the right of the GCO to terminate her fixed term contract early. It was not clear whether Ms Bradhsaw had advised him that the Claimant could have resat the ADC again in January 2023 (see paragraph

106 below). In respect of the second point, he said that it was not the Commercial Director's decision not to support the Claimant to a panel that had led to her dismissal; it was her failure to obtain an A grade at the resit that had materially led to her dismissal. In respect of the third point, he said that the clear intention throughout the policy was that individuals could not stay in the employ of the GCO if they failed to gain "A" on an ADC resit or following a panel interview.

99 On 23 November the Claimant contacted ACAS and commenced Early Conciliation.

100 On 17 December 2021 Ms Mepham produced her grievance investigation report. It was noted in the report that she had interviewed the four individuals against whom the grievance had been raised. Although it said at the end of the report that the interview statements of those individuals were part of the report, they were not attached to the copy of the report in the Tribunal Bundle. She did not interview Lena Patel or Sangeeta. In respect of Ms Patel, she said that the email correspondence provided by the Claimant had included sufficient detail to mitigate the need to directly contact her. In respect of Sangeeta, she said that she did not pursue it further to maintain confidentiality. The report comprised 35 typewritten pages. Her findings were that the job description for the role for which the Claimant had applied had not been specific about whether the role was in the Hubs team or the Vouchers team. She found that Mr Jordan was a solicitor employed in the Hubs team for 2-3 days a week which reduced the business costs associated with support from external solicitors. She also referred to a RAG of the Vouchers and Hubs teams which had been undertaken which had shown that 9 out of the 13 responsibilities were the same in the two roles (see paragraph 65 above).

101 Jules Blackwell was appointed to determine the Claimant's grievance. On 7 December 2021 Ms Blackwell informed the Claimant that she should receive grievance investigation report on 17 December and that it would be shared with her and that the hearing would take place on 21 December. In her replies the Claimant made it clear that she was concerned about the delays in the process and that they were impacting on her mental health. In one email she said that she would only have a meeting for the outcome to be shared and not to discuss the outcome.

102 The grievance investigation report was not sent to the Claimant before the grievance hearing on 21 December 2021. At the outset of the meeting the Claimant confirmed that she had been advised of her right to be accompanied but had chosen not to be accompanied.. Ms Blackwell then asked the Claimant whether she had received the grievance investigation report. The Claimant said that she had not. Ms Blackwell did not ask the Claimant whether she was happy to continue with the grievance hearing without having had sight of the investigation report or offer her an adjournment so that she could consider the report. She simply continued with the meeting and said that it would form part of the final paperwork sent to the Claimant. She said that there were three parts to the meeting – for the Claimant to state what outcome she wanted from the process, whether she wanted to go on record with any additional comments and the next steps and timings. Nothing was said about discussing the grievance and giving the Claimant an opportunity to comment on the report.

103 When asked about the outcome that she wanted the Claimant repeated the financial settlement terms that had been set out in the letter written by her solicitors

on 12 November 2021 and said that she also wanted there to be formal training for Mr Lewin. She confirmed that she did not want alternative employment with the Respondent. The additional points the Claimant wanted recorded included that there had been no OH referral or risk assessment and that the HR response to correspondence from her trade union representative had been inadequate and no meeting had taken place. Ms Blackwell confirmed that the meeting was the final step before all the evidence and representations compiled throughout the process would be considered and a decision made.

104 On 22 December 2021 Ms Blackwell sent the Claimant the outcome of her grievance. In her outcome letter she said that at their meeting the previous day they had discussed her complaint and then set out the details of her complaint. That was not true. They had not discussed the Claimant's complaint at that meeting. She said that her decision was not to uphold the Claimant's complaints and set out her basis for doing so in respect of each of the individuals about whom the Claimant had complained. When dealing with the complaints against Mr Lewin she said nothing about the Claimant's complaints about him placing her in a Vouchers role when she had applied for a Hubs role, her concerns about that being ignored or dismissed and Mr Lewin's attitude towards her having changed when she complained about those matters to HR. She said that Ms Battisegola had sought appropriate advice before making a decision about not supporting the Claimant to go for a Panel Review and that rationale of her decision was clear. She advised the Claimant of her right of appeal and the grounds on which she could appeal.

105 On 14 January 2022 the Claimant commenced proceedings in the Employment Tribunal.

106 On the same day the Claimant sought clarification from Alison Bradshaw, GCO Head of HR Business Partnering & Engagement, about restrictions on her resitting the ADC and applying for Commercial Lead roles. Ms Bradshaw's response was as follows,

"With regard to the ADC, the policy states that you have to wait 6 months to resit the ADC but you can only take it twice in 24 months. As you originally sat it in January 2021 and then again in September 2021, you need to wait another 12 months, till January 2023, to take it again. Theoretically however, you could apply for a post with your existing B but you can't do the ADC again until January 2023."

107 Mr Perrone did his ADC resit on 28 September 2022. He got a B on his resit. His combined Business Acumen and Commercial Judgment and Leadership Skills and Capability score was 5.37. Mr Lewin was not the Head of Commercial at that stage.

108 On 19 January 2023 it was confirmed that Mr Perrone would attend a Panel Review on 15 March 2023. The ADC policy provides that the Panel should take place within 90 days of the resit. There was no explanation of why Mr Perrone's Panel was taking place nearly six months after the resit.

109 Between November 2021 and August 2022 the Claimant applied for many jobs. She started new employment in August 2022 at a substantially higher salary than what she was paid by the Respondent.

Conclusions

Jurisdiction

110 The effect of sections 123 and 140B of the Equality Act 2010 is that complaints of any acts or failures to act that occurred before 24 August 2021 will not have been presented in time unless they were part of a continuing discriminatory act that extended beyond that date. We considered first whether it would be just and equitable to consider complaints about acts that occurred before 24 August 2021 if we did not find there to be any discrimination after that date.

111 In considering that we took into account the following matters. The earliest of the Claimant's complaints - being placed in a Vouchers role when she started employment occurred on 4 May 2021. Early Conciliation in respect of that should have commenced on 3 August 2021. It commenced on 23 November 2021. The Claimant tried to resolve that issue by raising it several times with her line manager and, when that did not work, with HR in BDUK and GCO, and by attempting to find alternative roles and seeking support to move to a different role. On 10 August she raised it with her line manager's manager who agreed to support her and said that she would speak to HR about the options of any possible move. From 11 August to 27 September 2021 the Claimant was absent sick from work with work-related stress. During that period she continued to look for alternative work and did an ADC assessment. From about 24 August the Claimant had advice and assistance from a trade union representative. He engaged with her employer to try to resolve the issues. On 25 October 2021 the Claimant raised a formal grievance and on 23 November she commenced Early Conciliation. The earliest claim would be a few months out of time. It is always desirable to attempt to resolve matters internally before embarking on legal proceedings. There was support from HR and Ms Battisegola. There was a period of sickness absence. The delay has not caused any prejudice to the Respondent. In all the circumstances of the case, we considered that it would be just and equitable to consider any claims that had not been presented in time.

Disability Discrimination

112 We considered first whether the Claimant was disabled by reason of anxiety and depression between 6 August and 22 December 2021. There was no evidence before the Tribunal of the Claimant suffering from depression and/or anxiety or of it having impact on her normal day-to-day activities before 11 August 2021. The only reference by the Claimant to her mental health prior to that date was her telling Mr Lewin on 3 August, *"I think the more I stay in this role the more it will have an impact on my mental health and wellbeing."* The medical evidence for the period 11 August to the termination of the Claimant's employment on 16 November 2021 was limited to the following – the Claimant was certified as unfit work at fortnightly intervals from 13 August to 27 September for work-related stress, on 17 August she was offered computerised CBT which was a programme designed to help manage symptoms of anxiety and depression and in a letter dated 16 November her GP confirmed that she suffering from anxiety and depressed mood caused by ongoing work-related stress and that she was being treated with Sertraline and on-line therapy. There was no evidence that the Claimant had an underlying condition of anxiety and depression. It appeared to have surfaced at that stage because of the work-related stress. Although

the Claimant referred in her witness statement and disability impact statement to suffering from Post-Traumatic Stress Disorder, there was no evidence that she had ever been diagnosed with PTSD.

113 The Claimant gave evidence about the impact of her mental health conditions on her normal day-to-day activities. She said that they had led to sleep disorders, confusion, fatigue and had affected her concentration. There was no medical evidence about the effect of her depression and anxiety. During the period that the Claimant was absent sick she looked for and pursued alternative employment. She applied for the DEFRA role and did the ADC assessment on 23 September 2021. On 28 September, when she returned to work, she said that she was feeling much better, was happy to return to normal hours and did not require any immediate adjustments. The Claimant then continued working without any adjustments and without any further sickness absence until the termination of her employment on 16 November 2021. Following the termination of her employment the Claimant was fully engaged in looking for new work – she liaised with headhunters and agencies, applied for jobs and attended interviews. Having considered all the evidence, we concluded that the Claimant's anxiety and depression, which was caused by stress at work, did not have substantial adverse effect on her normal day to day activities during the material time. In case we are wrong in that, any such impact was not long-term – it had not lasted 12 months when her employment terminated on 16 November and at that stage there was no evidence that any effects were likely to last more than 12 months. For all the reasons given above, we concluded that the Claimant was not disabled at the material time.

Direct race and sex discrimination

114 The Claimant's allegations of race and sex discrimination cannot be looked at in isolation as they all form part of the same picture and are interconnected. Central to this claim is the Claimant's first complaint of race discrimination that she applied for and was recruited to a role in Hubs (which was essentially a procurement role) but when she started work she was placed by Mr Lewin in a Vouchers role. Many of the other matters about which she complains arose, directly or indirectly, from that and the failure to deal with the concerns that she raised about that or as a reaction to her raising those concerns. Although Ms Battisegola accepted both in communications with the Claimant and in evidence before the Tribunal that the Claimant had applied for a Hubs role and was placed in a Vouchers role, Mr Lewin and the Respondent failed to do so.

115 We have found that the Claimant applied for and was recruited to a role in Hubs and that procurement and contract management was an important part of that role (see paragraphs 14, 15, 19 and 20 above). The Claimant applied for that role because that was where her expertise and experience lay. She was well qualified for such a role and had six years' experience of working in such roles at a senior level (paragraph 16 above).

116 When the Claimant started on 4 May Mr Lewin placed her in a Vouchers role. Whether the Claimant's description of it as a junior finance role is strictly accurate is not particularly important (although we note that Mr Lewin referred to it as "*probably our most simple product to deal with*" and told the Claimant that it would help her in what had been identified as a failing in her ADC – analysis of financial information). What is important is that it was different in material respects from the role for which

the Claimant had applied and to which she had been recruited (see paragraphs 14, 15, 27 and 31 above). It was not where her expertise and experience lay. It was new to her and she had to learn certain processes and tasks with which she was unfamiliar. That led to the Claimant not being given the responsibilities that other Commercial Leads in the Vouchers were given. We concluded that the Claimant was subjected to a detriment by being placed in the Vouchers role.

117 The Respondent's case was that the Claimant applied for and was recruited to a Commercial Lead role in the merged team and was placed in Vouchers because that was where the business need was and there was limited Hubs work available. In those circumstances she was not subjected to a detriment or treated less favourably than anyone else. We have found that the Claimant was recruited to Commercial Lead role in Hubs and that was what she expected to do when she started work on 4 May 2021. At that time there were three other Commercial Leads working in Hubs – Michael Jordan, Andrew Perrone and Mark Britten. They are all white and male. They continued working in Hubs. There was evidently sufficient Hubs work for three Commercial Leads. The position in May 2021 was that there were four Commercial Leads in Hubs (one black African woman and three white men) and only sufficient work for three of them.

118 The Respondent's case was that Michael Jordan was not an appropriate comparator because his role was different from that of the Claimant because his role was to provide legal advice. We rejected Mr Lewin's evidence to that effect (see paragraph 28 above). There was no evidence to support Mr Lewin's assertion to that effect. Mr Jordan was working as Commercial Lead in Hubs, which was the same role as the one to which the Claimant had been recruited. We concluded that all the Commercial Leads were appropriate comparators in respect of the Claimant's complaint of race discrimination about her being placed in the Vouchers team.

119 Michael Jordan was an independent contractor who had been providing his services since June 2020. Andrew Perrone's fixed-term contract, which was due to expire in August 2021, was extended in April 2021 for a further two years. We had no evidence about the third Commercial Lead. The Respondent had recruited the Claimant to a Commercial Lead role in Hubs in February 2021. If the work in Hubs diminished between then and the Claimant starting in her role, it is surprising that the Respondent did not dispense with the services of the independent contractor or allow Mr Perrone's fixed-term contract to expire in August 2021 on the grounds that the work in Hubs was diminishing and they had recruited someone to do that work for the next two years. Nor did it suggest to either of them that there was a business need in Vouchers and that they should move to Vouchers. We have no doubt that they would have been unhappy to do so for the same reasons that the Claimant was unhappy to be placed in that role. The decision made by Mr Lewin in those circumstances was to continue using the services of the white independent contractor as a Commercial Lead and to extend the fixed-term contract of another white Commercial Lead but to tell the Claimant, a black African woman, that she could not work as a Commercial Lead in Hubs because she had not been appointed to such a role and there was not sufficient work in any event and there was a business need for a Commercial Lead in Vouchers. Mr Lewin treated the Claimant less favourably than he treated Messrs Jordan and Perrone. Mr Perrone had not been listed as a comparator in the list of issues. However, it is clear on the evidence that she was treated less favourably than him.

120 There is clearly a difference in race and a difference in treatment here (the white Commercial Leads in Hubs are allowed to do Hubs work and the one black African Commercial Lead is placed in a different role), but, as set out above, there is much more that is troubling and unexplained. In spite of the documentary evidence about the role for which the Claimant applied and to which she was recruited, the Respondent and, in particular, Mr Lewin denied that the Claimant had applied for and been recruited to a role in Hubs; They asserted the Claimant had not been subjected to a detriment because the roles were broadly similar, when the evidence clearly shows that they were not; contrary to the documentary evidence that Mr Jordan was a Commercial Lead in the Hubs team, Mr Lewin asserted that he was engaged as a legal advisor but did not provide any evidence to support that; In those circumstances we rejected Mr Lewin's explanation for not dispensing with the services of Mr Jordan if there was a diminution of work in the Hubs team; there was no explanation of why Mr Perrone's fixed-term contract was extended after the Claimant's appointment and before she started work if there was a diminution of work in the Hubs team; there was no evidence that Mr Lewin ever gave any consideration to the Claimant working in Hubs and to one of the other Commercial Leads being moved to Vouchers; Mr Lewin had a tendency to exaggerate the skills and experience of white employees and to not recognise the Claimant's skills and experience (see paragraphs 29 and 59 above).

121 We determined that we could conclude, in the absence of an explanation, from the facts summarised at paragraphs 114-120 (above) that Mr Lewin had discriminated against the Claimant on the grounds of race when he placed her in the Vouchers role. We are mindful that it is unusual to find direct evidence of race discrimination and that discrimination may well be unconscious and not intended. The burden then shifted to the Respondent to prove that the Claimant's race was not the reason for her being treated less favourably than the white Commercial Leads. The difficulty the Respondent has is that having denied that the Claimant was subjected to the detriment of which she complained and that Mr Jordan was an appropriate comparator, it never addressed the issue of why Mr Lewin decided that out of the four Commercial Leads the Claimant was the one who had to go and work in a different area. The Respondent provided no evidence as to precisely what work the other Commercial Leads were doing and why the Claimant could not do it, or why one of the other Commercial Leads could not be moved to Vouchers. The Respondent, not having provided any explanation, we concluded that the Claimant's complaint of race discrimination in respect of that complaint was made out.

122 We dealt next with the Claimant's complaints of race and sex discrimination about Mr Lewin not giving her development opportunities (training in Hubs work, leading team meetings and Value for Money meetings, line management responsibilities) between May and November 2021 (paragraph 2.1(ii) and 2.2(i) above). The Claimant relied on Messrs Lowes and Charlton as comparators. There are two initial points to be made in respect of that complaint. First, the Claimant was absent sick from 11 August to 27 September 2021 and on annual leave from 11 to 19 October. Much of her time after her return to work was taken up with other matters. The Claimant was, therefore, effectively working in her Vouchers role from 4 May to 11 August, a period of a little over three months. Secondly, as the Claimant accepted, she was new to that role and it was not where her experience and expertise lay. There were certain processes and tasks that were new to her which she had to learn. We are not saying, as Mr Lewin said in his evidence, that the Claimant did not have the basic competencies for the role, but there were aspects of

the role with which she was not familiar. Messrs Lowes and Charlton had been working in their roles for a little over a year and were familiar with all aspects of the role. The Claimant was not given those development opportunities in her initial three months in the role because the role was unfamiliar to her and she had to learn certain aspects of it. The other Commercial Leads were given those responsibilities because they were experienced in that role. The failure to afford the Claimant those opportunities was not on the grounds of her race or gender. It was a consequence of the earlier discrimination, but not an act of discrimination in itself.

123 We then dealt with the complaints of race discrimination in respect of not allocating Ms Watkins' work (in particular Open Reach) to the Claimant and the allocation of Rural Tech to her (paragraph 2.1(iii) and (iv) above). The Claimant relied on Mr Charlton as a comparator. Much of what we have said about the Claimant being new to the role and needing to learn aspects of it applies to these complaints as well. Ms Watkins left about three weeks after the Claimant started. Open Reach was a key strategic supplier. Mr Charlton had worked with Ms Watkins on that account. In those circumstances, it made sense for Mr Charlton to take over responsibility for that relationship. He had been dealing with that supplier and was more experienced than the Claimant in Vouchers work. The Claimant was allocated the Rural Tech account because it was a less important account and afforded her the opportunity to learn. The allocation of those accounts was not made on the basis of race, it was made on the basis of experience in the Vouchers role.

124 We then considered the complaint of sex discrimination that Mr Lewin blocked the Claimant's opportunity to transfer to a procurement role on 13 July 2021 (paragraph 2.2(ii) above). We understood this to be a reference to Mr Lewin telling the Claimant that she could not start a new role until she had resat her ADC, i.e. she could not move with her current rating of B (see paragraph 40 above). That was clearly not the case as the Claimant could have moved to another role with the B (see paragraphs 18, 40 and 106 above). Mr Lewin accepted in evidence that he might have told the Claimant that but would not have said it with any degree of certainty as he was not clear on the position. We accepted that Mr Lewin told the Claimant that because that is what he believed the position to be. He did not do it to block her move or because of her race. In any event, as the Claimant found out a few days later, she could not move to another role until she had satisfactorily completed probation (see paragraph 43 above).

125 It was not in dispute that on 6 August Mr Lewin asked the Claimant why she had met with Sangeeta. The Claimant alleged that he did so forcefully and that it was an act of race discrimination. By 6 August Mr Lewin was aware that the Claimant had raised concerns with HR about him. As we have found (paragraph 51) he was not pleased about the Claimant meeting another employee who had raised concerns about him, and his displeasure may well have been conveyed in the tone in which he asked her that question. He asked her that question because he was unhappy about her meeting with someone who had raised concerns about him in circumstances where she was complaining about him. It was not because of her race.

126 We then considered the Claimant's complaints of race and sex discrimination about matters that occurred on 10 August 2021 (paragraph 2.1 (v)-(vii) and 2.2 (iii)-(v) above). The majority of them relate to the one-to-one meeting between the Claimant and Mr Lewin on that day. One that does not is about a comment Mr Lewin made at Value for Money meeting earlier that day (paragraph 53 above). It was not in

dispute that the exchange set out in that paragraph had taken place. The Claimant said that he had been dismissive and had assumed that she was trying to pass work to others. He said that he was not dismissive and had wanted to ensure that she was aware of the process for approval of Voucher projects. We accepted Mr Lewin's evidence. There was no evidence from which we could conclude that this had been an act of race discrimination. The Claimant had also alleged that Mr Lewin had refused to reduce her notice period and had claimed that she had been treated less favourably than Ms Watkins whose notice period had been reduced to two weeks. We have not found that either of those acts occurred (see paragraphs 33 and 54 above). The Claimant did not ask Mr Lewin to reduce her notice period and he did not refuse to do so. Amy Watkins' notice period was not reduced to two weeks.

127 We then considered the rest of the Claimant's complaints about 10 August 2021. We have found that the Claimant and Mr Lewin were both angry and upset at the meeting and that there was a heated exchange between them. Mr Lewin was upset and angry because the Claimant had repeatedly expressed her unhappiness about being placed in the Vouchers role, on 20 July she had told him that she was content to stay in the role for another three months (until the conclusion of her probation period) but had then gone to HR and complained about being placed in the role, she had met with a former colleague who had also been unhappy with him and he believed that the Claimant was the person who had complained about bullying and harassment in the anonymous mental health survey. Mr Lewin said that she needed to demonstrate resilience to pass her ADC. Ms Lewin for the first time said at this meeting that there were performance concerns that would be raised at the mid-year probation review. He had not raised any performance concerns before. He had recognised before that aspects of the role were new to the Claimant and that she had to learn them, but had been positive about it (paragraph 41 above). We accept that Mr Lewin subjected the Claimant to a detriment by saying that he would raise performance concerns at her mid-probation review but that he did so because he was upset and angry with her for the reasons we have set out in this paragraph, and not because of her race.

128 We considered next the Claimant's complaint of race discrimination that Ms Battisegola failed to support the Claimant's informal grievance of 10 August 2021 (paragraph 2.1(viii)). We have found that that did not happen. Ms Battisegola responded to the Claimant's email within ten minutes and met with her on the same day to discuss the concerns that she had raised. She acted on the Claimant's concerns by speaking to Mr Lewin and discussing options with HR (see paragraph 57 above). That complaint is not made out because what the Claimant alleged did not happen.

129 We have also not found that Mr Lewin talked over the Claimant at her return to work meeting or in other one-to-one meetings after her return to work on 28 September 2021. Hence, the Claimant's complaint of sex discrimination in respect of that is not made out (paragraph 2.2(v)).

130 We then considered the Claimant's complaint of race discrimination that on 25 October Mr Lewin and Ms Battisegola rejected her application for an ADC panel review (paragraph 2.1(ix)). Although the decision was ultimately the decision of Ms Battisegola she made the decision following consultation with Mr Lewin and Ms Sidhu. She had no direct knowledge of the Claimant's work and training and she relied on Mr Lewin to provide the information in respect of that (paragraph 80 above)

The ADC policy does not dictate what the supporting evidence should be but gives a guide as to what it should include. The Policy also provides that the supporting evidence will cover the period from the first ADC until the Panel and that the responsibility for assembling the supporting evidence will belong to the participant (see paragraph 69 above). The Claimant had done her first ADC on 11 January 2021 and had continued working for her former employer for nearly four months after that. She might have had some evidence from that which might have been relevant. The Claimant had completed the first module of the development programme in July 2021. We consider that in all the circumstances it would have been prudent for Ms Battisegola to have also discussed the matter with the Claimant before making her decision. That having been said, the policy makes it clear that only a small number of individuals would be expected to go through that process. The Claimant had only worked in the Vouchers role effectively for three months. She had only completed one of her three training modules. It was very unlikely that the kind of evidence that would have been required would have been available. There was no evidence from which we could conclude that the Claimant had been treated less favourably than a comparator in similar circumstances had or would have been or that the reason for it had been race. Katy Barker's circumstances were different. She had achieved B(ASR) on what was treated as her first ADC and the Accreditation Panel, under a different process, changed her score to A (paragraph 39 above). Mr Perrone's position was also different because he did his resit 18 months after his first ADC. There was no evidence about who made the decision to support his Panel review and on basis of what evidence, but he had clearly had sufficient time to acquire such evidence. There was also no explanation of why he was being allowed to take his resit outside the 90 day period specified in the ADC policy. Ms Barker and Mr Perrone were not appropriate comparators because their circumstances were different.

131 The Claimant also complained that on or around 25 October Mr Lewin and Battisegola discriminated against her on the grounds of sex by withdrawing support that had previously been offered (extension of probation, helping her look for alternative employment) (paragraph 2.2(vii) and that on 25 October they decided to terminate her contract early (sex and race discrimination against Mr Lewin and sex discrimination against Ms Battisegola – paragraphs 2.2(viii) and 2.1 (x). We looked at these complaints together because they are linked. The decision to terminate the Claimant's employment was made by Mr Lewin on 25 October (paragraph 81). There were two aspects of that decision that caused us concern. The first was the assertion that the Claimant's contract had to be terminated because there was no further opportunity for her to be accredited during the currency of that contract. The second was that, even if that were the case, whether there was any reason why it had to be terminated with such haste.

132 As far as the first matter is concerned, on 28 October Ms Sidhu advised the Claimant and her trade union representative that her fixed-term end date in her contract had been set to provide her an opportunity to resit the ADC, the Claimant had undertaken her resit and not been accredited and had therefore exhausted all her options to resit the ADC (paragraph 84). She had continued,

"In line with your offer letter and contract the GCO will now need to progress the end of the fixed term contract as there is no further opportunity to be accredited under the current agreement." (my emphasis).

The same point was made in the termination letter that she drafted for Mr Lewin on the same date. The letter said that her contract was being terminated because there was no further opportunity to resit (paragraph 85). That appears to have been Ms Sidhu's view and was probably what she advised Mr Lewin and Ms Battisegola. However, her view is not shared by Margaret Saitch from ADC and Alison Bradshaw, Head of GCO HR (paragraphs 88 and 106 above) who make it clear that the effect of the policy is that an individual can only resit the ADC once in the 24 month period after the first ADC and, having done that, cannot do another resit until after the completion of that 24 month period. They all made it clear that the Claimant could resit her ADC again in January 2023. The Claimant's fixed-term contract was due to expire on 3 March 2023. There was, therefore, still an opportunity for her to be accredited under her current agreement.

133 We also considered it unreasonable for the Respondent not to have discussed the matter with the Claimant before making the decision to terminate her employment. We accept that the Claimant was unhappy in the Vouchers role and wanted to move and that no move could be facilitated until the Claimant had satisfactorily completed her probation. There had been talk about Hubs work being available towards the end of the year and, if such work was available, it might have made sense for the Claimant to complete her probation doing that work. That would not have involved moving the Claimant to a different role. Instead Mr Lewin decided that he wanted to dismiss the Claimant as soon as possible and the decision was communicated to the Claimant when she attended a meeting with Ms Sidhu to discuss a different matter.

134 We considered that the hasty termination of the Claimant's employment and the manner in which it was done was unreasonable and unfair. However, just because conduct is unreasonable and unfair does not mean that it is discriminatory. We are conscious of the fact that we have found that Mr Lewin discriminated against the Claimant on the grounds of race at the start of her employment. We concluded that Mr Lewin was advised that the Claimant's employment had to be terminated after she had failed to get an "A" in her resit and that he chose to do it sooner rather than later because he considered the Claimant to be a troublesome and difficult employee – she had complained about him to HR, she had made it clear that she was unhappy in her role, she had been absent sick, if she remained in employment he would have to conduct an attendance review meeting and a mid-probation review. We concluded that the decision to dismiss the Claimant was made on the basis of erroneous advice from HR and implemented sooner rather than later because it was expedient to do so. It was not act of race or sex discrimination. Once the decision to terminate her employment had been made, there was no need to consider the extension of her probation or to support the Claimant in seeking alternative roles.

135 The comments about the Black Country at the meeting on 8 November and the amusement that it generated had nothing to do with race. It related to the CEO's performance at a Public Accounts Committee meeting which had indicated that did not know the area. Mr Lewin had not seen the Claimant's email in the course of the meeting. As soon as he saw it after the meeting, he had explained to the Claimant what they had been talking about at the meeting and that the Black County was a geographical region. Mr Lewin did not subject the Claimant to any detriment at that meeting and the whole matter had nothing to do with race.

136 There was no evidence from which we could conclude that Mr Bryant's dismissal of the Claimant's appeal was an act of race discrimination. There was no evidence from which could infer that he would have come to a different conclusion if the Claimant had been a white employee. Equally, although we had some reservations about Ms Blackwell conducting the grievance outcome hearing without the Claimant having had sight of the investigation report, there was no evidence from which we could conclude that she had discriminated against the Claimant on the grounds of her race in rejecting her grievance.

Breach of Contract

137 The issue here was whether the Claimant had been contractually entitled to three months' notice. The Claimant's contract provided that, although she was not entitled to a period of notice because of the power of the Crown to dismiss at will, in practice the Respondent would normally give three months' notice to terminate the appointment "*subject to clause 2.4 and successful completion of the Employee's probationary period.*" Clause 2.4 provided that the first six months of the appointment would be a probationary period and that the probationary period could be extended for up to a further 16 months. It then continued,

"Whilst the Employee is in their probationary period (whether during the first six months or at any time prior to successful completion of probation), the Appointment may be terminated by GCO at any time by giving the Employee 5 weeks' notice or payment in lieu." (my emphasis).

Clause 13 provides for immediate termination and payment in lieu of notice.

138 The Claimant's initial six months probationary period was due to conclude on 3 November 2021. It was not formally extended on that day but, more importantly, the Claimant was not at any stage informed in writing that she had successfully completed her probationary period. The Claimant was informed on 28 October 2021 that her employment would terminate on 16 November 2021 and that the Respondent would pay her five weeks' pay in lieu of notice (paragraph 24 above). It is clear that when the Claimant was sent that letter and when her employment terminated, she had not successfully completed her probationary period and as such was contractually entitled to five weeks' notice and not three months' notice. Under the contract, the Respondent was entitled to terminate the contract immediately and make that payment in lieu of notice. The claim for breach of contract is not well-founded.

Trade Union Detriments

139 Ms Battisegola did not offer the Claimant the right of appeal against her decision not to refer the Claimant to Panel review because no such right existed under the ADC Policy (paragraph 2.8(i)). We did not understand the Claimant's complaints of trade union detriments in respect of her appeal against her dismissal and her grievance (paragraph 2.8(v)). Ms Sidhu did not arrange a meeting to discuss the Claimant's termination of her contract without her trade union representative being present. She told the Claimant at a meeting that had been arranged for another purpose that her employment was going to be terminated. She ought not to have done so and a formal meeting to discuss the termination of her employment should have been arranged and she should have been advised of her right to be

accompanied at that meeting. On 28 October Mr Lewin informed the Claimant that her employment would terminate on 16 November 2021. He said that his understanding was that the Claimant did not wish to attend a meeting to discuss the matter but afforded her the opportunity to do so, if she wished to, and advised her of her right to be accompanied. We think that there was a misunderstanding between the parties about what whether the Claimant wanted a meeting or not. (paragraph 86 above). On 2 November Mr Lewin advised the Claimant of her right of appeal and the Claimant was accompanied by her trade union representative at the appeal hearing. Ideally, the meeting to discuss the termination of her employment, should have been held, with the Claimant being advised of her right to be accompanied, before the decision to terminate was made. However, we have not found that the Respondent subjected the Claimant to the detriments of which she complains or that its sole or primary purpose was to prevent her making use of trade union services at an appropriate time.

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Employment Judge - Grewal

Date: 09/05/2023

JUDGMENT & REASONS SENT TO THE PARTIES ON

10/05/2023

FOR THE TRIBUNAL OFFICE