EMPLOYMENT TRIBUNALS

Claimant **Respondent**

v

Ms S R Simpson **Ministry of Defence**

Heard at: **London Central Employment Tribunal**

On: **24 April – 3 May 2023**
(2 May in Chambers)

Before: **EJ Webster**
Ms Z Darmas
Mr S Godecharle

Appearances
For the Claimant: **In person**
For the Respondent: **Ms L Harris (Counsel)**

JUDGMENT

1. The Claimant's claims for direct discrimination on grounds of race and sex are not upheld.

2. The Claimant's claims for harassment related to race and sex are not upheld.

3. The Claimant's claims for victimisation are not upheld.

WRITTEN REASONS

The Hearing

1. At the outset we discussed the agreed List of Issues and they remained as had been agreed with no additions or applications to amend or update during the first morning. However after the Claimant started giving evidence it appeared that her understanding of what her claims were differed from that set out in the List of Issues.

2. We commenced hearing evidence from the Claimant in the afternoon of the first day. It became apparent during the questioning regarding Issue 2.1, that the Claimant was under two misapprehensions:
    (i) That she was still able to pursue her claim regarding the decision surrounding the 2016 promotion decision itself and the way it was made; and
    (ii) That she did not consider that the delay to the service complaint about that decision had occurred because of her sex or race.

3. There then followed a lengthy process by which the Claimant was asked to go through each incident in the List of Issues to say which, if any, she said were because of her sex and/or race and to ensure that we all understood exactly what she intended or meant by each of the incidents relied upon.

4. She confirmed that all of the incidents apart from 2.1, 2.4 and 2.7 [references to the LOI in the Bundle] were allegations of direct sex and/or race discrimination, victimisation and harassment.

5. She confirmed that she did not seek to assert that the delay to the way that the 2016 service complaint was dealt with was discriminatory either directly or in respect of her claims of harassment and victimisation. This was checked carefully with the Claimant and she was adamant that she did not believe that the delay to her claim was discriminatory, but she was very upset about its subsequent effect on her career. This was in effect a withdrawal of Issue 2.1 though we have still considered the facts surrounding that situation for the purposes of background. This was clarified with the Claimant at the time.

6. The Claimant confirmed that incidents 2.4 and 2.7 [Reference to the List of Issues in the bundle] were acts of victimisation only. However, it also became clear that what was written at 2.4 was not what the Claimant intended her claim to be about. She said that it was clear that she did not think Diane Duncan had told others not to speak to her but that Diane Duncan herself had been told not to speak to the claimant. When pressed on the issue of what exactly she said had been done that was an act of victimisation, the claimant confirmed that she considered that the sending of the email (whether to her or others) was the act she relied upon. The Respondent confirmed that it had no objection to that amendment. That amendment is therefore reflected in the Issues set out below.

7. Subsequently, on the morning of the second day, the Claimant made another application to amend. This was to state that the content of the email chain, referred to at 2.7, was an act of direct sex discrimination because it included the phrase ‘This woman’. The Respondent objected to that application. The Tribunal rejected the application to amend. Full reasons were given at the time and are not repeated here. However, in brief, the Tribunal considered that the Claimant had been fully represented until the day of the hearing, she had been given the opportunity on day 1 to clarify what her claims were and the amendment sought would have necessitated evidence from an additional witness for the respondent. The balance of prejudice therefore fell against the respondent if such an application were to be granted and we considered that the application ought not to be granted.

8. We were provided with 7 witness statements. One from the Claimant and the remaining from the respondent. We had witness statements and heard oral evidence from the following individuals:
    (i) The Claimant
    (ii) Catherine Brown (Career Manager for Section 2 of the Royal Logistics Corps, Army Personnel Centre
    (iii) Colonel Blair Cunningham - Assistant Head of Service Complaints, APC
    (iv) Diane Duncan Administration Officer (APC)
    (v) WO2 Rebecca Holland - 151 Regiment
    (vi) Carolyn Irwin – Career Manager, APC
    (vii) Major Adam Lloyd – Training Major for the 151 Regiment

9. Given the changing rank of the individuals it was agreed that we would simply refer to the individuals using the preface Ms or Mr as opposed to rankings.

10. We were provided with a bundle numbering 1075 pages. During cross examination on the second day it transpired that the respondent had not disclosed documents relating to the Claimant's application for promotion in 2020. The explanation provided by the respondent for the failure to disclose the documents earlier were that they had been overlooked. The claimant objected to their inclusion in the bundle. We considered that they were relevant and whilst we understood the claimant's frustration that such documents had not been disclosed earlier, she was given time to consider them and address them and could cross examine the relevant respondent witnesses regarding them should she need to do so and we did not consider that the claimant was prejudiced by the late acceptance into the bundle. The provenance of the documents was unknown though and it was agreed that one of the existing witnesses would serve a supplementary witness statement explaining the new documents and their relevance. Ms Irwin therefore produced a short additional statement. The claimant was given the equivalent of a day to consider that statement before Ms Irwin gave evidence.

11. On the following day (Day 4) the claimant produced a document that was not I ntbe bundle whilst cross examining Ms Irwin. She was not able to explain why she had not disclosed it earlier particularly given the conversation that had occurred the day before regarding the respondent's late disclosure. Nevertheless, the respondent did not object to that document being relied upon and so the Tribunal accepted it as part of the evidence.

12. Both parties sent written submissions and addressed the Tribunal orally.

13. The Tribunal gave an oral Judgment on the final day and subsequently, via email, the Claimant has requested written reasons.

The Issues

<u>Direct Discrimination – s.13 Equality Act 2010</u>

14. The Claimant is female and her racial background is Black Caribbean.

15. Did the Respondent subject the Claimant to the following alleged detrimental acts or omissions:

15.1 In July 2016, did C's service complaint about the mishandling of the report being due to sex discrimination take 2 years to resolve and have the effect of placing C two years and 1 rank behind her comparators as at February 2022? [FBP §2]

15.2 In February 2019, did R prepare an unfavourable 2018/2019 SJAR report which did not properly reflect C's work output or performance? [FBP §10]

15.3 In March 2019 did R's late submission (by Adam Lloyd) and in April 2019 did R's late release of C's SJARs to the boards, and in September 2020 did the double release of 2019/20 SJAR by the APC result in C not progressing in rank and meeting promotional targets set out in her FCR summary for her CEG? [FBP §18]

10.4 In June 2020, was C deliberately excluded from the APC's email distribution list by R (Ms Diane Duncan)? [FBP §15] **Victimisation only.**

10.5 In July and August 2020, did R promote Sgt Heredia and Sgt Jones to Staff Sergeant while failing to promote C who was more eligible for promotion? [FBP §13]

10.6 In October 2020, was C's request for Formal Career Review (FCR) in October 2020 refused despite that this was in fact a requirement when C became Sergeant thereby slowing down or preventing career progression? [FBP §14]

10.7 *On 29 March 2021 Ms Diane Duncan sent an email saying that she was told not to speak to the Claimant due to the amount of SCs she had in."* [FBP §16] **Victimisation only**

10.8 On 1 April 2021, did R promote Sgt Byatt and not C who has stronger credentials?

10.9 It is noted that C perceives that the consequence of the above treatment has been to prevent her career progression and place her considerably behind her peers.

16. If proven, were any of the detriments in paragraph 2 above less favourable treatment compared to someone in materially similar circumstances to the Claimant who was of a different race or sex? If so, were they because of the Claimant's race or sex?

<u>Victimisation – s.27 Equality Act 2010</u>

17. Do any of the following constitute a protected act for the purposes of Section 27(2)(d)?:

17.1 C's service complaint on 6 July 2016 that she was given a less favourable Personnel Annual Report (2015/2016) due to sex discrimination.

17.2 If so did the Respondent subject the Claimant to the detriments alleged at paragraphs 2.2 – 2.8 above because of the protected act?

Harassment s. 26 Equality Act 2010

18. Did the Respondent subject the Claimant to unwanted conduct by way of the conduct alleged at paragraphs 10.2, 10.3, 10.5, 10.6, and 10.8 above?

19. If so, was any such conduct related to the Claimant's sex or race?

20. If so, did that conduct have the purpose or effect of; violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

21. Was it reasonable for the Claimant to treat the conduct as having that effect?

Limitation

22. When did the alleged acts and/or omissions upon which the Claimant relies occur?

23. Are any acts and/or omissions of the Respondent out of time?

24. Are the alleged acts and/or omissions based on a series of unconnected acts or a continuing state of affairs?

25. If any of the acts and/or omissions are out of time, can the Claimant show that it would be just and equitable to extend time?

The Law

26. S136 Equality Act 2010 - The Burden of Proof

S.136(2) provides that if there are facts from which the court or tribunal could decide, in the absence of any other explanation, that a person (A) contravened a provision of the Equality Act 2010, the court must hold that the contravention occurred; and S.136(3) provides that S.136(2) does not apply if A shows that he or she did not contravene the relevant provision.

27. The EHRC Employment Code states that 'a claimant alleging that they have experienced an unlawful act must prove facts from which an employment tribunal could decide or draw an inference that such an act has occurred' – para 15.32. If such facts are proved, 'to successfully defend a claim, the respondent will have to prove, on the balance of probabilities, that they did not act unlawfully' – para 15.34.

28. The leading case on this point remains Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases 2005 ICR 931. This was further explored in *Madarassy v Nomura International plc 2007 ICR 867, CA*; and confirmed in *Hewage v Grampian Health Board 2012 ICR 1054, SC*.

29. In the case of Igen, the Court of Appeal established that the correct approach for an employment tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the tribunal could infer that discrimination has taken place (on the balance of probabilities). If so proven, the second stage is engaged, whereby the burden then 'shifts' to the respondent to prove on the balance of probabilities, that the treatment in question was 'in no sense whatsoever' on the protected ground.

30. The Court of Appeal in *Barton v Investec Henderson Crosthwaite Securities Ltd 2003 ICR 1205, EAT*, gave guidelines as follows:

(i) it is for the claimant to prove, on the balance of probabilities, facts from which the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. If the claimant does not prove such facts, the claim will fail

(ii) in deciding whether there are such facts it is important to bear in mind that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In many cases the discrimination will not be intentional but merely based on the assumption that 'he or she would not have fitted in'

(iii) The outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal

(iv) The tribunal does not have to reach a definitive determination that such facts would lead it to conclude that there was discrimination — it merely has to decide what inferences could be draw

(v) in considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts

(vi) these inferences could include any that it is just and equitable to draw from an evasive or equivocal reply to a request for information

(vii) inferences may also be drawn from any failure to comply with a relevant Code of Practice

(viii) when there are facts from which inferences could be drawn that the respondent has treated the claimant less favourably on a protected ground, the burden of proof moves to the respondent

(ix) it is then for the respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed that act

(x) to discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever on the protected ground

(xi) not only must the respondent provide an explanation for the facts proved by the claimant, from which the inferences could be drawn, but that explanation must be adequate to prove, on the balance of probabilities, that the protected characteristic was no part of the reason for the treatment

(xii) since the respondent would generally be in possession of the facts necessary to provide an explanation, the tribunal would normally expect cogent evidence to discharge that burden — in particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or any Code of Practice.

Direct discrimination – s 13 Equality Act 2010

31. s 13 Equality Act 2010 "(1)A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

32. We have reminded ourselves that discrimination such as this is rarely obvious and it is unusual that any such treatment is openly admitted to or confirmed by clear written evidence as confirmation. The tribunal must consider the conscious or subconscious mental processes which led A to take a particular course of action in respect of B, and to consider whether a protected characteristic played a significant part in the treatment.

33. For A to discriminate directly against B, it must treat B less favourably than it treats, or would treat, another person. The Tribunal must compare like with like (except for the existence of the protected characteristic) and so "there must be no material difference between the circumstances" of the claimant and any comparator. (*section 23(1), EqA 2010*).

34. Section 23 EqA provides:

> *(1) On a comparison of cases for the purposes of section 13…there must be no material difference between the circumstances relating to each case.*
> *(2) The circumstances relating to a case include each person's abilities if – on a comparison for the purposes of section 13, the protected characteristic is disability…*

35. In ***Nagarajan v London Regional Transport*** [1999] IRLR 572, the House of Lords held that if the protected characteristic had a 'significant influence' on the outcome, discrimination would be made out. The crucial question in every case is, '*why the complainant received less favourable treatment…Was it on the grounds of [the protected characteristic]? Or was it for some other reason..?*'.

36. In ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** [2003] ICR 337 at [11-12], Lord Nicholls:

> *'[…] employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the Claimant on the proscribed ground, was less favourable than was or would have been afforded to others.*

The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case. There will be cases where it is convenient to decide the less favourable treatment issue first. But, for the reason set out above, when formulating their decisions employment Tribunals may find it helpful to consider whether they should postpone determining the less favourable treatment issue until after they have decided why the treatment was afforded to the Claimant […]'

37. Since ***Shamoon***, we should address both stages of the statutory test by considering the single 'reason why' question: was it on the proscribed ground, or was it for some other reason? Underhill J summarised this in ***Martin v Devonshire's Solicitors*** [2011] ICR 352 at [30]:

> *'Elias J (President) in Islington London Borough Council v Ladele (Liberty intervening) [2009] ICR 387 developed this point, describing the purpose of considering the hypothetical or actual treatment of comparators as essentially evidential, and indeed doubting the value of the exercise for that purpose in most cases-see at paras 35–37. Other cases in this Tribunal have repeated these messages- see, e.g., D'Silva v NATFHE [2008] IRLR 412, para 30 and City of Edinburgh v Dickson (unreported), 2 December 2009 , para 37; though there seems so far to have been little impact on the hold that "the hypothetical comparator" appears to have on the imaginations of practitioners and Tribunals.'*

38. Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.
(2) Each of the following is a protected act—
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.
(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
(4) This section applies only where the person subjected to a detriment is an individual.
(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

39. <u>Harassment – s26 Equality Act 2010</u>

22. S26 (1)A person (A) harasses another (B) if—

(a)A engages in unwanted conduct related to a relevant protected characteristic, and

(b)the conduct has the purpose or effect of—

(i)violating B's dignity, or

(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…..

(4)In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a)the perception of B;

(b)the other circumstances of the case;

(c)whether it is reasonable for the conduct to have that effect.

(5)The relevant protected characteristics are—

….

sexual orientation

Limitation

40. S 123 Equality Act 2010 Time limits

…..

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—
(a) the period of 6 months starting with the date of the act to which the proceedings relate, or
(b) such other period as the employment tribunal thinks just and equitable.
(3) For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.
(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

The Facts

41. We have reached all our findings on balance of probabilities. Where there has been a dispute of fact and we have found in favour of one party over another it is because we preferred their evidence on this matter.

42. Where we have not mentioned facts or issues raised before us that does not mean we have not considered them, it means that they were not relevant to our conclusions.

Background

43. The Claimant has worked for the army since 2002. She is currently a staff sergeant. This case largely arises out of the respondent's grievance and promotion processes. As part of the case we were told about various processes and there was a lot of respondent specific jargon and acronyms used. So as to avoid repetition we have set out some introductory paragraphs to reflect the Tribunal's understanding of the processes.

Positioning

44. We were not given huge amounts of detail about how the army is organized. However for the purposes of this case we were given to understand that an individual is posted every 3 years or so to different roles and sometimes different regiments. This might coincide with a promotion it might not.

45. The claimant, during the relevant time, worked for the Royal Logistics Corp ('RLC') with her trade being a driver.

46. Every year, each Unit and each regiment conducts a grading exercise known as 'positioning' whereby you are ranked within your unit and then within your regiment. So, for example you might rank first amongst your unit and fifth amongst your regiment overall. This ranking process is against people from all different trades e.g. drivers, chefs, etc.

Appraisals/SJARs

47. Every year, an individual goes through an appraisal process. They have a mid year appraisal called an MJAR and an end year appraisal called an SJAR. Both are collaborative processes. The MJAR is usually a discussion document by which the manager and the individual can discuss aspirations and performance so that they can maximise their achievements for the purposes of the SJAR. It is also usually from the MJAR that an individual is given their 'position' though not entirely.

48. After discussion between the individual and the person within their regiment responsible for the lay equivalent of manager, a report is prepared called an SJAR. This form comprises various elements. It includes a narrative section which describes your performance and raises any concerns or positives, you are given an overall grade (e.g. A- or B+), your positioning is recorded, and you are given indications as to whether you ought to be considered for promotion at either one or two ranks above. The possible 'scores' for those promotion possibilities are 'Developing', Yes, High or Exceptional. If you are scored as 'Developing' you cannot be promoted.

49. The SJAR is prepared by your Commanding officer. They consult with the people you working with on a day to day basis who are generally your first and second in command. The person preparing your SJAR will usually be in an oversight role and also work with you directly but not to the same extent.

50. The normal situation is that someone has to have been in rank for 2 years before they can be promoted. However, if someone is rated as 'Exceptional' then they can be accelerated through the process and put forward for promotion earlier.

51. If someone is considered ready to be promoted according to their SJAR, then they are put forward to the promotions Board. We were told that the only mandatory requirements for getting put before the board were that you had the appropriate qualifications for the role, that you had scored 'Yes' or above in your SJAR and that you had 2 years in rank (unless you had scored Exceptional).

Promotions/The 'Boarding' process

52. The Promotions Board are provided with a 'book' for each individual of all their SJARs. The Board members are normally expected to consider the last 3 or 4 SJARs with the most recent one being the most important. The Promotions Board for each rank normally takes place once a year. The Promotions Board consists of 5 people who all score the individuals out of 10. Therefore at the end each individual has a final score out of 50. They are not provided with any information about any service complaints or the individuals' ethnicity. They can glean the individual's sex because the individuals are referred to as he/she in the narrative sections. They perform this scoring process in silence.

53. We were not told in any detail as to how the Board members reached their score. We were not told how various aspects of the SJAR were weighted for example. It is therefore not clear what weight is given to an A- grade and a position of 10 in the regiment vs a B+ score and a position of 5 in a regiment. We were told that this was because your positioning within either a unit or a regiment did not denote how competitive that regiment was; so ranking 4th in one regiment may not denote the same level of achievement as ranking 10th in another. Further, in ranking you are measured against others in different trades which in themselves may not be as competitive. So you may have two people with identical grades and positioning who are in different units or regiments who achieve a different final score from the Board because, in the Board's opinion, they deserve different scores out of 10. We were told that the Board is qualified to make this judgment using their military expertise. Where different Board members give an individual a score that is more than 2 points apart (e.g a 9 and a 6) then each board member must explain their scoring and see if a closer consensus can be achieved. We were also told that the Board members would all have received unconscious bias training to offset any possible bias – though we were given no information as to what that training consisted of.

54. For each Board, there will be a base line score (e.g. 25). If an individual scores under that they cannot be promoted. The number of positions available at the next rank up will depend on rank and trade and the numbers within the army at any given date. So, for example, there may only be 30 positions available at staff sargeant level. Therefore the top scoring 30 individuals will be given a post provided they have all scored above 25. Therefore whether you get promoted depends not only on how well you have done in the previous year, but how well your peers have done as well.

55. If someone misses the Boarding process for a good reason, then it is possible for a Special Board to be convened. In those instances, someone may be appointed late to a role. The Special Board carry out the same exercise as they did for the 'normal' boarding process. The person who is scored late has their scores compared to the original Board and if their score would have put them in the top 30 against those in the 'normal' Board, then they will be appointed retrospectively. This late appointment will not be at the expense of those already appointed in the original Board. Instead, anyone appointed in the Special Board provides superfluous numbers at that rank and will result in people doubling up in role or people waiting until later in the year to take up their positions. E.g. If there are 30 positions then 30 will be appointed at the original Board. Then, if a later Special Board is convened, it is possible that additional people will be promoted and they will be in addition to the original 30.

Service Complaints

56. Service Complaints ('SC') are the equivalent of an internal grievance. However they are mandatory for those in the armed services if the person wants to be able to pursue a Tribunal claim for discrimination (s121 Equality Act 2010). They follow a proscribed process and there are individuals within the army charged with considering the Service Complaints. If an individual is not happy with the way a Service Complaint is dealt with they can appeal and if still unhappy they can refer it to an Ombudsman.

57. Before an SC is accepted, it is considered whether it is 'admissible'. Generally speaking it will only be admissible if it relates to something that has happened within the last 3 months. We were not addressed on the admissibility process in any detail as no claims have been brought in relation to that.

First Service Complaint

58. The Claimant submitted a Service Complaint on 6 July 2016 regarding her SJAR (service person's Joint Appraisal Report) for the period from 27 July 2015 to 31 January 2016 complaining that her grades had been changed and the role and responsibilities had been amended and the whole form had been sent off without her consent.

59. The narrative of the complaint broadly reflects the above paragraph. At point 3 of the form she ticked 'No' when asked "Does your complaint include allegations of bullying, harassment or discrimination…" . Later on in a further submission by the Claimant she raised the following allegation:

> *" I do believe that male peers have received preferential treatment (and grading) base [sic] on their gender"*

60. This additional submission, dated 13 July 2016, was sent separately but was meant to be an addendum to the original SC. However, it was initially overlooked by the Respondent. It is not clear why this was missed apart from the fact that it was sent separately. The Claimant's SC was therefore put through the admissibility process without the additional document and deemed admissible.

61. Major Duggan began investigating the complaint and, we think, spoke to the Claimant. However it then became apparent to the Respondent that the Claimant was intending to raise issues regarding discrimination as per her addendum and so they asked her to resubmit her Service Complaint so that it could be considered for admissibility with the additional information. The resubmitted the complaint on 14 November 2016. It was deemed admissible on 3 January 2017.

62. Shortly thereafter two key members of staff were on maternity leave and then Major Duggan (the investigator) was posted elsewhere. A different investigating officer was appointed and met with the Claimant. Finally, the report was prepared and referred to Mr Cunningham to make a decision as to whether to uphold the claimant's complaint or not.

63. Mr Cunningham concluded, having considered the evidence he had that he would uphold two parts of the Claimant's complaint but not uphold her discrimination allegation. The complaints upheld were that her 2016/16 SJAR had been changed when submitted with no explanation to the claimant and that it was then submitted without the claimant's consent or knowledge and was incomplete. As a result of his determinations the claimant's SJAR was rewritten and submitted to a specially convened promotions Board. As a result of that, she was promoted to sergeant and her promotion was backdated to 2016.

64. The Claimant did not appeal against Mr Cunningham's decision. The Claimant says that she was content with the outcome because she was promised by APC and specifically Ms Irwin that she would be put forward for promotion in line with her peers for sergeant in the following year. During cross examination she put the email at page 1020-1021 dated 13 June 2018 to Ms Irwin. This is an email from Major Huw Willams to Ms Irwin. Mr Williiams was seeking confirmation that the claimant (unnamed in the email and therefore unknown to Ms Irwin) could be put forward for promotion with her retrospective service taken into account. Ms Irwin replied as follows:

> *"So, I think that the short answer is that the seniority would be backdated to the year that they originally should have promoted. This then enables them to run for subsequent promotion in line with all the others promoted in that year. It does mean that that in some cases it's unavoidable that they will only have 1 SJAR in rank."*

65. The Claimant understood this a promise to be put before the Board for promotion. We disagree with this interpretation. We conclude that Ms Irwin was saying that her retrospective promoted service would be counted towards the normal 2 years served in post before someone is submitted to the Board. Therefore having only 7 months in post would not count against her- in fact she would be considered as having been in post since 2016.

66. Nevertheless we find that does not mean that the SJAR process had to disregard all other aspects of the claimant's work or performance and no promise of being put before the board was contained within this email. We consider that all that this email promised was that the claimant's time in role would be as if she was

appointed in 2016, i.e. she would technically have the requisite 2 years required to be Boarded.

SJAR by Adam Lloyd – 2018/2019

67. After the Claimant was confirmed as sergeant in March 2018, she was posted to her role in June 2018. We do not accept that she had in fact been appointed as a sergeant in November 2017 and not told until March 2018. There was no evidence to substantiate that assertion.

68. The Claimant was posted in June 2018 to the 124 Squadron in 151 Regiment in the Royal Logistics Corp (RLC) as a Detachment Permanent Staff Instructor type B Tp Detachment PSI SnCO of a reserve transport squadron.

69. Mr Lloyd had also just been appointed to that unit. He was the Claimant's First Reporting Officer. Ms Holland was responsible for her day to day management and assigning of tasks. When compiling the Claimant's SJAR, Mr Lloyd sought the input of Ms Holland and Mr Herlihy who were the two members of staff working directly with the Claimant on a day to day basis. It was small team of three and what was referred to as 'One deep' which meant that there was only person performing each role.

70. B Troop was a dislocated group in that it was separate from the rest of 124 Squadron who were dispersed around the M25. The Claimant was based in Essex and Mr Lloyd in Croydon.

71. Ms Holland and Mr Herlihy wrote their feedback which was mixed. Both Mr Herlihy and Ms Holland's feedback was mixed. It is notable that the Claimant makes no allegations regarding Mr Herlihy's feedback but challenges almost all aspects of Ms Holland's despite the fact that in a broad sense they concur.

72. The other aspects of the Claimant's performance taken into account by Mr Lloyd were:

    (i) The Claimant had not performed particularly well in a driving course (whilst the Claimant made representations that because she was not intending to follow a particular career path she could not have placed in the top third, she has not really explained why she was in the bottom third);
    (ii) The Claimant had, whilst driving, had a car accident in which a vehicle had been written off;
    (iii) The Claimant had a CCJ entered against her when she failed to pay a debt;
    (iv) The Claimant had not performed a task to his satisfaction at a reservists weekend. He had asked her to be responsible for the location and readiness of all the vehicles and did not feel she had performed that role particularly well.

73. The claimant gave evidence that all of the above matters had good explanations and were not significant with regard to her performance overall. Mr Lloyd's

evidence before us stated that he considered the Claimant needed to concentrate more on her driving skills as this was her 'trade' and that taking everything onto consideration, including the Claimant's explanations for the above, he did not consider that she should be put forward for promotion.

74. The Claimant considered that Ms Holland was bad mouthing her to Mr Lloyd in respect of various incidents and that he took her word at face value and counted it against her. We disagree. We find that Ms Holland may well have informed Mr Lloyd regarding the 'coach incident' and any issue regarding the claimant attending the reservists away weekend when she had had a training course finish on the Friday. But these were factually narrated as opposed to any sense of gossip or ill feeling. We found Ms Holland to be a reasonable and straightforward witness recounting her frustrations with the Claimant in a reasonable manner. We conclude that she did recount her frustrations with the Claimant to Mr Lloyd as part of her role but that they were reasonably founded and not based on gossip. We also conclude that it was reasonable for Mr Lloyd to consider Ms Holland's opinion of the Claimant when writing her SJAR for the year.

75. We note that in her SC about this process and before us, the Claimant alleged that Ms Holland was a calculating liar. This allegation was also considered in the Appeal against her service complaint regarding this matter. During this Tribunal hearing, the claimant was able to challenge Ms Holland regarding the alleged lies and we found that Ms Holland was a straightforward witness and found that the claimant's interpretation of what Ms Holland had done was based on misunderstandings and assumptions by her because of the personal animosity or personality clash between them at this point. We found that this undermined our impression of the claimant's credibility given that she appeared to either willfully or mistakenly misinterpret what Ms Holland had done or said. This approach to incidents and witnesses generally by the claimant tied in with her subsequent misinterpretations of policies and documents which we address at various points in this Judgment. We found that when the claimant was given straightforward explanations for things that she had misunderstood or misinterpreted yet she refused to accept the explanations, instead, at every stage, she chose to believe the worst in relation to Ms Holland's actions and in relation to other matters where she disbelieved the respondent or doubted their motives.

76. We also consider that Mr Lloyd did use his working knowledge of the Claimant's performance as he gave evidence to us of an occasion where he had asked the Claimant to take charge of a task and considered that she did not perform it to the level he required.

77. We were provided with no evidence to suggest that the claimant's race or sex was motivation for any of the feedback provided to Mr Lloyd regarding the preparation of the SJAR. More importantly, the Claimant conceded during cross examination that she did not think that Mr Lloyd's actions were because of her race or sex.

78. The Claimant was scored as 'Developing' on the SJAR for this year. This meant that she could not be put forward to the promotions Board. Mr Lloyd said that she was simply not performing well enough to get a higher grade. He accepts that this was because she had only been in post for 7 months by the time he prepared the

SJAR. The Claimant states that he ought not to have considered her as being only 7 months in the post because her promotion had been backdated. We understand the frustration the Claimant has experienced because, in theory she had been in post for over 2 years, but in reality she had only been doing the role for 7 months and therefore was far less able to perform at a higher level than someone who had in fact been doing the job for 2 years. Nevertheless, the decision to rank her as 'developing' was based on her actual performance of which we were given evidence which we accept. We do not think that decision was based on the fact that she had been in post for 7 months, rather, that was incidental to her performance. It was agreed that this was probably at least part of the reason she had not performed well enough to score above 'Dev' but ultimately it was her performance that was scored not her length of service. Had she been in post for 2 years and performed in the same way, she would have been given a 'Dev' score too.

79. The claimant was also not positioned within the regiment that year. The reason given by the respondent was that she had only been in post for 2 months at the relevant time and it had been agreed that her MJAR would be delayed because of this and thus she would not be positioned. Mr Lloyd was of the opinion that had she been positioned it would have been very low because of her lack of experience and that this in turn would have been detrimental to her because it would have remained permanently on her record. We accept the Respondent's explanation that had she been, in all other ways, recommended for a possible promotion, the effect of her not being positioned would have been offset by an explanation to the Board regarding the fact that she had not been in post long enough for her to be positioned.

80. We appreciate that claimant considers that her lack of experience ought to have been irrelevant because by that time she technically ought to have been in post for 2 years. Her interpretation of the backdating of her promotion was that her time in post ought not to be counted against her because she had in fact been in post for 2 years. Nevertheless, we do not consider that it was ever promised or suggested that the claimant did not need to demonstrate her worth within role once she got there and that she would somehow be free from the normal scoring considerations. Had she scored brilliantly in the 7 months that she was there, then the time in post would not have been relevant. The time in post was relevant because it explained why she had not done so well. It was not used against her but it was an explanation for her performance. However we fully appreciate her frustration and upset at the fact that she was, from a practical point of view, behind where she ought to have been through no fault of her own. This was unfair.

81. We note the claimant's comments on this SJAR at page 345. She was very unhappy about the situation and in particular about what she perceived Ms Holland's feedback to be about her. It is noteworthy that she refers to her earlier Service Complaint as being one about mismanagement and possibly bullying. She does not mention discrimination on any ground at this stage.

<u>Second Service Complaint</u>

82. The Claimant's second Service Complaint (p 346) was dated 2 April 2019. In essence, it was a complaint about the SJAR and its contents and the resulting decision not to refer her to the Board. The Claimant asserts that this complaint referenced discrimination by virtue of the fact that she ticked the box (p350) which includes the possibility of the complaint being about discrimination and the fact that she referenced her 2016 SC.

83. The box at p350 that the claimant ticked says that her allegations included *'bullying harassment discrimination or any other allegation specified in regulation 5(2) of the Armed Forces (service Complaints Miscellaneous Provisions Regulations 2015)."* We find that this is a very broad category of possible complaints. For example, we have reviewed Regulation 5(2) and can see it is clear that the complaint does not relate to any of those matters. We do not accept that by ticking this box the claimant has made it clear that she is alleging discrimination. The form requires the claimant to clarify or specify what her complaint was and she does so at page 350 (box 4a) where she says:

"Dishonest/biased behaviour (6D)

I believe my complaint falls in this category because my current SJAR is not a true reflection of my job role and the things I've completed. Also based on the circumstances surrounds my situation with my 2015/16 SJAR. "

84. Even the broader grounds of her complaint do not reference discrimination. She said in evidence that it ought to have been clear because she references her 15/16 SC. What she says specifically is

> *"With all these facts; due to the treatment I've encountered and the handling of my 15/16 SJAR, and the two years it took to resolve my SC which puts me in this position and causing me to face persecution."*

85. It is clear that the claimant was and remains unhappy about the fact that she is now lagging, in her perception, 2 years behind where she ought to have been. We have great sympathy with her sense of frustration. However, both of the comments quoted above show that the reason she gives behind her second SC does not either directly or implicitly reference sex or race discrimination. Her second complaint references the handling and time taken to resolve her original SC in 2016. It does not reference the unequal treatment she alleged with her male colleagues. She does not mention the words discrimination and clearly focuses her complaint around her lack of promotion and the time she feels she has lost. We find that it is more likely than not that the respondent did not understand the second complaint as being one of sex or race discrimination. Perhaps more importantly we find that that the claimant did not say either directly or indirectly that she was being discriminated against on grounds of race or sex by Mr Lloyd or Ms Holland or Mr Herlihy in their feedback or comments that led to the SJAR. Nor, we find, did she consider that this was the cause at the time. At the time, she was just overwhelmingly disappointed because she had wrongly believed that she would be Boarded that year perhaps almost regardless of her performance.

86. The Claimant has alleged that part of the reason she was not promoted was that the SJAR was submitted late to the Board. We do not agree. Her SJAR was never intended to be submitted to the Board because she got a 'Dev' next to the question of whether she ought to be promoted. We accept Ms Irwin and Mr Lloyd's evidence that this means she would never have been put before the Board in any event.

87. The outcome of the second complaint was determined by Mr Cunningham again. The claimant has raised no claim regarding the investigation process before us though we note that in her appeal letter she alleges that he did not take certain information she provided into account. The complaint was not upheld. [pg 444 dated 4 March]. The outcome letter is a detailed analysis of the situation. He concluded that the claimant was not positioned or boarded for the reasons we have also concluded above. He did not consider whether Mr Lloyd's actions were discriminatory as he had not understood that the Claimant was raising such a concern.

88. The Claimant appealed against the decision (p454-456). At no point does she mention discrimination in that appeal. She does refer to her 2015/2016 SJAR as follows:

> *"I feel if my SJAR wasn't badly managed in 2015/16 I can assure you that I would've been promoted in 2016 along with my peers, complete my qualifications to gain substantive rank as a Sgt, and gotten posted to a regiment that would respected me for who I am, appreciate my effort and commitment, while being professional and rewarded me fairly and appropriately."*

89. When her appeal was not upheld she went to the Ombudsman. Her letter to the Ombudsman says as follows:

> *[I] believe that I've been career fouled due to the mishandling of my 2015/2016 SJAR and the detrimental impact it has on my career where moving up the ranks are concerned. As it stands, I've lost two years in service due to the time the 2015/16 SC took to be completed.*
>
> *All my peers who got selected to Sgt in 2016 have gotten selected to SSgts in 2019. This really made me feel disadvantage, and robbed of what should've been. requested that his decision be considered by the Ombudsman by appealing on 11 March. Her appeal to the Ombudsman was then dismissed on 12 October and concluded that there were no grounds to reinvestigate (p490).*

90. It is noteworthy that the Claimant does not reference discrimination at any point in her appeal or her application for a review by the Ombudsman. The Ombudsman did not uphold her review.

91. Subsequently, because the Claimant's relationship with Mr Lloyd and Ms Holland had deteriorated, it was agreed that she would be transferred. The decision was made in July 2019 (p 374).

Third Service Complaint

92. The Claimant then submitted a third service complaint on 25 July 2019. This was a complaint about which we heard very little because she ultimately withdrew it. Nevertheless, we have considered the grounds on which she brought this matter as it is relevant to our conclusions. She again ticked Box 3 and in Box 4a she elaborated as follows:

"(6C - Bullying, and 6D - Dishonest or biased behaviour).

I believe my complaint falls in these categories, because the reasons for me wanting to leave 151 Regiment RLC is not what is stated in the AGAI 67 Annex C. The Annex C is bearing falsehood and incorrect information about me. I was bullied and threatened into signing the Annex C, hence I signed it. I was neglected, bullied, discriminated against, and faced with unprofessionalism by 151 Regiment which affected my career and health and well being, which resulted in me asking to leave the Regiment."

93. She withdrew this service complaint following an agreed resolution on 11 December 2019.

94. We make reference to this complaint only insofar that it is clear that although she says the word 'discrimination' within the above grounds she does not specify what type of discrimination. The substance of the complaint mainly surrounds the unsuitability of her accommodation and the problems it causes her with her knee issues as well as her not blameworthy transfer. There is no mention, at any time, of sex or race discrimination.

<u>2019/20 Promotion Board</u>

95. The Claimant had a very positive SJAR in 2019 that meant she was put forward to the Board for promotion to staff sergeant in March 2020. She had the full support of her regiment in being put forward for that promotion.

96. Part of the requirement to be put before the Board as a driver that year was to have passed a driving course which the Claimant had. The Claimant states that it was well known that this was a requirement and had been since 2012. Ms Irwin stated that the requirement had previously been that you needed to pass the course to be promoted but not to be put before the Board. What this meant in reality was that if you were scored highly enough by the Board, you would be appointed but subject to passing the driving course before you took up the appointment.

97. Ms Irwin told us that she believed that at some point in 2019 (she was not sure of the dates) that requirement had changed and soldiers needed to have passed the course before they could be put before the Board. On balance we accept Ms Irwin's evidence on this point. Neither side produced evidence to enable us to determine it based on documentary evidence. However, given the fact that a Special Board was run for several people on this basis, we accept that it is more likely than not that the Claimant was not aware of the slight change to the rules that had occurred relatively recently. We do not accept that a Special Board would have been run for so many people if there had not been a clear misunderstanding of the rules by those who had not completed the course. We also do not believe that their

Commanding Officerss would have put indviduals forward for the Boarding process if they did not think that they had all the required qualifications. This reinforces our conclusion that Ms Irwin was correct and that there had been a nuanced change in the requirement for the drivers' course qualification.

98. The SJAR is comprised of a narrative, plus various grades and confirmation of her positioning. Her 'grading' that year was :

- She is scored B+
- Her narrative appears to us to be very positive
- She is said to be High for promotion 1 rank up
- She is said to be Yes for promotion 2 ranks up.
- Position: Sgt Simpson is placed 4th of 17 Sgts and the number 2 Driver in 77(HQ) Sqn.
- Sgt Simpson is positioned **12th of the 56** Sgts that I report on and **3rd of 13** Sgt Drivers in 27 Regt RLC.

99. The Claimant was given the score of 32 by the Board. The lowest score to get promoted was 35 because of the level of competition.

100. Subsequently, a Special Board was run because it transpired that some individuals had not been aware of the drivers course requirement change discussed above. Included within that Special Board were Mr Heredia and Mr Jones. There were also others. They were allowed to be scored without the need to pass the course and if they were promoted they would have to pass the course before being able to take up their promotion.

101. The Claimant states that this was unfair and she challenges the idea that they could score as highly as they did without the course qualification. She says that they were treated more favourably than she was on grounds of race and sex.

102. We make two observations regarding the comparison. Firstly, we find that by the time the Board decide to score Heredia and Jones the individuals have been told that the course qualification is not necessary until after they are Boarded. This is to offset the confusion and miscommunication about the change to the coure requirement. Therefore presumably this element would have been disregarded as part of the scoring criteria for those individuals.

103. Secondly, we consider that it is difficult for the Claimant to even get as far as a comparison exercise with Heredia and Jones because she did not score highly enough, even without them in the mix, to be considered for promotion. She has not demonstrated to us or even tried to explain how she would have scored more highly if, she had been scored at the same time as them or without the requirement for the course. She scores 32. We recognise that she has good marks in her SJAR but they are not exceptional when you consider that everyone being put before the Board was ready to be promoted.

104. The Claimant's main complaint with respect to this exercise is that Heredia and Jones were given the opportunity to be boarded when they did not have the same qualification she already had. We find that this decision was taken because there

had been a rule change and they got caught out by it. This was not a decision taken because of any reason regarding their sex or race. It appears that their superior officers were also ignorant of the rule change in time. Otherwise they would not presumably have advanced them to the Board only for them to be sifted out. It was not just Heredia and Jones who this happened to – there were several individuals caught out. We accept Ms Irwin's evidence that in these circumstances a special board was run and that in any event the subsequent promotion of Heredia and Jones would not disadvantage anyone who had been scored on the previous board because they were not pushed down the ranks – they were just also recruited and jobs were found.

2020/2021 Promotion Board

105. Subsequently the clamant was put forward to the Board for the following year (p 464 is the SJAR). The SJAR was completed in January 2021. She was ranked A-, exceptional and yes for promotion. The narrative is very positive. The following remarks outline her positioning:

> *"Sgt Simpson is 3rd of 18 Sgts in a fiercely competitive HQ Sqn. (p465).*
>
> *Sgt Simpson is placed in the top 10% **5th of 54** Sgts** and **3rd of 14** Dvrs in 27 RLC."*

106. As a result of this form she was scored at 37.5 by the Board. This was above the cut off requirement but the lowest score to be promoted was 38. Sergeant Byatt, whom the Claimant compares herself to was scored 39. The number of staff sergeants being recruited was 35. The Claimant was number 39 in the order. She was therefore fourth in reserve. She utlimately ended up being promoted.

107. The Claimant states that her performance or SJAR was above that of Byatt and that the reason she was scored lower than him was because of her sex, race and because she had brought Service Complaints.

108. There are clearly examples on the form of where she is scored more highly than him – but equally there are examples of where he scores more highly than her. They were scored by the same person for part of the form. In that part, the Claimant is scored more highly. They look remarkably evenly balanced if the assessment was based solely on that SJAR. However we accept the respondent evidence that previous SJARS would also have been taken into consideration.

109. This was a very finely balanced decision it would seem. There is clearly an element of subjectivity to the scoring by the Board that we are not privy to. The lack of transparency in this regard could be concerning. As stated above we were provided with no information on how different scores in different categories were weighted for example. However, we have no evidence to suggest that the marginal difference between these two high performing individuals was due to race or sex or because the claimant had raised SCs. Firstly we accept that the Board members were not given information regarding the SCs or the Claimant's race. With regard to gender they did know. However, to have discriminated against the Claimant, they would have to have been able to collectively, but in silence, manufacture a

situation whereby the claimant was scored very highly but ever so slightly lower than sp,e male colleagues but not others. It would also have required all 5 board members to agree to take this approach.

110. We were surprised by the fact that the Respondent does not keep records regarding the numbers of people promoted according to gender or ethnicity relative to the numbers within the respondent as a whole or relative to those who are put forward for promotion.

111. In this instance, we were provided with numbers as follows. There were 12 soldiers between the Claimant and Byatt on the score board of whom 8 qualified for promotion. So, all 12 had scored between 37.5 and 39. We were not told of the race or sex of those individuals in between. It was nevertheless clearly a fiercely competitive field.

112. We do know that there were 3 women who were promoted during this Board. That was 3 out of 9 put forward. That roughly amounts to 33%. By contrast, of 62 men put forward for promotion,32 were promoted which amounts to 52%. Given the lack of information collated and considered by the Respondent, we have not had an explanation for these figures which we address in our conclusions below.

Fourth Service Complaint

113. This complaint was submitted on 23 May 2021 (p514). In summary, the grounds of that complaint are that the Claimant did not get promoted and she had received the negative email about her on pages 501-508. She also clearly states that she thinks that the cumulative effect of her complaints are being used against her.

114. Again, we note that she does not specify race or sex discrimination anywhere on the form itself. She clearly states that she considers she has been delayed in her career because of the way the 2016 complaint was dealt with.

115. The form has added to it a letter from her solicitors. That letter does clearly state as follows:

> *"Our client considers the conduct constitutes discrimination and harassment on grounds of her gender, age and race also victimisation by reason of her complaint in paragraph number 1 above."*

116. The letter also sets out a series of incidents and events that we were not addressed about as part of this hearing.

117. The Claimant's complaint with regard to the email chain was upheld and she was apologized to and awarded £1,000. We note that the MOD's definition of victimisation is different from that of the Equality Act 2010. The definition states that if someone is treated badly because of raising a service complaint, that amounts to victimisation regardless of whether the complaint references discrimination or the Equality Act 2010.

118. The remainder of the Claimant's SC was not upheld. The outcome found that the email was sent to the Claimant in error and was not deliberate but nevertheless was hurtful. The Claimant appealed against that decision and went to the Ombudsman. Both appeal and review were not upheld.

Emails

119. The Claimant brought claims in respect of two different sets of emails. For the first set she says she was deliberately excluded by Diane Duncan so that she could not do her job properly. The second set were hurtful and she says were sent to deliberately cause her upset.

120. We turn first to the set from which she says she was excluded [p553.5 and 553.15]. She states that Ms Duncan deliberately excluded her from the emails which related to training. Ms Duncan's explanation was that she sent them to 2 individuals per regiment. She says that it was up to each regiment to tell her who their RCMO and their second were for these purposes. If the unit was very small then it would the CO and the CO2 that would get the emails. She had not been told that she ought to email the Claimant instead of the second in command to the RCMO. She says that she had no way of knowing this unless she was told. The Claimant provided no evidence to suggest that Ms Irwin had been told that she was meant to be receiving these emails. We accept Ms Irwin's explanation as genuine. Her evidence was reinforced by Ms Irwin who confirmed that this was how it worked. We can see no benefit for Ms Duncan in deliberately undermining the claimant in this way and do not accept that it occurred. Any omission of the Claimant from these emails was caused by the fact that Ms Duncan had not been told that she ought to copy the claimant in.

121. There is then a series of emails between Ms Duncan and Catherine Walker. In it they are unequivocally rude about the claimant. We do not consider that this email was forwarded deliberately to the Claimant. The claimant in her witness statement says as much (para 32) when she says that she was 'obviously not meant to see' the exchange. We agree. It is clear that these emails were written about the Claimant without any intention that she should see them. They were hurtful gossip about someone and not intended to be seen by anyone apart from them.

122. An email from Ms Duncan says as follows:

> *"Yes she's the one that I was told not to speak to in 2019 due to the amount of SC she had in."*

123. In evidence Ms Duncan said that she was only aware of the fact that the claimant had brought a single SC because of a plastic wallet in her personnel file. She said that she had not read what was in the wallet but its existence denoted an SC. We were told by Ms Brown that SCs would remain on a file until they were resolved. Therefore the earlier 2016 SC would not have been there when Ms Duncan wrote these emails. She also said that it would only have been placed on the file if their department had to respond to it in some way. She said that it was

not the case that all SCs regardless of content would be put on the individual's personnel file.

124. Therefore, if there was a complaint still on the file at this time it would have to have been about the promotions or SJARs otherwise would not have been relevant to the department. The date on which Ms Duncan sent the emails was March 2021 [notes of interview 555.1]. if we accept Ms Brown's evidence about how SCs were stored, there would not have been a report on the Claimant's at this point because there would not have been an outstanding SC that was relevant to the APC department. If there was just one SC it would have been one of the Complaints about the SJARs and promotions as opposed to the 2015/2016 SC.

125. Based on the various and sometimes conflicting accounts of how SCs were stored and discussed, we find that it is more likely than not that the Claimant bringing SCs was a topic of conversation amongst the staff at APC. We do not accept Ms Duncan's evidence that she only knew about one SC and that her comment about the 'amount' of SCs was somehow a reference to only one. That is not plausible. Given that she said that it was highly unusual for someone to have even one SC on their file, we have no doubt that someone who had, by the time these emails were being sent, submitted 3 in the last 5 years, was something that was remarked upon in their department. This is particularly so given that it related to the promotions process and this was the department they worked in. We find it clear that Ms Duncan and Ms Walker saw the claimant as a complainer and were nastily gossiping about her as such.

126. Nevertheless, we had no evidence that they would have known the detail of the complaints and if they did we conclude that it would have been of the second and third complaints as they could plausibly have still been on the file around this time. We do not accept that they knew about the detail of the first complaint or would have had an opportunity to read it. We conclude that their understanding, such as it was, related to the claimant's concerns around not being promoted and the delays to her career. This reflects the main thrust of all of her first 3 grievances though we accept that inequality with her male colleagues is mentioned in her first grievance. The Claimant was not shy in telling people that she brought Service Complaints if she felt that it explained her being placed in a certain unit or gave relevant background information to the person she was speaking with. However, we find that when she did tell them , we find that on balance she refers to them as being explanations for her delayed progress as opposed to any mention of sex or race discrimination. She said when describing her

Formal Career Review

127. The Claimant asked for a Formal Career Review (FCR) in October 2020. This was refused by Ms Galbraith. We heard evidence on this point from Ms Brown and the Claimant.

128. Ms Brown said that Ms Galbraith had simply applied the rules at the time which we were taken to at page 712.4 (para 18) She states that the rules had changed but that there were transitional arrangements in place. We accept Ms Brown's evidence which was that before 2018, soldiers were entitled to two FCRs; one after 8 years in the army and one after 14 years in the Army. Subsequently the rules

changed so that soldiers were only entitled to one at the point of 16 years of service or achieving the rank of Sergeant, whichever happened first. The transitional arrangements at paragraph 18 of the policy for the RLC state that those who have already had 2 FCRs at the point that they make sergeant or reach 16 years' service, are not entitled to a further FCR. It was for this reason that the claimant was initially told that she was not entitled to another FCR.

129. When this was put to the Claimant in cross examination, the Claimant said that she did not accept this interpretation of the transitional provisions. It is not clear to us why she refused to accept this explanation. Nevertheless, we do accept that this was the policy in place at the time and this was why she was refused the FCR by Ms Galbraith. The subsequent decision to review that and allow the claimant to have a third FCR was a step taken by the respondent apparently because they recognised how upset the claimant was at that time. It was not to make good or rectify any wrongdoing on their part.

Conclusions

Limitation

130. All of the acts or omissions relied upon by the claimant occurred more than 6 months before the claimant submitted her ET1 apart from the last two which relate to Ms Duncan sending the rude email on 29 March 2021 and the promotion of Sergeant Byatt over the Claimant on 1 April 2021.

131. The case of *British Coal Corporation v Keeble and ors 1997 IRLR 336, EAT*. requires the court to consider the prejudice which each party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case, in particular: the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

132. Nevertheless, successive cases thereafter have suggested that it is not incumbent upon a Tribunal to take a checklist approach to exercising its discretion which is wide. *Southwark London Borough Council v Afolabi 2003 ICR 800, CA* confirmed that at a minimum, the Tribunal should consider the length of and the reasons for the delay and whether the delay had prejudiced the respondent.

133. The Claimant asserts that prior to seeking legal advice from solicitors (though we do not know exactly when this was in 2021) she was unaware that she could bring a claim before the Tribunal. The respondent disputed that argument stating that she made a threat of legal action in 2019 and clearly knew her way around the service complaints process within the respondent.

134. We do not accept that the reference the Claimant was taken to from 2019 amounts to demonstrating that the claimant had knowledge of her right to bring an employment tribunal claim. The Ombudsman outcomes refer to Judicial Review

proceedings, they do not include any reference to Employment Tribunals. We therefore consider that it is plausible that the claimant knew she could take court action but not that she could take Employment Tribunal action nor on what grounds.

135. Nevertheless, even accepting the Claimant's explanation at its highest as to why she did not bring proceedings earlier, we have to consider whether it is just and equitable to extend time in all the circumstances. Although we have a wide discretion, it is still the case that extending the time limit should be an exception and not the rule. (Bexley Community Centre (t/a Leisure Link) v Robertson [2003] EWCA Civ 576.

136. What the claimant has asserted, from the outset, is that there is an overarching, ongoing situation whereby she has been subjected to a detrimental situation because she is 2 years behind her peers following the 2015/16 SC/promotion situation. She considers that this 'umbrella' [our word not hers] means that there was a continuing act of discrimination or that the link between all the issues which are covered by the umbrella, should persuade the Tribunal to exercise its discretion and allow the older claims in or find that this was an ongoing act of discrimination.

137. However, on the first day of this Tribunal the Claimant resiled from any assertion that the delay to the resolution of her 2016 Service Complaint was discriminatory on grounds of sex or race. She said that she accepted the respondent's explanation for the time it took to resolve that matter and in effect withdrew her claim in respect of that point. Her remaining claims regarding the 2016 situation had been struck out in earlier proceedings. We therefore have a situation whereby the overarching background or underlying unfairness relied upon by the claimant is not, even in her own case, caused by discrimination. It provides us simply with an unfair background and therefore a lack of an umbrella under which all the discriminatory acts can be gathered.

138. Our conclusion is that the subsequent incidents relied upon by the Claimant are all isolated allegations of wrongdoing by the respondent. They involve different individuals' actions or decisions on almost every occasion. They are by their definitions, one off incidents or decisions. Some of them have an ongoing impact (e.g. the failure to promote) but they are nevertheless one off decisions and the claimant has not provided any evidence to link them beyond the fact that she continues to maintain that she has not progressed as quickly as her peers.

139. The claimant's explanation that she was unaware of her right to bring a claim is important and has been given significant weight in our deliberations, but we do not consider that it is sufficient to explain the length of time it has taken her to bring the majority of her claims which date back several years. Other than 2.7 and 2.8, the latest incident relied upon is on October 2020 and the Claimant does not enter into ACAS Early Conciliation until 23 June 2021 and her claim is not submitted until 18 August 2021. The Claimant does not contact ACAS until 2 months later than the 6 month time limit in s123(2) Equality Act. At this time she was clearly receiving legal advice and yet did not put in a claim to the ET1 regarding the already out of time aspects of her claim for a further almost 2 months. The Claimant has not explained why she sought legal advice so late, nor when in 2021 she sought legal

advice which would allow us to decide whether she acted promptly once she received advice. She also has not explained why, once receiving legal advice she still did not submit a claim for at least 2 months. We have to consider the inequity for the respondent of allowing such claims to be considered out of time. They have provided witness evidence for us to consider but necessarily, memories fade particularly when considering events going as far back as 2018.

140. In summary, the claimant has not properly or sufficiently explained to us why she chose not to take legal action prior to the date when she issued her ET1.

141. When considering what is just and equitable we can also consider the merit of any such claims. Here we do not consider that the claims have sufficient merit to exercise our discretion to extend time and therefore the prejudice to the claimant of finding the claims out of time is not outweighed by the prejudice to the respondent of such claims being allowed out of time. We therefore find that save for the incidents listed at 2.7 and 2.8 in the List of Issues the claimant's claims are out of time and we do not consider it is just and equitable to extend time as beyond the claimant stating .

142. If we are wrong in that we have nevertheless gone on to determine the claims in any event.

Direct Discrimination

143. As an overall observation, we note that the Claimant rarely put to the witnesses that their actions were because of or related to her race. Any such questions usually came as an afterthought at the end of her cross examination. We are keenly aware that she is a litigant in person but it was clear to us that she rarely, if at all, really considered that race was an important part of the reason why she felt she had been treated badly by the respondents. If she did, she did not articulate it to us.

144. Whilst it is of course not necessary to name individual comparators, the claimant did not provide the ethnicity or race of the comparators she was relying upon. All evidence regarding the comparators related primarily to their sex. We have therefore considered any allegations about race against a hypothetical comparator. Further, at no point did the Claimant put forward any evidence that the respondent's actions related to or were caused by her race nor did she challenge the respondent's evidence that several of the individuals who carried out the acts she alleged, would not have known her race (e.g. the promotion boards). She at no point suggested in her questions or her evidence or submissions that compared to a white person, she was treated less favourably.

145. Instead, the claimant presented us with allegations of unfairness and pointed at what made her different from the comparators, namely her sex. Whilst as a litigant in person this is a common approach, we as a Tribunal do need to be presented with something more than just differential treatment. We have reminded ourselves that there is rarely overt evidence of direct discrimination but something more is still required to justify a finding of discrimination.

146. We now address each incident in turn.

In July 2016, did C's service complaint about the mishandling of the report being due to sex discrimination take 2 years to resolve and have the effect of placing C two years and 1 rank behind her comparators as at February 2022? [FBP §2].

147. This claim was effectively withdrawn on the first day when the Claimant confirmed that she did not believe that the delay to the process was because of her race or sex. The Claimant was given several opportunities by the Tribunal to consider her position in this regard and explain her claims. Nevertheless, she did not resile from the position that she considered that the delay was not discriminatory and accepted the respondent's explanation for the delay. We therefore do not uphold this claim.

In February 2019, did R prepare an unfavourable 2018/2019 SJAR report which did not properly reflect C's work output or performance? [FBP §10]

148. We have found as a question of fact that the report was factually reflective of her performance as judged by the respondents. In addition it was not unfavourable – it was simply not good enough for promotion. The Claimant provided us with no independent evidence that she had performed to a better standard than that which they presented and that this better performance had somehow been overlooked. She disagreed with the characterisation of her performance but had no evidence that she had in fact performed differently from the assessment given by 3 different senior officers. In contrast, we were provided with the written reports by Mr Herlihy and Ms Holland which were both equally complimentary and critical. They were not wholly unfavourable as suggested. We also heard plausible witness evidence that there had been several incidents during her relatively short tenure within the unit that caused some doubt on her suitableness for promotion at that time.

149. We also noted that although Mr Herlihy says broadly the same as Ms Holland certainly in terms of tone and approach, the claimant did not at any point criticise his feedback or assert that it was negative on grounds of race or sex. Nor did the Claimant seek to suggest that Ms Holland had in some way influenced Mr Herlihy at all.

150. We accept that Mr Lloyd was perhaps more reliant on Ms Holland's and Mr Herlihy's feedback on the Claimant than longer serving Commanding Officers but that does not mean that he relied solely on their opinions or that it was unreasonable for him to take their opinions into account. We have rejected the claimant's assertions that Ms Holland was bad mouthing the claimant to Mr Lloyd. We found Ms Holland quite credible as she explained clearly why she had said what she said. Ms Holland did not hold the Claimant accountable for example, for the coach incident. Ms Holland explained why she had concerns regarding the Claimant's performance and did not try to back away from that in evidence before us – simply saying that in such a small unit she had expected the claimant to be more forthcoming in her support. It was this that explained her criticisms of the claimant. We accept that is all she told Mr Lloyd too. He confirmed that she had not maligned the Claimant to him either at the time of preparing her SJAR or before or after. She did however inform him of how the Claimant was performing.

151. In any event we were provided with no evidence to suggest that any of them were influenced by or acted in that way because of the claimant's race or sex or that they would have treated someone who had performed in the same way as the Claimant had performed better if they were either a man or someone of a different race. At its highest what the claimant presented to us was a personality clash with Ms Holland. Again we find that the claimant is presenting us with what she has perceived as negative treatment and unfairness. We have concluded that she was not treated unfairly in all the circumstances nor that, if compared to someone who had performed the same way, she was treated less favourably than they would have been. There is no set of circumstances from which we could find discrimination. The Claimant has not provided the something more we need to shift the burden of proof to the respondent to explain the SJAR scores or the decision not to position the Claimant following the MJAR.

152. Further we do not believe that the claimant thought that this treatment was discriminatory at the time because it is not raised in her Service Complaint about this issue despite knowing that she could raise such matters and having done so in the past with no ill effect.

153. If we are wrong in that, and the claimant has shifted the burden of proof just through her pointing at a perceived unfairness, we find that the incidents that were highlighted as examples of the claimant's performance not being worthy of being put forward for promotion, were well explained and credible non discriminatory reasons for the treatment as evidenced by Mr Holland and Ms Lloyd and explained in the feedback provided and the final SJAR compiled.

In March 2019 did R's late submission (by Adam Lloyd) and in April 2019 did R's late release of C's SJARs to the boards, and in September 2020 did the double release of 2019/20 SJAR by the APC result in C not progressing in rank and meeting promotional targets set out in her FCR summary for her CEG? [FBP §18]

154. The March 2019 SJAR was not submitted late because she had 'Dev' written on her SJAR and was therefore not going to be eligible for Boarding.

155. The Claimant's case regarding the double release was difficult to understand. It was not set out in her witness statement and only really came to light during her cross examination of the respondent witness Ms Irwin. However we note that it is set out as an allegation in the notes of one of her grievance investigations and suggests that she thinks that the fact that she had two different explanations for the two separate releases of her SJAR to the system meant that something suspicious had occurred. Her allegation was that her SJAR was released by APC on two occasions. She believes that it was released first in March and then again in September 2020. She suggested before us that the release in September indicated that her SJAR had not in fact gone before the Board in March and that the score of 32 was applied retrospectively after the Special Board which appointed Mr Jones and Mr Heredia. Essentially she was alleging a cover up to demonstrate why she was not promoted when they were.

156. Ms Irwin denied that any such steps were taken saying that the Claimant would have been informed of her score at the time and that the Board scoring was released far earlier than September 2020. We did not have express evidence that the score had been released to her in March 2020 but we had indirect evidence in various documents that the Board results had been published in April 2020 and must therefore have been sent to the Claimant. Her explanation for the second release in September was that she did not know really know why this had occurred but could only point to an administrative need for the report to be looked at.

157. We find that it is implausible that such lengths would have been gone to, to cover up any failure to put the Claimant before the Board. There would be no negative consequence to Ms Irwin if someone got missed off a Board so there would have been no need to cover it up at such great lengths. Where Boards were missed inadvertently then individuals were Boarded on a specially convened board. There was no reason for APC or anyone else not to put the Claimant before the Board and she was given a score which we do not think would have been manufactured and sent to her in March or April had she not in fact been scored. To suggest such advanced planning to deny her a promotion is not plausible and we had no evidence to substantiate it.

158. We find that on balance the claimant must have been informed of her score of 32 when the Board results were published for everyone to see and therefore long before she became aware of the Heredia and Jones promotions. They were boarded long after the results of the original Board were released. We do not accept that the Claimant would have been told that she had a score of 32 and would not be promoted if she had not in fact gone before the Board.

159. Therefore the allegation as we understand it did not occur. Even if we are wrong, given that there was a second release of the SJAR in September 2020, we find that any such release was not because of the claimant's race or sex as the claimant has provided us with no information whatsoever that the release of the SJAR was caused by those characteristics. At its heart the claimant's case is that the respondent had developed a desire to keep her down because of her SCs. We do not accept that she has made out facts that support that allegation.

In July and August 2020, did R promote Sgt Heredia and Sgt Jones to Staff Sergeant while failing to promote C who was more eligible for promotion? [FBP §13]

160. We have accepted the respondent's explanation for the decision to put Mr Heredia and Mr Jones to a special board which was that there had been a relatively recent change in policy and that both these individuals, and several others and their SOs were not aware that the drivers course had to be completed prior to Boarding as opposed to prior to promotion. Had the COs been aware of this requirement at the sift stage, they would not have put the individuals forward for the Board. This is why they were removed on the sift from the first Board and put into a special Board later on. We conclude that the difference in scores between the Claimant and the comparators was not influenced in any way by the course requirement as by the time the Special Board scored Heredia and Jones, they were not looking for the presence of the course to determine scoring. That decision was

not in any way motivated by the claimant's sex or race but because of the lack of communication within the respondent regarding the rule change for the drivers course requirement.

161. If the course requirement is removed, then the Claimant was not more eligible for promotion. This is demonstrated by the scores and narrative on her SJAR against the scores for Heredia and Jones who the Board scored more highly than she did – though we accept not in all aspects. However it was the main thrust of the Claimant's argument before us that her lower score was simply unfair because of the course requirement deficiency as opposed to that their actual scores on the SJAR were not merited (other than the course issue).

162. Nevertheless, as she is a litigant in person we have compared the scores for Heredia, Jones and the Claimant to see if there were other differences justifying the different final scores. We can see that there were extremely positive narratives for both Heredia and Jones - far more exuberant than that for the claimant. We also note that although Heredia had overall lower scoring to the Claimant (i.e. had fewer A- than the claimant) he also had more 'exceptional' ratings later in the form and he had no areas for development whereas the Claimant did. We also accept that the Board would have considered earlier SJARs and we do not have sight of theirs but we do know that the claimant's SJAR from the year before was good but not outstanding. For all those reasons, we do not consider that the Claimant has demonstrated that the reason why she scored less than her comparators or a hypothetical comparator was because of her race or sex. She gave us no evidence on this point instead focusing on the unfairness that Heredia and Jones was Boarded at all given the course requirement which we have found had changed.

163. If we are wrong, we consider that the Respondent has explained its reasons for the lower scores namely that the Claimant's performance had not, at that point, been as positive as the comparators' performance overall.

In October 2020, was C's request for Formal Career Review (FCR) in October 2020 refused despite that this was in fact a requirement when C became Sergeant thereby slowing down or preventing career progression? [FBP §14]

164. The claimant was not refused an FCR. She was initially told that she was only entitled to two which was in accordance with the rules at the time. We accept that these were the rules at the time and that this was the reason she was refused a third review initially. Subsequently, however because she was so unhappy, a third FCR was granted to her though we accept this was outside the normal rules for the Respondent at the time.

165. The reason behind the initial refusal was the transitional rules that we were shown, not the claimant's race or sex.

On 1 April 2021, did R promote Sgt Byatt and not C who has stronger credentials?

166. We find that the Respondent did promote Byatt. The difference in points between him and the claimant was 1.5. A cursory look at their SJARs suggests that they were broadly commensurate with each other rather than there being any

clear different strengths between them. There were areas where the claimant scored better and areas where Byatt scored better. In our view they appear to be roughly the same.

167. We note however that there were 12 soldiers between the Claimant and Byatt. So, between the scores of 37.5 and 39, there were 8 individuals who had scored 38 or 38.5 – again very close in scores. We were not told of the race or sex of those individuals in between. It was nevertheless clearly a fiercely competitive field.

168. Where a scoring system is as opaque as this one, it makes it very difficult for anyone to determine the reason behind such small differences in score by the Board. We have found that the Board was unaware of race and the claimant's previous Service Complaints and therefore any bias or discrimination could only have been on grounds of sex. We do not know the sex of the 8 individuals who placed in between the claimant and Byatt. We do know that there were 3 women who were promoted during this Board. That was 3 out of 9 put forward. That roughly amounts to 33%. By contrast, of 62 men put forward for promotion,32 were promoted which amounts to 52%.There is enough of an indication that there is a disparity between the treatment of men and women put forward for promotion that could shift the burden of proof to the respondent. The respondent does not keep records of the proportion of women or men either put forward for promotion or once put forward, actually promoted overall so we can only consider the figures for this Boarding process.

169. We must therefore consider the reason given by the Respondent for the Claimant and Byatt having slightly difference scores despite on paper appearing broadly similar. On careful consideration, we accept the Respondent's non-discriminatory explanation for the point difference between the Claimant and Byatt. The Board made a nuanced decision based on this SJAR and the previous SJARs (which we have not had sight of for Byatt) and using their professional expertise, the Board decided that Byatt deserved 1.5 points more than the Claimant. It was a slight difference but there were also slight differences between the Claimant and 8 others which the Claimant has not challenged and we have also not had explained and who could have been women. The Claimant has not challenged the evidence before us concerning the minutiae of the marking of Byatt or the other indiividuals placed between her and Byatt. In circumstnaecs where the difference is so small, it seems to us that the difference could be caused by a multitidue of factors and against the context we have seen of so many had slightly different scores based on nuanced decisions by the Board, we consider that the Respondent's explanation that it was different Board members making nuanced decisions based on their expertise and information given in the SJAR books is the reason.

170. Ultimately, in any event, the Claimant did not suffer a detriment because she was subsequently promoted because of her scoring at this Board. Her score meant that she was fourth in reserve and she ended up being promoted. We do not accept her argument that she was only promoted because she had complained in an ew Service Complaint and her solicitor. She said that normally there would only be 3 in reserve that got appointed but that as the fourth, it was unusual and could only have happened because she complained. However we do not accept that premise as there is one person after her on the waiting list who was also promoted after her

as fifth in reserve. Unless the person after her (p665) had also submitted a complaint then this renders that argument implausible and improbable. We had no evidence to suggest that the fifth in reserve was appointed just because they complained. It may have been unusual that the fourth person in reserve was appointed but the claimant has not established that this treatment, which would amount to more favourable treatment, was caused by her Service Complaint or her solicitors' involvement.

171. We do not uphold the Claimant's claims for direct discrimination.

Victimisation – s.27 Equality Act 2010

172. As an overall observation that has informed all of our victimisation decisions, we find that nobody who the claimant has made allegations of victimisation against knew about the sex discrimination allegation in the 2015/16 SC.

173. The remaining Service Complaints do not reference discrimination at all either actually or impliedly and therefore do not constitute protected acts. They are not either something done for the purposes of or in connection with the Equality Act (s27(2)(c) nor are they making an allegation that someone has contravened the Equality Act (s27(2)(d). Therefore any claim for victimization can only succeed if the Claimant can show that she was subjected to a detriment because of her first Service Complaint.

174. The Claimant confirmed in cross examination that she did not tell people about the basis for her 2015/16 complaint and we consider that there would be no other way for them to find out unless they were in the APC department where they handled the complaints. Even then, we accept the respondent's various witnesses' evidence that the 2015/16 SC would not be in the Claimant's file after it was resolved in 2018 and that in any event, everyone understood that her grievances overall to be primarily about her lack of promotion.

175. We have found that Ms Duncan did know about the existence of service complaints and knew that the claimant had more than one. However we believe that everyone, including the Claimant considered that her complaints after 2015/16 were about the delays to her career progression and the failure to promote her as opposed to about discrimination allegations and the detail of the complaints were not public knowledge. We find that Ms Duncan did not know that the Claimant's first Service Complaint included an allegation of sex discrimination.

176. Therefore whilst we have found that Ms Duncan's comments in her emails were caused by the number of and fact of the Claimant's Service Complaints, this does not mean that this satisfies the Equality Act 2010 definition of victimisation.

177. The respondent referred to the case of South London Healthcare NHS Trust v Dr B I Al-Rubeyi (EAT) 2010 which found that where a colleague knew of a grievance but not that it was a complaint of discrimination, then there could not be a successful claim for victimisation. This is, we find, almost on all fours with the current case. The Claimant did tell people about her SCs but she did not tell them about the detailed content and said in evidence before us that she had no need or

desire to. We find that the knowledge of the Claimant's discrimination allegations were therefore confined to Mr Cunningham and did not extend to any of the other individuals accused of detrimental treatment in the claims before us.

178. With regard to the two elements of the claim that are brought as victimisation only, we find that the claimant was not deliberately excluded from APC's email distribution.

179. With regard to the rude and disrespectful emails sent by Ms Duncan and Ms Wallace, we find that they were caused by the fact that the claimant had brought service complaints but not by the fact that she had alleged discrimination or referenced the Equality Act as we do not consider that Ms Duncan knew about the substance of the 2015/16 complaints and all subsequent complaints had not referenced discrimination in any way.

180. With regard to the remaining incidents also brought as victimisation claims, we do not find that any of the incidents were caused by the Claimant having brought Service Complaints. There was no link evidenced before us between the incidents and the Service Complaints. Further there was no knowledge by those accused of the substance of the Claimant's allegations beyond that she had concerns regarding her career progression. They were not aware she had alleged discrimination in her first Service Complaint thus defeating any claim for victimisation under the Equality Act 2010.

181. We do not uphold the Claimant's claims for victimization.

Harassment s. 26 Equality Act 2010

182. None of the conduct relied upon as being acts of harassment, on the surface, directly related to the claimant's race or sex. As discussed above under the direct discrimination conclusions, the claimant has not pointed to or provided any link whatsoever between any of the acts and her race or sex save for that the fact that she sees an unfair or different outcome between herself and the comparators. She has not provided us with any evidence that suggests that any of the alleged conduct relates in some other way to her sex or race in a way that we have not perhaps understood or realised.

183. We therefore conclude that other than the rude chain of emails, all the claimant's claims of harassment must fail because none of the behaviour complained of is related to the claimant's race or sex.

184. The only comment in the email chain that refers to the claimant's sex is the use of the phrase 'This woman'. We have found that the decision to send the email to the claimant was not intentional so it was not intended to cause the effect of creating intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

185. We have carefully considered whether the use of the phrase 'this woman' was perceived by the Claimant as creating a intimidating, hostile, degrading, humiliating or offensive environment for her. We accept that the Claimant went home after

receiving the email chain and that she was genuinely upset. However we consider that in fact what the Claimant was upset about and has remained upset about was the discussion regarding her complaints and the fact that she was being discussed at all.

186. The specific comment was referred to, amongst several others in the claimant's grievance as drafted by her solicitors as follows:

"This clearly demonstrates that our client's concerns are founded; that her concer ns about her treatment were disregarded, and that by reason of the service compl aints raised, she was continuing to be victimised. The exchange further demonstr ates the attitude towards our client who appears to have been red flagged as a "d ifficult woman" and was spreading this influence by email to Catriona Wallace. Ms Diane Duncan clearly preconceived and stereotyped our client as a complainer. Our client further submits that Diane Duncan was not involved with her complaint or the investigation, and that sharing of information about her complaints has bee n unlawful and inappropriate."

187. It is clear that the claimant is upset about being seen as a complainer and being victimised. No mention is made of an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant related to her sex. The email chain is clearly an irreverent, rude conversation which she had every right to be upset about – nevertheless we do not accept that the claimant perceived the comment of 'This woman' as creating a hostile environment relating to her sex or race. Instead we find that it is the rest of the email chain that creates a hostile environment relating to the fact that she has brought grievances. She was not called a 'difficult' woman in the email chain as suggested in the grievance letter from the solicitors. What upset her was the idea that she was being discussed by APC in relation to her grievances and therefore although the comment relates to her sex, it did not have the purpose or the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. The Claimant was upset about being discussed not about being called 'This woman'. We therefore do not uphold the Claimant's claim for harassment.

Employment Judge Webster

Date: 16 May 2023

JUDGMENT and SUMMARY SENT to the PARTIES ON

16/05/2023

FOR THE TRIBUNAL OFFICE