EMPLOYMENT TRIBUNALS

Claimant: Ms S Gordon

Respondent: Southern Housing

Heard at: London South (by video) **On:** 1,2,5,6,7,8 & 9 June 2023

Before: Employment Judge Evans
Ms J Cook
Mr K Murphy

Representation
Claimant: Mr Tomison, counsel
Respondent: Ms Smeaton, counsel

JUDGMENT

1. By consent, the name of the Respondent is amended to Southern Housing.

2. The Claimant's claims of direct race discrimination, harassment, victimisation and constructive unfair dismissal fail and are dismissed.

REASONS

Preamble

1. The Claimant presented a claim of race discrimination (direct discrimination), harassment and victimisation on 20 February 2020 ("the first claim"). She then presented a further claim of race discrimination (direct discrimination), harassment, victimisation and constructive unfair dismissal on 17 May 2021 following the termination of her employment on 22 April 2021 ("the second claim").

2. The claims were heard by this Tribunal on the dates set out above. 1 June 2023 was taken up by the Tribunal reading in. Evidence was heard on 2,5,6 and 7 June. The parties made their submissions in the morning of 8 June and the Tribunal deliberated for the rest of 8 June and on 9 June. The Tribunal reserved judgment at the end of the parties' submissions and these are the Tribunal's reasons for the unanimous reserved judgment given above.

3. The bundles: the parties had agreed a bundle for the first claim containing 489 pages and a bundle for the second claim containing 364 pages. All references in these reasons are to the "electronic" page numbers, that is to say to the page numbers of the relevant pdf file containing each bundle. Page numbers preceded

by "B2" are to pages contained in the bundle relating to the second claim. All other page numbers are to the bundle relating to the first claim.

4. The witnesses: the following witnesses gave evidence by reference to witness statements prepared and exchanged before the hearing:
   4.1. Mr Clarke (an employee of the Respondent and its predecessors between 2012 and September 2019);
   4.2. The Claimant (two witness statements);
   4.3. Ms Lane (a current employee of the Respondent employed as a Property Manager);
   4.4. Mr Whittaker (an employee of the Respondent and its predecessors between August 2011 and December 2018);
   4.5. Mr Osman (two witness statements);
   4.6. Ms Beard (the Respondent's Director of Financial Services);
   4.7. Mr Kazi (the Respondent's Director of Corporate Finance);
   4.8. Ms Campbell (the Respondent's Director of Legal Services); and
   4.9. Ms Pauley (the Respondent's Head of Region (South London and Surrey)).

5. The Respondent also provided a witness statement for Ms C Cooper (employed as the Respondent's Head of Home Ownership between July 2018 and March 2020) but she did not attend the hearing to give oral evidence.

Any preliminary matters dealt with at the final hearing

6. The Claimant is represented by Thompsons solicitors, a firm in which I was a partner. I disclosed details of my involvement in that firm to the parties at the beginning of the hearing, explained that no other Employment Judge was available to hear the case, and gave the Respondent an opportunity to make an application that I be recused. The Respondent made no such application. The hearing therefore proceeded.

The issues for the Tribunal to decide

7. The issues that the Tribunal would need to decide in order to determine the claims had been agreed between the parties prior to the hearing. They had been agreed as set out below except in two respects.

8. First, in closing submissions, the Claimant withdrew issue 4.12 in the first claim. Secondly, an issue arose immediately before closing submissions in relation to the drafting of issues 10 and 11 in the second claim. The Claimant applied to amend those issues to include the words "(whether or not found to be discrimination, victimisation or harassment)" in each of those issues. The Respondent objected but the amendment was permitted for reasons given orally at the hearing.

9. The agreed issues relating to remedy have not been set out below, it having been agreed that this judgment would deal with liability issues only.

The first claim

References below to the parties' pleaded cases are to the Claimant's Particulars of Claim received by the Tribunal on served on 20 February 2020 **(PoC)** and the Respondent's Amended Grounds of Resistance served on 17 July 2020 **(GoR).**

Jurisdiction

1. Whether any of the matters complained about occurred outside the normal limitation period. The Respondent's position is that the Tribunal does not have jurisdiction to hear complaints relating to matters prior to 1 October 2019 because they are time barred.

2. If so, whether any of those matters amount to acts extending over a period of time ending within the normal limitation period.

3. In respect of any which are not, whether the Tribunal should exercise discretion to hear those matters out of time.

Harassment (section 26 Equality Act 2010)

4. Whether the Respondent subjected the Claimant to unwanted conduct related to the Claimant's race (Black British). The Claimant relies on the allegations (which are not admitted by the Respondent) as set out at below:
4.1. The Respondent not paying the Claimant acting up pay for her role as Acting Up Senior Property Manager, from August 2018 to 1 November 2018 (para 14 PoC, paras 16 – 18 GoR);
4.2. Os Osman telling the Claimant not to apply for the post of Senior Property Manager on 18 July 2018 (para 4 PoC, para 7 GoR);
4.3. The Respondent not appointing the Claimant to a permanent post of Senior Property Manager (para 6 and 9 PoC, paras 8 – 12 GoR);
4.4. The Respondent offering to the Claimant a secondment to a Senior Property Manager post at a reduced salary of 10% (para 7, PoC, paras 8 – 12 GoR);
4.5. The Respondent offering the role of Senior Property Manager as a development opportunity (para 8 PoC, paras 8 – 12 GoR);
4.6. The Respondent paying the Claimant 10% less to carry out the role of Senior Property Manager 1 November 2018 to 1 November 2019 (para 8 PoC, paras 8 – 12 GoR)~~;~~,which includes the allegation that in April 2019, following the outcome of the Claimant's first grievance, Mr Osman; (1) did not increase the Claimant's salary to 100%, (2) failed to conduct any, or any meaningful, review of her reduced salary, and (3) failed to communicate the outcome of that review to the Claimant;
4.7. The Respondent returning the Claimant to her previous role of Property Manager as of 2 November 2019 (para 10 PoC, GoR paras 21 and 22);
4.8. The Respondent not offering the Claimant the option of applying for a permanent position at the end of her secondment (para 11 and 12 PoC, paras 21 and 22 GoR);
4.9.[WITHDRAWN]~~ The Claimant's grievance outcome dated 10 January 2020 (para 17 PoC, paras 23– 27 GoR);~~

4.10. The Claimant being left out of information updates in January and February 2020(para 20 PoC, para 30 GoR);
4.11. On or before 27 January 2020, Os Osman telling Claire Cooper that the Claimant thought she was racist (para 21 PoC, para 31 GoR)
4.12. [WITHDRAWN] ~~The Respondent (Senior Managers) not inviting the Claimant to Senior Property Manager meetings on 26 March 2019, 15 April 2019, 30 April 2019, 4 September 2019 and 4 October 2019 (para 22 PoC, para 30 GoR).~~

5. If so, whether the conduct of the Respondent had the purpose or effect of:
5.1. Violating the Claimant's dignity; or
5.2. Creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

6. If so, was it reasonable for the conduct to have that effect.

Direct Discrimination (section 13 Equality Act 2010)

7. Whether the Respondent treated the Claimant less favourably than the Respondent treats or would treat others because of the Claimant's race. The Claimant relies on the allegations set out at paragraph 4 above.

8. The Claimant relies on the comparators of Caroline Brooks, Rob Shaw and Luke Mills for the allegations referred to at paragraphs 4.3, 4.4, 4.5, 4.6, 4.7, 4.8, 4.10 and 4.12 above. The Claimant relies upon hypothetical comparators for the allegations at 4.1, 4.2, 4.9 and 4.11.

Victimisation (section 27 Equality Act 2010)

9. Has the Claimant committed one or more protected acts within the meaning of s.27(2) & (3) of the EQA and if so what were those acts?
9.1. The Claimant relies on the following protected acts, where the Claimant raised allegations of race discrimination/harassment:
    9.1.1. The Claimant's grievance dated 31 October 2019;
    9.1.2. The Claimant's registration with ACAS on 31 December 2019 citing race discrimination;
    9.1.3. The Claimant's grievance appeal dated 15 January 2020.

10. Has the Respondent subjected the Claimant to a detriment because the Claimant did any of those protected acts and if so what was the detriment? The Claimant relies upon the detriment set out at paragraph 4.10.

The second claim

References below to the parties' pleaded cases relating to claim number 2301693/2021 (**Second Claim**) are to the Claimant's Grounds of Claim received by the Tribunal on 7 May 2021 **(Grounds of Claim)** and the Respondent's Grounds of Resistance served on 14 June 2021 **(GoR).**

Jurisdiction

1. Whether any of the matters complained about occurred outside the normal limitation period. The Respondent contends that the Tribunal does not have jurisdiction to hear complaints relating to matters arising before 5 February 2021 because they are time barred.

2. If so, whether any of those matters amount to acts extending over a period of time ending within the normal limitation period.

3. In respect of any which are not, whether it would be just and equitable for the Tribunal to extend time.

Direct Discrimination (section 13 Equality Act 2010)

4. Whether the Respondent treated the Claimant less favourably than the Respondent treats or would treat others because of the Claimant's race. The Claimant relies on the following acts:

4.1. In November 2020 Sabina Oleksy asked the Claimant to attend a formal Stage 1 sickness review despite the Claimant not having been sick (§32 of the Grounds of Claim, para 12.4 GoR);

4.2. In or around August 2020 , Ms Oleksy denied the Claimant leave over Christmas (§34 of the Grounds of Claim, para 12.3 GoR); and

4.3. In September 2020, Mr Osman told Ms Oleksy to treat the whole team badly (an instruction which was communicated to the Claimant on 19 January 2021) (§35 of the Grounds of Claim, paras 13 – 14 GoR).

5. The Claimant relies on the comparator, Sandra Lane. Where the comparator is deemed not suitable, the Claimant relies upon a hypothetical comparator.

Victimisation (section 27 Equality Act 2010)

6. Has the Claimant committed one or more protected acts within the meaning of s.27(2) & (3) of the EQA and if so what were those acts?

6.1. The Claimant relies on the following protected acts, where the Claimant raised matters of race discrimination/harassment:

6.1.1. The Claimant's grievance dated 31 October 2019;

6.1.2. The Claimant's registration with ACAS on 31 December 2019 citing race discrimination;

6.1.3. The Claimant's grievance appeal dated 15 January 2020; and

6.1.4. The Claimant's Tribunal claim (Case No. 2300721/2020) submitted on 20 February 2020.

7. Has the Respondent subjected the Claimant to a detriment because the Claimant did any of those protected acts and if so what was the detriment? The Claimant relies upon the detriments set out at paragraph 4 from 4.1 to 4.3.

Harassment (section 26 Equality Act 2010)

8. Whether the Respondent subjected the Claimant to unwanted conduct related to the Claimant's race. The Claimant relies upon the matters set out at paragraph 4 from 4.1 to 4.3.

9. If so, whether the conduct of the Respondent had the purpose or effect of:
   9.1. Violating the Claimant's dignity; or
   9.2. Creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

Constructive Unfair Dismissal (section 98 Employment Rights Act 1996)

10. Whether the Respondent acted in fundamental breach of contract. The Claimant relies upon the individual allegations of discrimination, victimisation and harassment set out at paragraph 4 from 4.1 to 4.3 (whether or not found to be discrimination, victimisation or harassment).

11. The Claimant also relies on the *'last straw'* doctrine in relation to the instructions from Mr Osman communicated to her in January 2021 to be considered with the discriminatory conduct (whether or not found to be discrimination, victimisation or harassment) alleged in her First Tribunal Claim (being those allegations at paragraph 4 of the List of Issues to the First Claim).

12. If so, whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent; and
    12.1. Whether the Respondent had reasonable and proper cause for doing so.

13. Did the Claimant resign because of a repudiatory breach?
    13.1. Did the Claimant delay before resigning and affirm the contract?

The law
Direct race discrimination

10. One of the forms of discrimination prohibited by the Equality Act 2010 ("the 2010 Act") is direct discrimination. This occurs where "because of a protected characteristic, A treats B less favourably than A treats or would treat others" (section 13(1)).

11. The question, therefore, is whether A treated B less favourably than A treated or would treat a hypothetical comparator and whether the less favourable treatment is because of a protected characteristic – in this case race. On such a comparison, there must be no material difference between the circumstances relating to each case (section 23 of the 2010 Act).

12. A Claimant does not have to show that the protected characteristic was the sole reason for the treatment – it is enough that it had a "significant influence" on the outcome. Further, the discriminator may have acted consciously or

subconsciously. (Nagarajan v London Regional Transport [2000] 1 AC 501.) A "significant influence" is one that is more than trivial.

13. Section 136 of the 2010 Act provides for a shifting burden of proof:

(1) This section applies to any proceedings relating to a contravention of this Act.
(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

14. The correct approach to the shifting burden of proof remains that set out in the guidance contained in Barton v Investec Securities ltd [2003] IRLR 332 approved by the Court of Appeal in Igen Ltd v Wong [2005] IR 931 and further approved recently in Efobi v Royal Mail Group Ltd [2021] ICR 1263.

15. There is a two-stage process to the drawing of inferences of direct discrimination. In the first place, the Claimant must prove facts from which the Tribunal could conclude in the absence of any other explanation that the Respondent had committed an act of discrimination against the complainant.

16. In Efobi the Supreme Court confirmed the point that a Tribunal cannot conclude that "there are facts from which the court could decide" unless on the balance of probability from the evidence it is more likely than not that those facts are true. All the evidence as to the facts before the Tribunal should be considered, not just that of the Claimant.

17. In Madarassy v Nomura International plc [2007] ICR 867 the Court of Appeal stated that "could conclude" must mean "a reasonable Tribunal could properly conclude" from all the evidence before it. The Court of Appeal also pointed out that the burden of proof does not shift simply on proof of a difference in treatment and the difference in status. This was because it was not sufficient to prove facts from which a Tribunal could conclude that a Respondent *could have* committed an act of discrimination.

18. In deciding whether there is enough to shift the burden of proof to the Respondent, it will always be necessary to have regard to the choice of comparator, actual or hypothetical, and to ensure that they have relevant circumstances which are the same or not materially different to those of the Claimant having regard to section 23 of the 2010 Act.

19. If the burden does shift, then the employer is required to show a non-discriminatory reason for the treatment in question. The Respondent must prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic.

20. Section 212 of the 2010 Act provides that a detriment does not include conduct which amounts to harassment. Consequently, although direct discrimination and harassment claims may be pursued in the alternative, conduct will either amount to discrimination or harassment but not both.

Harassment

21. Harassment is defined in section 26(1) of the 2010 Act:

(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.

22. Section 26(4) of the 2010 Act deals with matters to be taken into account when deciding whether unwanted conduct had the relevant effect. The Tribunal must take into account the perception of the Claimant, the other circumstances of the case and whether it was reasonable for the conduct to have had that effect.

23. In deciding whether conduct is "unwanted", this is a question of fact which requires the Tribunal to decide whether the conduct was unwanted by the employee (Thomas Sanderson Blinds Ltd v Mr S English UKEAT/0316).

24. Turning to the necessary causal connection "related to" is a broad test requiring an evaluation of the evidence in the round. In deciding whether conduct "related to" a protected characteristic, the Tribunal must apply an objective test and have regard to the context in which the conduct took place (Warby v Winda Group Plc EAT 0434/11). It is not enough to show the individual has the protected characteristic or that the background related to the protected characteristic but rather the Tribunal will need to make findings as to the motivations and thought processes of the individual decision makers (Unite the Union v Nailard [2018] EWCA Civ 1203).

Victimisation

25. Victimisation is defined in section 27 of the 2010 Act:

(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. …

26. The causal connection required is the same as in a direct discrimination claim. It is not a "but for" test but an examination of the real reason of for the treatment. As such, it is necessary to consider the employer's motivation (conscious or unconscious).

27. Section 212 of the 2010 Act provides that a detriment does not include conduct which amounts to harassment. Consequently, although victimisation and harassment claims may be pursued in the alternative, conduct will either amount to victimisation or harassment but not both.

Time limits under the 2010 Act

28. Section 123 of the Equality Act 2010 provides where relevant as follows.

(1) Subject to sections 140B, proceedings on a complaint within section 120 may not be brought after the end of –

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment Tribunal thinks just and equitable…

…

(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.

29. Turning to the "just and equitable" extension, it is for the Claimant to show that it would be just and equitable to extend time. However, the discretion given to the Tribunal to extend time is a wide discretion to do what it thinks is just and equitable in the circumstances. The Tribunal should assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time. These will usually include:

    29.1. the length of and reasons for the delay;

    29.2. whether the delay has prejudiced the Respondent (for example, by preventing or inhibiting it from investigation the claims while matters were fresh;

    29.3. the prejudice to the Claimant in refusing to extend time.

30. Other factors which may be relevant include:

    30.1. the extent to which the cogency of the evidence is likely to be affected by the delay;

    30.2. the extent to which the party sued had co-operated with any requests for information;

    30.3. the promptness with which the Claimant acted once he or she knew of the facts giving rise to the cause of action;

    30.4. the steps taken by the Claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action;

    30.5. the merits of the claim.

31. Although the discretion is wide there is no presumption that it should be exercised so as to extend time. Indeed, the exercise of discretion is the exception rather than the rule (Bexley Community Centre (t/a Leisure Link) v Robertson [2003] EWCA Civ 576). Further, the burden, which is one of persuasion, is on the Claimant to persuade the Tribunal it is just and equitable to extend time.

Constructive unfair dismissal

32. Section 94 of the Employment Rights Act 1996 ("the 1996 Act") gives an employee the right not to be unfairly dismissed. In order to bring a claim of unfair dismissal, the employee must first show that they have been dismissed. The circumstances in which an employee is dismissed are set out in section 95 of the 1996 Act. The burden of proof to show a dismissal has taken place is on the employee. Section 95(1)(c) provides that an employee is dismissed when they terminate the contract with or without notice in circumstances such that they are entitled to terminate it without notice by reason of the employer's conduct. When the employee does this there is a constructive dismissal.

33. In order for there to be a constructive dismissal there must be a fundamental breach of contract by the employer. That is to say a significant breach going to the root of the contract or which shows that the employer no longer intends to be bound by one or more essential terms of the contract.

34. If the employee relies on a breach of the implied term of trust and confidence, this is a term that the employer shall not without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. The test is an objective one. Any breach of the implied term of trust and confidence is a fundamental breach.

35. A single act or omission by the employer may of course comprise a fundamental breach of contract. However a course of conduct can also cumulatively amount to a breach of the implied term of trust and confidence entitling an employee to resign and claim constructive dismissal after a "last straw" incident, even though the last straw alone does not amount to a breach of contract and may not in itself be blameworthy or unreasonable. However the last straw must contribute something to the breach even if relatively insignificant.

36. So far as the link between the fundamental breach of contract and the employee's resignation is concerned, it is not necessary for the employee to show that the breach of contract was the only cause of the resignation. It must however be one of the factors.

37. Overall, therefore, the Tribunal must consider: (1) whether there has been a breach of contract by the Respondent (2) whether any such breach was fundamental (3) where the employee resigned in response to the breach; and (4) whether the employee affirmed the contract notwithstanding the breach.

Submissions

38. The Respondent's written submissions ran to 28 pages and those of the Claimant to 45 pages. Copies of those submissions are on the Tribunal's file. Each representative also made written submissions. The Tribunal has taken careful account of the parties' submissions but does not summarise them here.

Findings of fact

39. In making these findings of fact the Tribunal has taken into account all of the evidence before it although of necessity it does not refer to each element of it in these reasons.

Overview of the relevant period

40. The Claimant's employment began in 2007. By 2017 she was employed by Amicus Horizon as a Home Ownership Officer ("HOO"). In 2017 Amicus Horizon merged with Viridian and Optivo was formed. At the time of the merger the Claimant was providing cover for the Senior Home Ownership Officer/Home Ownership Team

Leader role ("SHOO") by undertaking additional duties. By the time of the hearing Optivo had become Southern Housing.

41. In 2018, following the merger, Mr Osman, the Director of Home Ownership, carried out a restructure of the Home Ownership team. The new structure did not have the roles of HOO and SHOO but instead had the roles of Property Manager ("PM") and Senior Property Manager ("SPM"). External consultants considered to what extent the old and new roles matched one another. The role of HOO was identified as a partial match for the role of PM (page 117).

42. The restructure proposal (page 108) spoke of an ambition to rival "the very best in the industry" and of it being necessary to "invest intensely in both people and resources" to achieve this. It refers to "a strong focus on having sufficient numbers of professionally qualified property managers. This will enable the department to proactively engage in new developments far more than either of the legacy organisation. This will mean that we will be able to take handover of, and commission new blocks and estates far better than has ever been achieved in the past."

43. The Claimant had an interview for the new PM role. She was offered and accepted the role, which began on 1 August 2018. The Claimant subsequently applied for the new SPM role in October 2018 and was interviewed on 22 October 2018. She was unsuccessful but was then offered a 12-month secondment to the role of SPM for Kent and Sussex from 1 November 2018 to 1 November 2019 (page 225) at a salary which was 10% below the rate for the SPM role. She accepted the offer but then was off work sick from 19 November 2018 to 11 January 2019.

44. On 24 January 2019 the Claimant raised a grievance ("the first grievance") (page 233) in relation to her pay for the period 1 August to 30 October 2018 arguing, in effect, that for this period she should have been paid the SPM salary, not the SHOO salary. That grievance was upheld by Ms Beard on 5 April 2019 (page 251). Further, during the grievance hearing on 19 March 2019, the Claimant had raised concerns about the fact that her salary in the seconded role was 10% below that of the SPM role. Whilst not formally part of the grievance, Ms Beard recommended that "the reduced salary being paid for the fixed term role of Senior Property Manager be reviewed".

45. On 1 October 2019 Ms Emery told the Claimant that the Kent and Sussex SPM role would be deleted from the Respondent's structure and the Special Projects SPM role, initially established for a 12-month period, would be made permanent (page 307). On 2 October 2019 the Claimant was told that at the end of her secondment she would return to her substantive post as a PM from 2 November 2019 (page 274).

46. On 31 October 2019 the Claimant raised a second grievance ("the second grievance") (page 286) in which she complained about a failure to address the recommendations contained in the first grievance and, also, the fact that the Kent and Sussex SPM role was being deleted and she was being returned to her substantive role. She complained further about the fact that she had been offered the Kent and Sussex SPM role on a seconded (rather than permanent) basis and

about the 10% reduction to salary. She said she believed she had been discriminated against because of her race. The second grievance was dismissed by Mr Kazi on 10 January 2020 (page 330) and, on appeal, on 1 April 2020 by Ms Campbell (page 389).

47. On 19 January 2021 the Claimant had a one-to-one meeting within Ms Oleksy, the SPM who had line managed the Claimant since her appointment in September 2020. The Claimant raised a grievance on 2 March 2021 ("the third grievance") (page B2 130) alleging that in the one-to-one meeting Ms Oleksy had "informed me that she had been instructed to manage me in a way which was bullying, harassing and intimidating". She then resigned on 8 March 2021 (page B2 162). The second grievance was rejected by Ms Pauley on 30 April 2021 (page B2 219).

48. The allegations contained in the first, second and third grievances were all aimed primarily at Mr Osman. He is also the person she refers to as the "perpetrator" of the ill-treatment and discrimination of which she complains in her letter of resignation.

General findings

49. Mr Tomison urged us to make factual findings in relation to four wider evidential issues and we turn now to these.

<u>The extent to which Mr Osman spoke to Ms Gordon</u>

50. Mr Osman accepts that he did not speak to the Claimant very often. He accepted in cross-examination that he had little interaction with her before she performed the seconded SPM role and that during it he had less interaction with her than with other SPMs. His evidence was that he had less reason to speak to her during the seconded SPM role because her role related to Kent and Sussex whereas the issues that took up his time tended to be in London, which was covered by the other SPMs. He also noted the during this time he and the Claimant both split their time between two offices and that he believed they were in the same office location perhaps only once a month. So far as the periods before and after the second SPM role were concerned, Mr Osman's evidence was that he would have had little need to speak to her about work – he would have more naturally raised work related queries with her line manager – and that she was not keen to engage with others in the team.

51. The Claimant noted in her witness statement that Mr Osman did not appear to want to interact with her but that because she did not report to him she had not let this bother her. She said he had not really spoken to her at all from when he started his role**.** She and other black colleagues felt that he did not like them. She said that this continued after she had become an SPM**.**

52. Ms Lane and Mr Clarke gave evidence in relation to this issue. Ms Lane focused in her witness statement on the extent to which Mr Osman spoke to the Claimant compared to other SPMs. She gave two examples of how he had not sought information from the Claimant during her time as SPM for <u>Kent and Sussex</u> in relation to St George's and Acorn Walk. When cross-examined about this, Ms Lane

could not remember exactly what issues were being discussed in relation to St George's and Acorn Walk. Her basic point was this: they were both properties that the Claimant had dealt with when she had been a SHO/PM in London and so she had knowledge that would have been of use. We find that Ms Lane believed that the Claimant might have had useful information in relation to these properties as a result of her previous experience with them. However, given that she could not remember the exact nature of what was discussed, we do not accept that information was required that only the Claimant could provide.

53. Having heard the evidence of Mr Osman, we find that he did not ask the Claimant about either of these properties. We find that he would have been aware of her previous experience of at least one of them (he accepted this in relation to Acorn Walk). We find that he spoke to the SPM who was responsible for the sites at the time. We find that as a senior manager this was the obvious way for him to proceed and that the relevant SPM could have sought information from the Claimant as a previous PM if that had been necessary.

54. The third point made by Ms Lane of this kind was that Mr Osman asked in early 2020 who dealt with Norfolk House. She believed that he knew it was the Claimant and yet he did not just go over and speak to her in the way that he spoke to other employees in relation to other properties (such as herself). Mr Osman said in cross-examination that he could not now say for sure if he had been aware in early 2020 that that was a property which the Claimant dealt with but if he had he would not have asked aloud who dealt with it – so he did not believe that he was aware of this in early 2020. Given the findings that the Tribunal makes below about Mr Osman's reliability as a witness, and given that in cross-examination he accepted that he had known at the relevant time that the Claimant dealt with Acorn Walk, we find that when Mr Osman asked who dealt with Norfolk House he did not know that it was the Claimant (who at this point had only been back as PM in London for a few months).

55. Turning to Mr Clarke's evidence, in his witness statement he stated that he saw Mr Osman asking Claire Cooper and Caroline Brooks questions that the Claimant could more readily answer. When asked about this in cross-examination he was unable to provide any significant detail in relation to this. We therefore given little weight to this aspect of his evidence. Mr Clarke also stated that Mr Osman would speak regularly to Dani and Ms Lane (who are both white) whilst not speaking to black employees. So far as Dani is concerned, however, we accept Mr Osman's evidence that he had known her for a long time, from previous employment, and that this explained why he would speak to her quite regularly despite there being little business need to do so.

56. We find in light of answers given to questions asked in cross-examination that Mr Clarke was only working and sitting in the same area as Mr Osman from around September 2018 until February 2019, during which period Mr Osman spent two days a week in the Wood Green office of the Respondent. We also find that there were during the relevant period one or sometimes two lines of management between Mr Clarke and Mr Osman so he had little reason to interact with him on a day-to-day basis.

57. Given that the contention put forward by the Claimant is that Mr Osman did not speak to her *because she is black*, we should consider the evidence about his dealing with black employees in the round. We find that Mr Osman worked closely for a period of time with a senior employee who is black and who was at the time the Claimant's manager. We find that in the early days post-merger he spent at least two days a week working closely with this employee in another office – that is to say somewhere where Mr Clarke and Ms Lane would not have seen him doing this. We find that this employee did not believe Mr Osman tended to deal with people less favourably because of their race, noting the following exchange when she was interviewed by Mr Kazi after her employment with the Respondent had ended on 11 December 2019. Question "What is your view of SG's allegation of racial discrimination". Answer "I'm surprised, I don't think Os is like that."

58. We also find that another black employee interviewed by Ms Campbell at the Claimant's request, did not suggest that there was a racial element in Ms Osman's treatment of others, commenting as follows when asked if she could think of any reason why the Claimant would feel excluded or isolated: "JB replied that OO has a very busy head and job and can at times come across as abrupt and doesn't interact with people, a lot. JB does not think there is any malice in his behaviour and that he is the same with everyone really. JB does perhaps feel that he could benefit from people skills training to help strengthen his 'Gober P' side. [After the meeting JB added that "it would also be fair to add that I don't have a good relationship directly with him based on how he comes across abrupt" but that as he believes there's no malice she ignores this and that's manageable as she doesn't work directly with OO.]"

59. We also find that the extent of communication between the Claimant and Ms Osman is likely to have been affected by her own personality and how she interacted with colleagues. Her 2016/2017 appraisal comments "Selena is a **quieter** member of the team but she is a good colleague and will always help out when needed" [our emphasis]. Equally, in his interview on 27 February 2020 Luke Mills commented when asked about where the Claimant had been excluded (page 363) "No I don't think so. A lot of things the rest of us discussed were London specific. Also SG's a very quiet person. If she was excluded she possibly excluded herself. I don't think anyone excluded her, but she kept herself to herself. After SG joined my team we discussed this and she just likes to get in and get her head down and work." The Claimant's tendency to be only "quietly enthusiastic" which could sometimes be construed as a "lack of enthusiasm" is also noted in Ms Emery's appraisal of the Claimant (page 240). We therefore find that the Claimant was a relatively quiet employee in the workplace, not someone who would spend much time chatting with colleagues.

60. Taking the evidence in the round, we find that it was indeed the case that Mr Osman did not speak often to the Claimant. We find that the respective roles of Mr Osman and the Claimant in the organisation – there was always at least one layer of management between them – meant that on a day-to-day basis there was little reason for them to speak. We find that in addition to this they were often not working in the same building and that the Claimant's tendency to be quite quiet in the workplace would have been a further factor reducing the extent of their communication.

61. We also find that Ms Lane and Mr Clarke believed that Mr Osman would avoid speaking to the Claimant because she was black. We find that the evidence of Mr Clarke in this respect was lacking in detail and that he had had only limited opportunities to see the Claimant and Mr Osman interacting. We further find that the specific examples that Ms Lane gave of Mr Osman not speaking to the Claimant in relation to particular properties were not examples of circumstances where one would have expected Mr Osman to speak to the Claimant rather than to some other employee

62. We find that Mr Osman did speak significantly more regularly to Dani, a white employee. We also find that Mr Osman had known Dani for a considerable period of time and from previous employment.

63. We further find that Mr Osman worked closely for some time with a senior black manager who did not believe that there was a racial element in how he treated other employees. In addition, we find that another black employee did not suggest that there was a racial element to his treatment of the Claimant when asked if she could think of any reason why the Claimant would feel excluded or isolated.

Mr Osman telling Ms Cooper to manage the Claimant in a particular way

64. This allegation arises as a result of a mediation which took place between the Claimant and Ms Cooper on 7 March 2019. The letter from HR dated 11 March 2019 recording the outcome of the grievance said that it was "…confirmed by CC that she was instructed to manager [sic] the staff in a certain way" (page 458). The minutes prepared by the Claimant's union representative (page 461) put things slightly differently stating "[Ms Cooper] explained she had been told by Oz to manager [sic] her in a particular way, and she was only doing what she had been asked to do by her manager". Ms Cooper has provided a witness statement saying she had not seen a copy of the notes prepared by Ms Joseph before 12 May 2021 "and would not have signed them off if I had. I definitely did not say that I was told to manage the Claimant in a certain way by Os Osman".

65. When it was put to the Claimant in cross-examination that Ms Cooper denied have received an instruction to manage the Claimant in a particular way, the Claimant did not really answer the question – she said, instead, "but the actions she took were to treat me badly". When it was put to Mr Osman in cross-examination that he had instructed Ms Cooper to manage the Claimant "in a particular way", he had no recollection of a specific conversation with Ms Cooper about managing the Claimant. He noted that Ms Cooper had only managed the Claimant for a short period. He said that he would have said in any conversation that all employees should be managed in accordance with the Respondent's policies, procedures and values.

66. Taking the evidence in the round, given the presence of the same error in the letter to the Claimant and the union representative's minutes ("manager" instead of "manage") we find that the relevant words in the later dated letter were copied and pasted from the minutes prepared by the union representative with other amendments then being made. Although we give only limited weight to Ms

Cooper's witness statement, given that she did not attend to be cross-examined, we find that the minutes were not agreed with Ms Cooper. Taking the evidence in the round, we do not give the letter or the union prepared minutes significant weight as a record of exactly what was said at the mediation. Overall, we find that Ms Cooper did not say that she had been instructed manage the Claimant "in a particular way". We find, however, that it is more likely than not that Ms Cooper referred at the mediation to having received advice from Mr Osman in relation to how to manage the Claimant. This is of course entirely unsurprising: it would have been strange for a mediation to have taken place between the Claimant and Ms Cooper if there had been no difficulties in their relationship.

Ms Gordon's performance

67. The Claimant's historic performance is documented in appraisals. The 2016/2017 appraisal by Claire Bean, in which the Claimant is described as a "Team member" of the Home Ownership department, is a good appraisal. It is not, however, perfect. Ms Bean notes (page 80) that "Selena recognises that she can sometimes not receive criticism well". The report on the additional SHOO duties that she had just begun to perform is also positive.

68. The 2017/2018 appraisal carried out by Ms Cooper, when the Claimant was a HO providing cover for the SHOO role by undertaking additional duties, is also a good appraisal. The Claimant's review of the year in terms of the performance of her managers is mixed. She notes that she is missing the support of Michael Cleaver and Ms Bean (page 104). She says that at times she has "found it very difficult". She says that the lack of one to ones and Team Meetings has had a negative impact on her and the Team.

69. The 2018/2019 appraisal carried out by Ms Emery is again a good appraisal. In the course of this year the Claimant became a PM and her secondment to the SPM role had begun in November 2018.The appraisal notes as follows in relation to areas where knowledge has been (or will be) increased: "She's also been keen to build on her knowledge by tacking new challenges with attendance at Soft Landing meetings to give input into new sites… She's also building on her s20 knowledge by issuing s20 notice for major work, being involved with contract procurement…, and attending a training course at Devonshires office which covered case law as well as good practice" (page 241). These are referred to a "two areas requiring development" on page 242. The conclusion of Ms Emery is "She has performed well through this reporting period, and the only reason for marking her overall as Doing Well" rather than Excellent is due to these two development areas."

70. It is in this respect relevant to note some of the Claimant's own evidence. In her second witness statement she explains between [4] and [7] how she initially found the work in the Home Ownership Team extremely challenging and needed a lot of encouragement and reassurance from a director and another member of the Home Ownership Team, who became an "unofficial mentor". She places emphasis on the "support and reassurance" she received.

71. Overall, we find that the Claimant was well-regarded as an employee as a HO and that there was satisfaction with the way she provided cover for the SHOO role by

undertaking additional duties. It also shows that by March 2019 Ms Emery regarded her as developing into the SPM role that she was performing, but with development areas outstanding. It further shows, however, that the Claimant had a need for management support and encouragement when stepping up to new challenges: this is seen both in what she herself says in her witness statement and also in her comments about a lack of one to ones in 2017/2018. The appraisals and other evidence do not suggest, however, that the Claimant was regarded as an exceptional performer. Rather the overall impression is of a conscientious if slightly under-confident employee who applies herself diligently to new challenges but who required significant support when doing so.

Ms Emery's view of Ms Gordon's treatment

72. Mr Tomison invited the Tribunal to draw an inference from a specific comment that Ms Emery made during an interview with Mr Kazi and, also, from the non-appearance of Ms Emery as a witness, despite the fact that she remains an employee of the Respondent.

73. We note that there is no dispute that when asked by Mr Kazi on 11 December 2019 "Do you think any of Os' actions have a racial discrimination element" Ms Emery answered "I don't know but it doesn't look good as Selena is the only non-white Senior Manager". In his witness statement, Mr Kazi does not refer to what Ms Emery is recorded as having said to him, but rather states "I asked Michelle Emery whether she thought race could have played a factor. Michelle and Os has had their differences but she was clear that there was no racial element to it. She looked horrified when I put the question to her." We note at this point that the notes of the meeting do not suggest that Ms Emery was "clear" that there was no racial element. Rather the words themselves suggest that she does not know. When cross-examined about this, Mr Kazi said that her tone and body language, and a firm shaking of the head, made him understand that she could not support the view that Mr Osman's treatment of the Claimant was not racially motivated.

74. We find that there is a mismatch between the words that Ms Emery used and what Mr Kazi said he understood by them. If the comment had been accompanied by a shaking of the head that would have most obviously implied concern by Ms Emery that the allegation might be true, not her expressing the view that it was not. We therefore find that in her answer Ms Emery was expressing the view that what were referred to as the "actions of Mr Osman" *might* have a "racial discrimination element".

75. We turn later to what inferences should be drawn from that. However we also find at this point that Ms Emery and Mr Osman have had significant difficulties in their working relationship. This is alluded to in the note of the meeting by Mr Kazi. It was also reflected by evidence given by Mr Osman. He said she had been unhappy with the way he had arbitrated when friction arose between her and Ms Cooper, that they had difference in relation to a variety of other matters, including changes to her own responsibilities.

The first claim issue 4.1 – the Respondent not paying the Claimant acting up pay for her role as Acting Up Senior Property Manager from August 2018 to 1 November 2018

76. As we have found above, following the merger in 2017 the HOO role was replaced by the PM role and the SHOO role by the SPM role. We find that the PM role was intended by Mr Osman (as the architect of the restructuring exercise) to be a more demanding role than that of HOO and that of SPM was intended to be a more demanding role than that of SHOO. This was reflected in the job descriptions, in the way that the external consultants found that the HOO role was only a "partial match" for the PM role, and in the pay differences. It was also reflected in what the restructure proposal as noted at [42] above said about the Respondent's future ambitions.

77. It is worth noting in this respect that the differences in pay were substantial. In late 2018 the salary for the SPM role was around £46,400 whereas that of SHOO had been around £38,300.

78. Up until the end of August 2018 the Claimant had been paid the HO salary of £34,131 plus an acting up allowance of £4,196 (taking her to the SHOO salary). The Respondent wrote to the Claimant on 1 August 2018 (page 150) and 9 October 2018 (page 153) confirming that "your additional duties allowance has been extended. This allowance is in recognition of the additional responsibilities you've taken on covering the Senior Home Ownership Office position". At no point did the correspondence suggest that the nature of the allowance had changed.

79. Although the roles of PM and SPM replaced those of HOO and SHOO from 1 August 2018, Mr Osman did not seek at that point to appoint SPMs. Rather he appointed PMs and decided to wait until he had appointed people to the Head of Home Ownership positions before appointing to the SPM roles. This was because the people holding those positions would manage the SPMs and he wanted them to play a role in the recruitment of SPMs. Taking the evidence in the round we find, therefore, that during the period in question – 1 August to 31 October 2018 – the SPM role as envisaged by Mr Osman had not been implemented.

80. We find that the Claimant and Mr Osman discussed the question of the pay she would receive as a Property Manager. We find that no figures were mentioned - this is what the Claimant said in her first grievance (page 244). We find that the Claimant assumed that she would receive the PM salary plus an acting up allowance that would take her to the level of the SPM salary. What the Claimant was actually paid for the period in question was the PM salary plus the acting up allowance she had previously received of £4,196.

81. The outcome of the first grievance in relation to this issue was that Ms Beard decided that the Claimant should be paid the SPM salary for the relevant period (page 251). However she also concluded that the Claimant should not receive an apology from Mr Osman: "this claim was not upheld because there was a lack of communication between all parties". She explained in her witness statement that she was satisfied that "this was a genuine misunderstanding" and accepted Ms Osman's explanation that his intention was that the Claimant should only receive

the acting up allowance she had received when working as an SHO. She noted that the Claimant had accepted that during the relevant period she was doing nothing beyond what she had done when covering the SHOO role. She noted that she had concluded that the confusion had not been the Claimant's fault and so the "fairest thing to do" was to uphold the grievance in relation to pay. However, she had rejected the request that an apology be made "as I was satisfied that everyone had been acting in good faith". Ms Beard was not cross-examined to any significant extent on this aspect of her witness statement.

82. We find that Ms Beard concluded that the question of the correct pay for the period August to October 2018 was no more than a misunderstanding arising as a result of the way in which the restructure was implemented (that is to say, over a period of time) and a lack of clear communication about the exact salary figures between the Claimant and Mr Osman. We further find that during this period the Claimant was not performing the SPM role as Mr Osman envisaged it to be. Rather she was performing the same duties she had been performing before 1 August 2018. These duties – essentially those of an SHOO – were not the same as the duties of a SPM as envisaged by Mr Osman.

The first claim issue 4.2 – Mr Osman telling the Claimant not to apply for the post of Senior Property Manager

83. We find that Mr Osman did not tell the Claimant not to apply for the post of SPM. There are various reasons for us making this finding.

84. First, the Claimant has been inconsistent over time about what Mr Osman said. In the grievance meeting relating to the second grievance with Mr Kazi on 25 November 2019 she said "and he made me feel like I wasn't up to the job, by asking me questions that made me doubt myself" before going on to say "…I already decided not to apply for the Senior role after the way he made me feel during the interview". There is no statement to the effect that Mr Osman *told her* not to apply. What she said focused on how he made her *feel*. However, the Claimant said that Mr Osman had "told her not to apply" in her particulars of claim (page 25) and she said the same in her first witness statement ([10]). In cross-examination, however, when it was put to her that she had not been told not to apply for the role, she came very close to agreeing that this was the case before saying (as she had in her grievance) "he spoke to me in a way that made me feel not up to the job". When the Tribunal asked the Claimant to clarify the position she said that Mr Osman had said "he said he didn't believe I was the calibre of person he wanted for the role based of my PM role interview and he wanted highly experienced people, so basically there was no point in my applying for it".

85. When asked if Mr Osman had said "basically there is no point in you applying", or whether that was in fact the Claimant's understanding of what had been said to her, the Claimant said it was not exactly what he had <u>said</u> but it was what she <u>believed</u> he had meant. We note this point here because it is a good example of the Claimant not distinguishing clearly between what was actually said and what she understood was meant. It is a good example because the Claimant was asked to recall exactly what Mr Osman had <u>said</u> and yet in the very same sentence she

moved seamlessly from what he had said to what she had believed he meant, without giving any indication that this was what she was doing.

86. Secondly, Mr Osman's evidence in relation to this point has, over time, been essentially consistent.

87. Taking the evidence in the round, we find that the Claimant asked Mr Osman for feedback following the PM interview and ahead of the SPM interview. We find that what he said to her was that candidates for the SPM roles would need to demonstrate strong technical knowledge. Given that the Claimant knew at that point that she had not performed well in the PM interview, and in light of her history of lacking confidence (see [70] to [71] above), she took this to mean that she would not as things stood be a strong candidate.

88. It is appropriate at this point to record our general finding that we found the Claimant to be a less reliable witness than Mr Osman. This was because the Claimant has shown a tendency on numerous occasions to present as fact something which is in reality no more than her interpretation of what has happened or what has been said. We have given one example of this in [85] above. Others include the following. First, in her appeal against the outcome of the second grievance (page 341) she wrote "it was recognised in my previous grievance that a 10% reduction in my pay wasn't justified which is why the recommendation was made". In fact, the 10% reduction in pay was not a formal part of the first grievance and the recommendation was that "The reduced salary being paid for the fixed term role of Senior Property Manager be reviewed". There was no recognition that the 10% reduction in pay was not "justified". Indeed, we find that Ms Beard had no view about that one way or the other. Secondly, in paragraph 55 of her first witness statement the Claimant said that Ms Emery had said when interviewed by Mr Kazi "there was sufficient work in Kent and suggested that in fact my role be **given priority**" [emphasis added], referring to page 442. Having been asked about this three times in cross-examination, the Claimant accepted that this was not what Ms Emery had said – no reference had been made to any view of hers that the role should be "given priority". Thirdly, at paragraph 62 of her witness statement the Claimant stated that "Claire Cooper also sent an email to HR asking them to confirm the position and the allegation that she was racist". The email was at page 353 and that is not what it said. It said: "Please can you follow-up on my question about the letters, i.e. whether I was named in the name [sic] and if I was what was said about me."

89. In addition, the Claimant was generally unwilling to make any concessions when giving evidence. A good example of this was her continuing to maintain after cross-examination that there was something objectionable about the email sent by Ms Oleksy which is at B2 page 335 when quite clearly there was not. Another example was her refusal to accept that there was anything difficult about being managed by a new SPM when she had herself quite recently been very upset indeed not to obtain a permanent SPM role at the end of the 12-month secondment.

90. By contrast, we found Mr Osman to have been a careful witness. His oral evidence was generally consistent with his witness statements and, further, he was far more prepared to make realistic concessions than the Claimant. For example, he

accepted that he might have understood Ms Beard's recommendation to be that he consider whether he considered the 10% reduction to the Claimant's salary during her secondment to be valid in light of her performance. He said "yeah, I can see what you are saying now, not sure that is how I thought about it at the time. It is not an unfair thing to say, certainly".

The first claim issues 4.3 to 4.5: the Respondent not appointing the Claimant to the permanent position of SPM in October 2018 but rather offering her a secondment to that role as a "development opportunity".

91. The Claimant applied for the SPM role after encouragement from Ms Cooper. She was interviewed for that role on 22 October 2018 by Mr Osman, Ms Cooper and Ms Emery. She was scored against 11 questions. The possible scoring for each question was fails to meet criteria (0 points), partially meets criteria (1 point), meets criteria (2 points) and exceeds criteria (3 points). The interview panel members all scored the Claimant identically, with her scoring 1 or 2 points apart from question 10. This asked about "significant cases" in recent years and their impact on, amongst other things, statutory consultation and s20. All panel members gave the Claimant 0 points for that question. Overall she scored "partially meets" criteria in 5 questions, "meets criteria" in 5 questions and "fails to meet criteria" in 1 question.

92. The interview panel met on 25 October 2018 and their scoring sheets all bear that date. We find in accordance with Mr Osman's evidence that the panel discussed the Claimant's answers together and how "close she was" to the different criteria before each deciding on their own scores. We find that given the breadth of the scoring bands the fact that each of the panel members then scored the Claimant identically does not suggest improper collusion. Rather we find that the panel reached an honest consensus on the extent to which the Claimant met (or did not meet) each criterion and then gave the scores which were, in light of that consensus, obvious. We find that the resulting total score meant that the Claimant was not appointable. We also find that the decision whether to appoint each candidate was taken on the basis of interview performance only: CVs and application details were only used for short-listing purposes.

93. In terms of the performance of the Claimant during the interview, we find that she performed badly and that there is ample evidence to support this. First, there is the evidence of the Claimant herself. In her first witness statement the Claimant noted "I was certainly not at my best" whilst going on to say that she did not perform badly and "had done enough to be appointed to the role". However, when it was put to her in cross-examination that Mr Osman's opinion that she was not up to the standard required for the SPM role might be based not on race but on how she had performed in the interviews, she agreed that this might be the case. Secondly, Ms Emery agreed in her interview with Ms Campbell (page 370) that the Claimant had not been appointable. Read fairly as a whole that interview does not suggest Ms Emery disagreed with that assessment of the panel. She had said something similar in the earlier interview with Mr Kazi (page 442): "In the interviews, yes, she didn't perform well but that could have been nerves". Thirdly, Ms Cooper said nothing in her interview with Mr Kazi (page 443) which implies that she felt the Claimant had performed well enough to meet the criteria. Quite the reverse: the notes of the interview record her as having said "We all thought in 12 months time

SG would be better placed to apply for the SPM role and so we thought it was a genuinely a good thing to offer her the development opportunity".

94. The case of the Claimant was in the end that Mr Osman had pressurised the other members of the panel to score the Claimant in such a way that she would not be appointable. We find that there is no significant evidence to support this contention. Certainly, it is not something that either Ms Cooper or Ms Emery have said when interviewed on various occasions. We find that he did not do this.

95. The Claimant also invites us to draw inferences based on the fact the successful candidates for three SPM positions were all white. We find that it was indeed the case that Ms Brookes, Mr Mills and Mr Shaw were all white. Ms Brookes was, however, the only one of the three interviewed at the same time as the Claimant. Another white candidate was unsuccessful at interview on that occasion. Mr Shaw and Mr Mills were interviewed and appointed subsequently in February and April 2019. Mr Osman was not involved in the appointment of Mr Mills. Overall, therefore, the Respondent did not fill all the vacant roles in Autumn 2018. We find that the three white candidates were all found to be appointable at interview. We find that a comparison of subsequent appraisal materials in relation to Ms Brookes and the Claimant does not comprise evidence to which any significant weight should be given in relation to their relative merits at interview.

96. The Claimant also invites us to draw inferences based on an assertion that the SPM role was "not a step up for the Claimant". In fact we find that the SPM role as it was envisaged by Mr Osman was a significant step up for the Claimant. This was reflected, amongst other things, in the higher salary.

97. The Claimant further invites us to draw inferences based on an assertion that she did not have significant development needs and that this was reflected in the fact that Ms Emery did not provide "a significant amount of support beyond what a line manager would normally provide". However we find that the Claimant did have significant development needs in relation to the SPM role as it was envisaged by Mr Osman, particular in relation to section 20 consultations and "soft landings". This is what she herself said at paragraph 27 of her first witness statement, although she resiled slightly from this position in her cross-examination saying that she had previously done *some* section 20 consultations. Whilst we find that the Claimant only went on one formal training course whilst doing the SPM role (a training event with Devonshires solicitors) we also find that Ms Emery provided her with significant support beyond what a line manager would normally provide. We so find because this is what the notes of the interview between Ms Emery and Ms Campbell suggest (in particular the second paragraph on page 372). Further, that is consistent with what Ms Emery wrote in the 2018/2019 appraisal at page 224: "Selena has two areas requiring development…"

98. Although the Claimant was not appointed to the SPM position for which she had applied, she was offered a 12-month secondment to it as a "development opportunity" on the SPM salary reduced by 10%. We find that the possibility of such an offer being made was foreseen by the Change Management Business Case for the Home Ownership department prepared by Mr Osman. This states (page 118):

> *The proposed restructure also provides a number of more senior roles. Rather than look to the market for candidates with the full skill set, I propose that we try to recruit within the Department on a developmental basis. This would be on pay less than the assessed full pay, during the developmental period. For this reason I am proposing the banding of salaries with a flexibility to reduce by 10% as appropriate.*

99. We find that all the panel members agreed that the Claimant should be offered such an opportunity, having not reached the "appointable" score in the interview. We also find that a similar offer was made to Ms Derrig, a white employee, in that she was offered a reduced salary after being interviewed.

The first claim issue 4.6: the Respondent paying the Claimant a reduced salary during the secondment and Mr Osman failing to increase, review, or meaningfully review, that salary following the outcome of the Claimant's grievance and failing to communicate the outcome of any review to her.

100. We have considered the Claimant's first grievance above. The Claimant did not pursue the question of the 10% reduction to pay in that grievance but did raise it in the interview with Ms Beard, having been asked why she had "taken it off" the grievance. In the grievance outcome letter (page 238) Ms Beard included the following recommendation:

> *The reduced salary being paid for the fixed term role of Senior Property Manager be reviewed.*

101. In her witness statement Ms Beard noted that this was outside the scope of her investigation but she recommended that the salary be reviewed. She said there was no recommendation that it should be increased. We accept her evidence given in cross-examination that she made this recommendation because the Claimant was unhappy about the reduced salary but that she did not "think through or give guidance as to what that review should be". She made the point in cross-examination that she had not investigated the matter and so did not know the circumstances of the setting of the reduced salary.

102. The evidence of Mr Osman in relation to the review he said he had carried out was not detailed. He said that he had carried out a review but he could not remember the details of what he had done and he accepted that he had not increased the salary or communicated the outcome of the review to the Claimant.

103. We find that what Mr Osman understood to be required was that he review the original decision to reduce the SPM salary by 10% for the seconded role. We so find because this was what taken in the round Mr Osman's evidence suggested. It is also consistent with the wording of the recommendation. Further, given that the Claimant had been absent from November to January, it is likely that this is how he would have viewed things: the Claimant had had little opportunity to demonstrate that her performance merited an increase in pay. We also find that the Claimant's complaint was directed at the original decision to reduce the salary by 10%; her focus was on the original reduction being unjustified rather than on her subsequent performance being such as to merit an increase in pay.

104. We turn now to whether Mr Osman carried out any review at all. The Claimant contends that he did not. We find that he did but find that his review comprised no more than a mental re-checking of the original decision to reduce the salary by 10% which he concluded to be correct in the context of the Claimant being given a development opportunity as identified as a possibility in the Change Management Business Case for the Home Ownership department. We find that he did not conduct a review of the Claimant's performance in the seconded position because he did not understand that that was what was required. We find that whilst limited and brief the review was meaningful given what Mr Osman reasonably understood to be required. We find that although Mr Osman described himself as a "stickler for the rules" there were no rules obviously applicable to Ms Beard's recommendation – she said nothing about either how any review should be conducted or about what Mr Osman should do having conducted it. We find that this reflected the fact that Ms Beard did not regard the issue of the 10% salary reduction as something that she was tasked with investigating and considering formally.

The first claim issues 4.7 & 4.8: the Respondent returning the Claimant to her previous role of PM as of 2 November 2019 and not offering the Claimant the option of applying for a permanent position at the end of her secondment

105. When the Claimant was offered the secondment to the SPM role Ms Cooper told her on 1 November 2018 "at the end of the 12-month period it will be advertised permanently and I very much hope that you apply and are successful" (page 199). At this point there were (or shortly would be) two permanent SPM roles covering London, a 12-month special projects SPM role, and the Kent & Sussex SPM role which was permanent and to which the Claimant was being seconded for 12 months.

106. However, on 1 October 2019 Ms Emery told the Claimant that there was a proposal to delete the Kent & Sussex SPM role and make the special projects SPM role permanent. The Claimant's secondment was not extended and she returned to her substantive PM role when the secondment ended on 2 November 2019. What subsequently happened was that the Kent & Sussex SPM role was left vacant following the end of the Claimant's secondment and was deleted at the end of the financial year. The special projects role was then made permanent.

107. Taking the evidence in the round, we find that by the Autumn of 2019 Mr Osman had concluded that business needs dictated that the special projects SPM role, which he had initially envisaged as being a fixed term role lasting for just 12 months, should be made permanent. We find that financial constraints meant that he could not continue with four SPM roles. We find that he concluded that of the four SPM roles available the least important was the Kent & Sussex SPM role.

108. In making these findings we have specifically taken account of what Ms Emery said in her interview with Mr Kazi on 11 December 2019 (page 442). When asked "Os says that there is less need for the Kent SPM role than London. What is your view?" she answered "Oh no, there's a lot of need here. SG played a really important role in bringing experience and guidance to the team and they do miss

her". Although we do not doubt that Ms Emery was in favour of the Kent & Sussex SPM role being retained and felt a case should be made for this, her perspective was that of the line manager of the Kent & Sussex SPM role (as of the date of her interview the post had not been deleted). Removing the Kent & Sussex SPM role would inevitably have been felt by her as something that to some extent diminished her own role. Further, although the emphasis has varied, overall Mr Osman's evidence is that making the special projects SPM role permanent at the expense of the Kent & Sussex SPM role was a question of priorities as seen from his more senior management role. Ms Emery did not have the overview that Mr Osman had and her perspective will inevitably have been different.

109. We have also specifically taken account of the apparent lack of contemporaneous documentation in relation to the deletion of the role. The Claimant sought to draw a comparison between the documentation available in relation to the restructure that took place in 2018 and the lack of documentation in relation to this "restructure". However we have found that the comparison is not apt: this "restructure" involved no more than the deletion of one post (which by the time of its deletion was vacant because the Claimant's secondment had ended, so no question of redundancy arose) and the making permanent of another. It is unsurprising that this was not documented in any significant way.

110. The Kent & Sussex SPM role became vacant on 2 November 2019 at the end of the Claimant's secondment and remained vacant until it was deleted in April 2020. The fixed-term SPM role ended in around February 2020 and its holder, Mr Shaw, left the employment of the Respondent. He did not apply for the permanent special projects SPM role. The Claimant also did not apply for that role. Mr Younes Elachraoui, who had been working as a PM applied for and was appointed to the role.

111. Because of the decision to delete the Kent & Sussex SPM role and make permanent the special projects SPM role, there was no vacant SPM role for which the Claimant could have been considered in November 2019. She could have applied for and been considered for the special projects SPM roles in early 2020, but she chose to make no application.

112. The Claimant contends that the Respondent could have made her permanent in the role of Kent & Sussex SPM in November 2019 and then the three SPM roles could have been rejigged in April 2020 to permit the creation of a permanent special projects SPM role. We have found above that Mr Osman had decided by the Autumn of 2019 that the Kent & Sussex SPM role should be deleted to enable the special projects SPM role to be made permanent. In light of this, we find that to do what the Claimant contends he could have done would have been a strange management decision. It would have resulted in him (1) deciding that making the Claimant a permanent SPM at the expense of Mr Mills (the fixed term SPM), even though there was no contractual obligation to do anything of the sort at the end of her secondment; (2) potentially putting the Claimant's employment at risk in the subsequent rejigging of roles if she were found not to be suitable for either of the London SPM roles or the special projects SPM role. The basic fact was that the Claimant had been seconded to a particular role for 12 months and had no right to

occupy that role once the 12-month period had expired. This was not an "obvious alternative" as the Claimant suggested.

The first claim issue 4.10: the Claimant being left out of information updates in January and February 2020

113. The Claimant's case in this respect is limited. The only significant point made by her in this respect was set out at paragraph 176 of Mr Tomison's closing submissions: she was left out of information updates in relation to a major health and safety issue at St George's, one of the sites for which she was responsible as a PM, "for a period of time before the issue was then dumped back on her".

114. At the time the SPM for St George's was Mr Mills. The relevant emails before us in relation to this issue were B2 pages 327 to 333. These showed various emails in relation to St George's in early 2020. The Claimant is copied into the string of emails at B2 page 329 by Mr Osman. He also copies in the relevant SPM, Mr Mills. The Claimant replies at B2 page 328 explaining that she had not previously been given information about the issue at St George's. Mr Mills replies to this email at B2 page 327 with a timeline referring to the Claimant's previous involvement in the issue and telling her that she needed "to lead on comms with the residents".

115. The Claimant's allegation has remained vague and she did not provide significant further detail when cross-examined about it. It is not wholly clear whether she complains that Mr Osman or Mr Mills or someone else left her out of information updates.

116. We find that Mr Osman did not leave her out of any information updates in January and February 2020. The email included in the bundle show that he was in fact responsible for making sure that she was included in the email thread. So far as why the previous emails had not been copied to her, it seems quite likely that this was because they were between more senior employees and concerned issues not dealt with at the Claimant's level. Taking the evidence in the round, we find that the Claimant was not left out of any information update that she should have received in this period.

The first claim issue 4.11: on or before 27 January 2020 Mr Osman telling Ms Cooper that the Claimant thought she was racist

117. The Claimant's evidence (first witness statement paragraph 42) was that Ms Cooper told her that "Os Osman had told her that my grievance was against her and that I claimed she was also a racist". Mr Osman denied this (first witness statement paragraph 49), but accepted that he had told Ms Cooper that the grievance included allegations of race discrimination and that her name had been mentioned. He maintained his denial in cross-examination.

118. The Claimant put considerable emphasis on an email dated 28 January 2020 (page 253) from Ms Cooper to Ms Stewart in which Ms Cooper said:

> *Thank you for your time yesterday. Please can you follow-up on my question about the letters i.e. whether I was named in the name [sic] and I was what was*

said about me. Some important information has come to light today that has made me feel very differently about a lot of what has happened.

119. Mr Tomison contended that the "important information" was Mr Osman telling Ms Cooper that in the second grievance the Claimant had accused her of race discrimination. We find that it is highly unlikely that this was the important information: Ms Cooper was interviewed by Mr Kazi in relation to the grievance for 40 minutes on 11 December 2019 (page 443). The notes run to less than two pages and so are clearly not a verbatim record of what was said. We find that by the end of this meeting, if not at its beginning, Ms Cooper would have been aware of the details of the grievance. Consequently she would have known by then that, whilst she was named in the grievance, no allegation of race discrimination had been made directly against her. However, the wording she used at page 44 indicates that she was very upset by the grievance. Given the extent of Ms Cooper's knowledge of the grievance by 11 December 2019, we find that it is highly unlikely that her email of 28 January 2020 was prompted by Mr Osman telling her on that day that the Claimant thought she was racist. She was already well informed about (and upset by) the grievance.

120. The question for us is, therefore, whether we prefer the evidence of Mr Osman (who was of course a first-hand witness to what he said to Ms Cooper about the grievance) or that of the Claimant (who was not a first-hand witness to that conversation). We prefer that of Mr Osman for the following reasons. First, he was a first-hand witness and the Claimant was not. Secondly, for the reasons we have set out above, we found him to be a more reliable witness than the Claimant (and indeed what the Claimant said about Ms Cooper's email at page 253 is an example of her misrepresenting evidence in her witness statement (see [88] above)). Thirdly even if Ms Cooper did say to the Claimant that Mr Osman had told her that the Claimant thought that she was racist, this is not necessarily what Mr Osman said – rather it is Ms Cooper's recollection or interpretation of what he said. We therefore find that Mr Osman did not tell Ms Cooper that the Claimant thought she was racist.

The second claim issue 1: in November 2020 Ms Oleksy asked the Claimant to attend a formal sickness review despite the Claimant not having been off sick

121. The context for this and the remaining issues was Ms Oleksy becoming the SPM for the team of PMs to which the Claimant belonged in September 2020. We find that Ms Oleksy became the SPM of a team which was not content with how it had been managed by Mr Younes, who had been appointed to the role of SPM earlier in 2020. This can be seen in her description of the first meeting that she attended in her interview with Ms Pauley on 27 April 2021 (B2 page 206):

I attended a team huddle not sure of the date perhaps 2 weeks after I started work. With Younes Elachroui (Senior Property Manager), Diane Marfo (Property Manager) Selena and Charlene Onovwigun (Property Manager) There was lots of shouting and the team were clearly unhappy saying they didn't want to be managed by Younes .They said they'd raised a complaint in February that year about how the team was being managed that was not

responded to . I was shocked by the shouting. We agreed I'd meet with them separately.

122. We find that in addition to the team being discontent with how they had been managed by Mr Elachraoui, more senior management was also unhappy with how the team was performing. This is reflected in the email which Mr Osman sent to Ms Oleksy (B2 page 214) on 27 September 2020. The email refers in particular to a view that PMs are failing to deal with some matters that they should deal with but are instead "delegating up" (a practice which has not been challenged) and a need for Ms Oleksy to focus on managing the team "much more closely". It also notes that there had been sickness in her team and asks her to familiarise herself with the "managing absence policy/procedure".

123. Turning to the question of the stage 1 sickness review, Mr Osman emailed Ms Oleksy with an extract from a sickness report he had received (B2 page 115) which showed that between 13 February and 17 August 2020 the Claimant had had 11 days sickness absence. This would have meant that she had passed a particular threshold which would trigger a stage 1 formal absence review. The covering email said "Please see below relevant extract from report for you to follow in accordance with our procedures as needed". The email did not as such instruct Ms Oleksy to take any particular action in respect of the Claimant. We find that sending an email of this nature to a new manager was an entirely normal action for a manager in Mr Osman's position, given both that Ms Oleksy was new to the organisation and also that Mr Osman had some concerns about sickness in Ms Oleksy's team generally.

124. When Ms Oleksy contacted the Claimant about this the Claimant told her that 17 August had been wrongly classed as a day of sickness absence when it should have been a day of annual leave. We find that this was because she had in fact been ill on that date (paragraph 29 of her second witness statement) but when she had called to tell Mr Younes she was ill she also had said she would take a day of annual leave. It is easy to see how a misunderstanding could have arisen in these circumstances. Ms Oleksy responded to the Claimant telling her this by arranging for the Claimant's sickness leave record to be amended and told the Claimant that she had done this in her email of 28 October 2020 (B2 page 121). Ms Oleksy also noted that, whilst the sickness absence in February 2020 should have triggered the policy, she believed that this should have been addressed nearer the time and therefore due to "your good attendance to date I am happy to consider this as lapsed".

125. We find that Ms Oleksy dealt with this issue in a wholly reasonable way. She accepted the Claimant's word that the absence on 17 August 2020 had not been a sickness absence, arranged for the Claimant's records to be amended and did not pursue the question of a stage 1 sickness review in relation to either that absence or the earlier period of absence in February 2020.

The second claim issue 2: in or around August 2020, Ms Oleksy denied the Claimant leave over Christmas

126. The Claimant contends that she had a conversation with Ms Oleksy in which Ms Oleksy refused her request to take annual leave. The Claimant says that this

conversation took place after an email sent on 28 September 2020 (B2 page 113) and that "Sabina advised me verbally that it would not be granted" (second witness statement paragraph 40).

127. The Respondent's business required staff to cover the period over Christmas and the New Year. The business did not close down over this period. In an email of 25 September 2020 (B2 page 114) Ms Oleksy said "Few more gaps to fill 😊" and set out a rota for the relevant period showing that she had put herself down to work on most days. In the email of 28 September 2020 Ms Oleksy indicated that cover was required for certain dates over Christmas and the New Year. She said "I would expect every member of the PM team to volunteer. If the cover is not completed we cannot authorise any leave for this period so don't wait to last minute".

128. Ms Oleksy's email of 28 September 2020 resulted in a surprisingly angry response from another employee on the same day (B2 page 111). It also resulted in an angry response from the Claimant who wrote "For your records, I'll not be requesting any annual leave for this period as I feel from your email any personal circumstances will not be taken into consideration". Ms Oleksy replied to this email on the following day (B2 page 108) saying "I fully understand that individual people may be under circumstances that would prevent them from committing to cover over Christmas. I am more than happy to take those under consideration."

129. We find that Ms Oleksy did not "deny" the Claimant annual leave over Christmas. We find that in fact they spoke between the emails of 25 and 28 September 2020 and Ms Oleksy said that she would not approve the Claimant's holiday request until she had sorted out the Christmas cover rota. Using our industrial experience, we find that that was an entirely normal way of ensuring adequate cover over the Christmas period and avoiding a "first come first served" situation that might not adequately balance the needs of the team. We find that Ms Oleksy acted entirely reasonably. The main reason that we do not accept that Ms Oleksy denied the Claimant annual leave over Christmas is that that is inconsistent with the emails referred to above.

130. We further find that the Claimant's criticism of Ms Oleksy on the basis that "I was already aware what leave my colleagues were seeking" is entirely misplaced. A manager cannot sensibly be expected to approve one employee's holiday request on the basis that that employee "knows" that other employees do not wish to take holiday on the same dates. Further, if it were the case that other employees did not wish to take holiday over the relevant period, it is very difficult to see why they would have not been happy to show their hand in this respect by volunteering for the Christmas/New Year cover rota.

131. Finally, we find that Mr Osman had no involvement in the question of the Claimant's annual leave at Christmas 2020.

The second claim issue 3: in September 2020 Mr Osman told Mr Oleksy to treat the whole team badly

132. The Claimant says that when she and Ms Oleksy had a one-to-one meeting on 19 January 2021 "she told me during the meeting that Os had told her to manage the team including me in a particular way". She said that Ms Oleksy had gone on to say that she realised it had been "wrong and was not necessary".

133. In this Respondent the Claimant referred to what Ms Oleksy had written in PerformanceHub after this meeting, the final version of which was (where relevant):

> *We have discussed my initial management approach towards the team and we agreed that my initial implementation of instructions was not well aligned with team needs and fully fit for the circumstances the team has been for some time.. I am glad to report that this has been now amended and I hope we can work more flexibly and considerately together*

134. Given the emphasis that the Claimant now places on what Ms Oleksy said in that meeting, it is of note that her own PerformanceHub notes (B2 pages 127 to 128) do not comment significantly on it.

135. The Claimant's evidence in relation to what she was told by Ms Oleksy has been inconsistent. In the ET1 in the second claim she refers to an instruction to Ms Oleksy to "treat the whole team badly" but in the third grievance (B2 page 130) she says "she informed me that she had been instructed to manage me in a way which was bullying, harassing and intimidating". In the grievance investigation meeting on 22 March 2021 she refers to Ms Oleksy saying that "she had been told when she started to manage me in a particular way" (B2 page 173) and that "She also said she had been told to treat me in a less favourable way" (B2 page 174). She went on to say "the word that she used was to be horrible to us."

136. Mr Osman denied having given any instruction to treat the Claimant badly. When Ms Oleksy was asked about this in an interview on 25 April 2021 (B2 page 206) she denied having received any such instruction. She said that in the one-to-one meeting "I explained I was here to drive performance as in the past it hadn't been that good". When asked "Do you recall telling Selena you'd been told to treat her in a less favourable way" she answered "Absolutely not. I had the best relationship with Selena no one told me to treat her badly – why would they?" (B2 p207).

137. Taking the evidence in the round, we find that Mr Osman did not tell Ms Oleksy to treat the whole team badly. Rather, we find that he gave instructions as set out in the email of 27 September 2020 as summarised at [122] above: to manage the team closely in light of management concerns about its performance. We find that in light of the problems that clearly existed in the team at that point such an instruction was wholly reasonable. We have preferred the evidence of Mr Osman to the Claimant in relation to this issue for the following reasons:

137.1. For the reasons given above, we found Mr Osman to be a more reliable witness than the Claimant and, in addition, in relation to this particular issue the Claimant's account has not over time been consistent;

137.2. The email of 27 September 2020 is contemporaneous documentary evidence supporting Mr Osman's account;

137.3. It is inherently unlikely that Mr Osman would give such an instruction to a new manager whom he had only just met. Such an instruction would have been a hostage to fortune: she might have complained to his manager about being asked to treat her team in such a way;

137.4. Ms Oleksy's account was that no such instruction was given, notwithstanding the fact that by the time she was interviewed on 25 April 2021 she was clearly disenchanted with the management support that she had received and was shortly to leave the Respondent because she had not enjoyed working there. If Mr Osman had given such an instruction we find that she would have been likely to confirm that at the interview.

138. In light of these findings, we also find that Ms Oleksy did not tell the Claimant in the meeting on 21 January 2021 that Mr Osman had told her to "treat the whole team badly".

Conclusions

139. The parties submissions in relation to the issues addressed the question of direct discrimination first and then tagged on very limited submissions in relation to harassment, victimisation and constructive unfair dismissal before, finally, considering time limits very briefly. We have therefore structured our conclusions in the same way.

140. Before turning to the individual issues, we have considered first the extent to which our findings in relation to what Mr Tomison referred to in his submissions as the "wider evidential issues" show facts from which we could conclude in the absence of another explanation that the Respondent treated the Claimant less favourably because of race. Our findings in relation to these issues may reasonably be summarised as follows:

140.1. Mr Osman did not speak to the Claimant often. However their respective positions and roles within the organisation, where they physically worked, and their respective personalities meant that this was an unsurprising state of affairs. The Claimant has not proved that Mr Osman spoke more regularly to other employees in the same or similar circumstances as her.

140.2. Mr Osman did not tell Ms Cooper to manage the Claimant in a particular way but did give Ms Cooper advice in relation to how to manage the Claimant.

140.3. The Claimant was not regarded as an exceptional performer by the Respondent. She was regarded as a conscientious if slightly under-confident employee.

140.4. Ms Emery expressed the view that the actions of Mr Osman might have a racial discrimination element but this comment was made in the context summarised at [75] above.

141. We conclude that these findings of fact ("the wider evidential findings") are not to any significant extent facts which support an inference that the Respondent treated the Claimant less favourably because of race, although we do attach a little weight in particular to the view expressed by Ms Emery.

The first claim issue 4.1 – the Respondent not paying the Claimant acting up pay for her role as Acting Up Senior Property Manager from August 2018 to 1 November 2018

142. The comparator the Claimant relies on is a hypothetical comparator.

143. We conclude that the Claimant has not proved facts from which we could conclude in the absence of any other explanation that she was treated less favourably because of race:

143.1. She was not performing the SPM role as Mr Osman envisaged it to be during this period. Indeed, the SPM role as envisaged by Mr Osman had not been implemented generally during this period.

143.2. Further and separately, the SPM role was intended to be a more demanding role than that of SHOO in which the Claimant had been acting up. It attracted a significantly higher salary.

143.3. Further and separately, the Claimant has not identified an evidential comparator. There is no-one who was treated as she says she should have been treated.

143.4. Further and separately, although the Claimant's grievance in relation to this point was upheld, the basis on which it was upheld as found above was that there had been a misunderstanding.

143.5. Further and separately, the wider evidential findings are not to any significant extent facts which support an inference that the Respondent treated the Claimant less favourably because of race.

143.6. Further and separately, we conclude in light of our findings generally that Mr Osman did not take a number of decisions which were harsh and not in line with policy, as Mr Tomison submitted in his closing submissions.

144. Further, in case we are wrong about the burden of proof not having shifted, we conclude that the Respondent has shown a non-discriminatory reason for the treatment in question and that the treatment was in no sense whatsoever because of race: the Claimant was not performing the role of SPM during the relevant period and consequently there was no good reason why she should have been paid as though she were. We conclude that a hypothetical white comparator would have been treated in the same way as the Claimant.

The first claim issue 4.2 – Mr Osman telling the Claimant not to apply for the post of Senior Property Manager on 18 July 2018

145. The comparator the Claimant relies on is a hypothetical comparator.

146. We conclude that the Claimant has not proved facts from which we could conclude in the absence of any other explanation that she was treated less favourably because of race. This is because we have found that Mr Osman did <u>not</u> tell the Claimant not to apply for the post of SPM.

147. The Claimant does not pursue a claim in relation to what we have found above that Mr Osman did actually say to her. However, if she had done we would have concluded that she had not proved facts from which we could conclude in the absence of any other explanation that she was treated less favourably because of race:

147.1. The comments Mr Osman made to her and any implication in them that she had not demonstrated strong technical knowledge were justified by her performance at interview and the requirements of the SPM role.

147.2. Further and separately, the wider evidential findings are not to any significant extent facts which support an inference that the Respondent treated the Claimant less favourably because of race.

147.3. Further and separately, we conclude in light of our findings generally that Mr Osman did not take a number of decisions which were harsh and not in line with policy, as Mr Tomison submitted in his closing submissions.

148. Overall, we conclude that what Mr Osman actually said to her was in no sense whatsoever because of race. Rather he said what he said in light of his knowledge of the requirements of the SPM role and his honest and objective assessment of her performance at interview.

The first claim issues 4.3 to 4.5: the Respondent not appointing the Claimant to the permanent position of SPM in October 2018 but rather offering her a secondment to that role at a reduced salary of 10% as a "development opportunity".

149. The comparators the Claimants relies on are Caroline Brookes, Rob Shaw and Luke Mills, namely successful white candidates for the SPM role.

150. We conclude that the Claimant has not proved facts from which we could conclude in the absence of any other explanation that she was treated less favourably because of race:

150.1. We do not draw an adverse inference from the fact that the Respondent did not call either Ms Emery or Ms Cooper to give oral evidence for the following reasons. Generally, the Respondent's case is that the scoring of the Claimant at interview is adequately documented and the Claimant has not suggested that documents were falsified (and indeed there is significant documentation). In these circumstances the scope of the Respondent's witness evidence would always be a matter of professional judgment and Mr Osman was able to give evidence in relation to the relevant matters. More specifically, so far as Ms Cooper was concerned, she is no longer an employee of the Respondent and her brief written statement deals with little more than one specific point following the disclosure of a specific document. It is normal for employer not to call former employees as witnesses unless there is no sensible alternative not least because former employees may well not be cooperative. So far as Ms Emery is concerned, no allegations were made specifically against her which only she could address.

150.2. Further and separately, our findings in relation to the interview and scoring of the Claimant do not support the Claimant's case. The panel reached an honest consensus on the extent to which the Claimant met (or did not meet) each criterion and then gave the scores which were, in light of that consensus, obvious. The resulting total score meant that the Claimant was not appointable. Mr Osman did not pressurise the other panel members to score the Claimant so she would not be appointable. The Claimant performed badly at interview.

150.3. Further and separately, the three white comparators were in circumstances which were materially different to the Claimant. They were all found to be appointable at interview. Further, only one of them (Ms Brookes) was interviewed at the same time as the Claimant and by Mr Osman, and indeed another white candidate was unsuccessful in the round of interviews in which the Claimant participated. As noted above, Mr Osman was not involved in the recruitment of Mr Mills.

150.4. Further and separately, we conclude that the SPM role as envisaged by Mr Osman was a step up for the Claimant and so there was nothing inherently improbable about her being unsuccessful when she applied for the role. We also conclude that she did have significant development needs in that role.

150.5. Further and separately, the offering of roles on a reduced salary in circumstances such as those of the Claimant was envisaged by the Change Management Business Case document and, indeed, a white employee was offered a reduced salary also.

150.6. Further and separately, the wider evidential findings are not to any significant extent facts which support an inference that the Respondent treated the Claimant less favourably because of race.

150.7. Further and separately, we conclude in light of our findings generally that Mr Osman did not take a number of decisions which were harsh and not in line with policy, as Mr Tomison submitted in his closing submissions.

151. Further, in case we are wrong about the burden of proof not having shifted, we conclude that the Respondent has shown a non-discriminatory reason for the treatment in question and that the treatment was in no sense whatsoever because of race. We find that the reason for the treatment in question was that the interview panel concluded that the Claimant was not appointable to the role in light of her performance at interview but that in light of her previous experience with the Respondent it made business sense to offer her the role for 12 months on secondment as a development opportunity on a reduced salary.

The first claim issue 4.6: the Respondent paying the Claimant 10% less to carry out the role of Senior Property Manager 1 November 2018 to 1 November 2019 which includes the allegation that in April 2019, following the outcome of the Claimant's first grievance, Mr Osman: (1) did not increase the Claimant's salary to 100% (2) failed to conduct any, or any meaningful, review of her reduced salary, and (3) failed to communicate the outcome of that review to the Claimant.

152. The comparators the Claimant relies on are Caroline Brookes, Rob Shaw and Luke Mills.

153. We conclude that the Claimant has not proved facts from which we could conclude in the absence of any other explanation that she was treated less favourably because of race:

153.1. So far as the initial payment of the reduced salary during the secondment is concerned, this has been considered in relation to issues 4.3 to 4.5.

153.2. So far as the alleged failure to increase, review, or meaningfully review, the reduced salary, and the failure to communicate the outcome of the review, the three white comparators were in circumstances which were materially different to the Claimant. They were all found to be appointable at interview. They were not seconded to the SPM roles which they occupied or given those roles as a development opportunity. There was no reason for their salaries to be reduced by 10%. There was never an issue of their salaries being reviewed or increased following the outcome of any grievance.

153.3. Further and separately, so far as the alleged failure to review (or meaningfully review) the reduced salary is concerned, we have found above that in fact Mr Osman did review the reduced salary meaningfully following the outcome of the grievance.

153.4. So far as the failure to increase the salary or communicate the outcome of the review to the Claimant is concerned, whilst it would clearly have been sensible for Mr Osman to tell the Claimant of the outcome (as he acknowledged) there was no "procedure" or instruction contained in the grievance outcome that required him to do this. In light of our conclusions above in relation to the comparators relied upon and our conclusions below in relation to the wider evidential findings and the general allegation that Mr Osman took a number of decisions which were harsh or not in line with policy, the Claimant has not proved facts in this regard from which a reasonable Tribunal could conclude that she had been treated less favourably because of race.

153.5. Further and separately, the wider evidential findings are not to any significant extent facts which support an inference that the Respondent treated the Claimant less favourably because of race.

153.6. Further and separately, we conclude in light of our findings generally that Mr Osman did not take a number of decisions which were harsh and not in line with policy, as Mr Tomison submitted in his closing submissions.

154. Further, in case we are wrong about the burden of proof not having shifted, we conclude that the Respondent has shown a non-discriminatory reason for the treatment in question and that the treatment was in no sense whatsoever because of race. This is because we find that Mr Osman carried out a meaningful review and concluded that no increase was justified. We further find that the Respondent has shown that the reason that Mr Osman did not communicate the outcome of his review to the Claimant was simply that he forgot to do so.

The first claim issues 4.7 & 4.8: the Respondent returning the Claimant to her previous role of PM as of 2 November 2019 and not offering the Claimant the option of applying for a permanent position at the end of her secondment

155. The comparator the Claimant relies on are Caroline Brookes, Rob Shaw and Luke Mills.

156. We conclude that the Claimant has not proved facts from which we could conclude in the absence of any other explanation that she was treated less favourably because of race:

156.1. The three white comparators were in circumstances which were materially different to the Claimant because none of them had been seconded to their respective SPM roles. They had all been found to be appointable and had all been appointed to SPM roles (albeit a fixed-term SPM role in the case of Mr Shaw). In the case of Mr Shaw, unlike the Claimant he did not have a permanent role to return to at the end of the 12-month period of his fixed-term contract.

156.2. Further and separately, we have found above that what Mr Tomison refers to at the "obvious alternative" was not such an alternative at all.

156.3. Further and separately, we have found above that the underlying reality was that the Claimant had been seconded to a fixed-term role for 12 months and that at the end of that period in November 2019 there was no vacant SPM role for which she could have been considered.

156.4. Further and separately, the wider evidential findings are not to any significant extent facts which support an inference that the Respondent treated the Claimant less favourably because of race.

156.5. Further and separately, we conclude in light of our findings generally that Mr Osman did not take a number of decisions which were harsh and not in line with policy, as Mr Tomison submitted in his closing submissions.

157. Further, in case we are wrong about the burden of proof not having shifted, we conclude that the Respondent has shown a non-discriminatory reason for the treatment in question and that the treatment was in no sense whatsoever because of race.

158. We have found above that by the autumn of 2019 Mr Osman had concluded that business needs meant that the Special Projects SPM role should be made permanent, that financial constraints meant that he could not continue with four SPM roles, and that of the four SPM roles available the least important was the Kent & Sussex SPM role. Consequently, the Respondent has proved that the reason for the treatment was that the Claimant's secondment had come to an end and there was no permanent SPM role to which the Claimant could be appointed in light of the changes made to the SPM roles in light of the changing business requirements of the Respondent.

The first claim issue 4.10: the Claimant being left out of information updates in January and February 2020

159. The comparators the Claimant relies on are Caroline Brookes, Rob Shaw and Luke Mills.

160. We conclude that the Claimant has not proved facts from which we could conclude in the absence of any other explanation that she was treated less favourably because of race. This is because we have found above that the Claimant was not left out of any information update that she should have received in this period.

The first claim issue 4.11: on or before 27 January 2020 Mr Osman telling Ms Cooper that the Claimant thought she was racist

161. The comparator the Claimant relies on is a hypothetical comparator.

162. We conclude that the Claimant has not proved facts from which we could conclude in the absence of any other explanation that she was treated less favourably because we have found above that in fact Mr Osman did not tell Ms Cooper that the Claimant thought she was racist.

The second claim issue 1: in November 2020 Ms Oleksy asked the Claimant to attend a formal sickness review despite the Claimant not having been sick

163. The comparator the Claimant relies on is Sandra Lane and/or a hypothetical comparator.

164. The Claimant's factual case in relation to the first two issues arising in the second claim is that Ms Oleksy was executing the instructions of Mr Osman and that no-one but Mr Osman was motivated by her race (or a protected act). Consequently the Claimant's claims in relation to these issues fails in light of Reynolds v DLFIS (UK) Ltd and others [2015] EWCA Civ 439 fail.

165. However, in case we are wrong about that we have considered the substantive merits of the Claimant's claim in relation to this issue. We conclude that the Claimant has not proved facts from which we could conclude in the absence of any other explanation that she was treated less favourably because of race:

165.1. There is no significant evidence to suggest that Ms Lane was in the same or not materially different circumstances to the Claimant. For example, she was not managed by Ms Oleksy.

165.2. We have found above that the Mr Osman sending Ms Oleksy an email with an extract from a sickness report was an entirely normal action for a manager in Mr Osman's position in the circumstances.

165.3. Further and separately, we have found above that the trigger for the request to attend a formal sickness review was the Claimant telling Mr Younes that she was ill when she called in on 17 August.

165.4. Further and separately, we have found above that once the Claimant pointed out the error Ms Oleksy dealt with the issue in a wholly reasonable way, accepting the Claimant's word in relation to the absence, arranging for the Claimant's records to be amended and not pursuing the question of a stage 1 sickness review.

165.5. Further and separately, the wider evidential findings are not to any significant extent facts which support an inference that the Respondent treated the Claimant less favourably because of race.

165.6. Further and separately, we conclude in light of our findings generally that Mr Osman did not take a number of decisions which were harsh and not in line with policy, as Mr Tomison submitted in his closing submissions.

166. Further, in case we are wrong about the burden of proof not having shifted, we conclude that the Respondent has shown a non-discriminatory reason for the treatment in question and that the treatment was in no sense whatsoever because of race. The reason for the treatment was that in light of the documentation provided to Ms Oleksy she reasonably believed that the Respondent's formal sickness review process was engaged.

The second claim issue 2: in or around August 2020, Ms Oleksy denied the Claimant leave over Christmas

167. In light of Reynolds for the reasons given above this part of the Claimant's claim fails.

168. However, in case we are wrong about that we have considered the substantive merits of the Claimant's claim in relation to this issue. We conclude that the Claimant has not proved facts from which we could conclude in the absence of any other explanation that she was treated less favourably because of race because we have found above that Ms Oleksy did not deny the Claimant leave over Christmas.

The second claim issue 3: in September 2020 Mr Osman told Ms Oleksy to treat the whole team badly

169. The comparator the Claimant relies on is Sandra Lane and/or a hypothetical comparator.

170. We conclude that the Claimant has not proved facts from which we could conclude in the absence of any other explanation that she was treated less favourably because of race because we have found above that Mr Osman did not tell Ms Oleksy to treat the whole team badly.

Overall conclusion in relation to direct race discrimination claim

171. In light of the conclusions reached above, to the extent to which the complaints of direct race discrimination were brought in time (as to which we set out our conclusions below), those complaints fail and are dismissed.

Harassment and victimisation

172. The Claimant did not in her submissions put forward any significant positive case for why the complaints of harassment should succeed if the complaints of direct discrimination did not. So far as the complaints of harassment were concerned, the submissions were limited to "For similar reasons, this conduct amounted to harassment. For reasons of concision, the constituent elements of harassment will not be addressed." We conclude that this in reality reflected the Respondent's submission that "The harassment claim was pursued as a 'purpose' not an 'effect' claim. If they cannot succeed as a claim of direct discrimination, there is no basis for them succeeding in the alternative as acts of harassment".

173. We are therefore able to deal with the question of the harassment complaints quite briefly. Some of the complaints (specifically those arising in issues 4.1, 4.2, part of 4.6, 4.10 and 4.11 in the first claim and issues 2 and 3 in the second claim) fall at the first hurdle because we have concluded that the alleged unwanted conduct did not in fact take place. Those and all the other complaints also fail at the second hurdle: in light of our findings and conclusions set out above, none of the conduct of which the Claimant complains related to the protected characteristic of race. The harassment complaints therefore fail and are dismissed.

174. So far as the victimisation complaints are concerned, in the first claim the sole alleged act of victimisation related to issue 4.10. The Respondent accepts that the Claimant carried out protected acts. However the complaint fails because we have concluded above that the Claimant was not left out of any information update that she should have received in this period.

175. Turning to the victimisation complaints in the second claim, the Claimant's submissions in relation to issue 3 were that "the question is whether this instruction was given because Ms Gordon had done a protected act". The Claimant's submissions in relation to issues 1 and 2 were limited to the following "For similar reasons as the victimisation allegations above, this was an act of victimisation".

176. Again, the Respondent accepts that the Claimant carried out protected acts. However, the complaints fail because:

176.1. In respect of issues 1 and 2 the complaints fail in light of Reynolds.

176.2. Further and separately, in respect of issues 2 and 3, the complaints fail because we have concluded that the acts complained of as being detriments did not in fact take place.

176.3. Further and separately, in respect of issue 1 the complaint fails because the reason for the treatment was that in light of the documentation provided to Ms Oleksy she reasonably believed that the Respondent's formal sickness review process was engaged. The reason for the treatment was not in any way a protected act.

Constructive unfair dismissal

177. Turning to the issues agreed between the parties in relation to the constructive unfair dismissal claim, we conclude that in light of our conclusions set out above the factual complaints said to be acts of discrimination, harassment and victimisation did not either individually or cumulatively amount to a fundamental breach of contract – that is to say that the Respondent did not behave in a way calculated or likely to destroy or seriously damage the relationship of trust and confidence between the Respondent and the Claimant.

178. The reasons for our conclusion in this respect are, with one exception, obvious in light of our findings and conclusions above but we summarise them here as follows. The Claimant was not performing the role of SPM in the period August 2018 to 1 November 2018 and so there was no good reason why she should have been paid as though she were. Mr Osman did not tell the Claimant not to apply for the SPM role. The Claimant was not appointed to the permanent position of SPM in October 2018 because the panel concluded she was not appointable to that role and the subsequent offer of a secondment to that role on a reduced salary as a "development opportunity" was a positive rather than negative act by the Respondent. Mr Osman did subsequently meaningfully review her salary. It was entirely reasonable of the Respondent to return the Claimant to her substantive permanent role at the end of the secondment period of 12 months in light of the change to the requirement for SPMs going forward. The Claimant was not left out of information updates in January and February 2020. Mr Osman did not tell Ms Cooper that the Claimant thought she was racist. Ms Oleksy dealt with the sickness review issue in a wholly reasonable way and did not refuse her leave over Christmas. Mr Osman did not tell Ms Oleksy to treat the whole team badly.

179. The exception is the failure of Mr Osman to inform the Claimant of the outcome of his review of her salary when seconded to the SPM role. However, in circumstances where the issue the Claimant had raised in that regard were not part of her formal grievance, and taking account of all the circumstances, we find that this act was not sufficiently serious to breach the implied term of trust and confidence.

180. The Claimant's claim therefore fails on the basis that the Respondent did not breach the implied term of trust and confidence.

181. In case we are wrong in relation to the issue of the notification of the outcome of the salary review, the Claimant pursued her case on the basis that "The communication of Mr Osman's instructions to her in January 2021 amounted in

itself to a fundamental breach of contract. In the alternative, it added to the totality of what came before and resuscitated the past". However we have found above that not only that Ms Osman did not tell Ms Oleksy to treat the whole team badly but also that Ms Oleksy did not tell the Claimant that he had in January 2021. Consequently, the alleged last straw did not occur and did not contribute anything to the alleged breach of contract. As a result of this, the Claimant would have had to rely on the failure to communicate the outcome of the salary review alone and we would have concluded that she had not resigned in response to this breach. Further and alternatively, we would have concluded that she had affirmed her contract.

182. The Claimant was not therefore constructively dismissed and consequently the claim of constructive unfair dismissal fails.

Time limits

183. No time limit issue arises in relation to the claim of constructive unfair dismissal.

184. So far as the complaints of direct race discrimination, harassment and victimisation are concerned, in light of the conclusions we have reached above no issue arises as to whether there was conduct extending over a period. The question, therefore, in respect of the individual complaints presented more than three months after the date of the act to which the complaint relates is whether it would be just and equitable to extend time.

185. In the first claim any complaint relating to matters prior to 1 October 2019 was presented out of time, subject to the just and equitable extension. In the second claim the relevant date is 5 February 2021.

186. Consequently, turning to the first claim, the following complaints were out of time by the following periods: issue 4.1 – 11 months; issue 4.2 – around 14 months; issue 4.3 to 4.5 – around 12 months; issue 4.6 around 5 months. The complaints arising from the other issues in the first claim were not out of time.

187. Turning to the second claim, the following complaints were out of time by the following periods: issue 1 – around 4 months; issue 2 - around 4 months (the allegation relates to something that happened at the end of September not August as mentioned in the issue as drafted); issue 3 – around 4 months.

188. The Claimant's explanation for her delay in pursuing the first claim is that "I only became aware that I had been subjected to race discrimination on 1 October 2019" (the day she became aware that the SPM role for Kent and Sussex was being deleted). We find that it was indeed the case that prior to this date the Claimant did not believe she had been subjected to race discrimination, noting that the first time she raised it formally was in her grievance of 31 October 2019. We

find that the reason for the delay in her second claim was a focus on the termination of her employment.

189. Taking matters in the round, we extend time for the discrimination, harassment and victimisation claims because we find that it is just and equitable to do so. We consider that the prejudice to the Respondent is limited – there has been no significant suggestion that it has had difficulties investigating or defending the claims because of the passage of time. We do not find that the cogency of the evidence has been significantly affected by the passage of time. By contrast, the prejudice to the Claimant of not being able to pursue her Equality Act claims would clearly be substantial given that we have no doubt that she believes she was treated unlawfully as she alleges, particularly in light of her reluctance to form that belief initially. Further, the delays from when the Claimant formed the belief that she had been discriminated against in the first claim and generally in the second claim are relatively short.

Summary conclusion

190. The Claimant's complaints of direct race discrimination, harassment, victimisation and for constructive unfair dismissal fail and are dismissed.

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Employment Judge Evans
Date Reasons signed: 10 July 2023

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