EMPLOYMENT TRIBUNALS

Claimants: **(1) Miss N James**
(2) Miss J Saine

Respondent: **London and Quadrant Housing Trust**

Heard at: **East London Hearing Centre (in public)**

On: **16, 17, 18, 19, 23 and 24 January 2024**

Before: **Employment Judge Gordon Walker**
Members: **Mr S Woodhouse**
Ms J Houzer

Appearances

For the claimant: Mr D Stephenson, counsel

For the respondent: Mr S Butler, counsel

JUDGMENT having been sent to the parties on 29 January 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimants presented claims of race discrimination to the Tribunal on 4 October 2022. At a preliminary hearing on 16 November 2023 the claimants were given permission to amend to add claims of victimisation.

Issues

2. The hearing was listed to determine issues of liability only.

3. The issues were discussed at preliminary hearings on 17 April 2023 and 16 November 2023. During the liability hearing, the parties updated and finalised the list of issues. The final version of the list of issues incorporated the first claimant's withdrawal of her section 13 Equality Act 2010 claims in relation to detriments B and C.

4. The agreed liability issues were:

1. <u>Time Limit</u>

1.1. *Have the claims under the Equality Act 2010 (EA 2010) been presented in time under s.123 EA 2010? The EC notification date (Day A) was 8 August 2022 and the EC certificates were issued on 19 September 2022 (Day B). The ET1 (in relation to direct discrimination) was presented on 4 October 2022. The Claimant's amendment application (in relation to victimisation) was granted on 16 November 2023.*

1.2. *As a result, any claims of direct discrimination relating to acts or omissions prior to 9 May 2022 (three months minus a day before Day A) have not been presented within the primary limitation period and any claims of victimisation relating to acts or omissions prior to 17 August 2023 (three months minus a day before the amendment was granted) have not been presented within the primary limitation period.*

1.3. *Do any of the alleged acts or omissions constitute conduct extending over a period with the latest act or omission being in time?*

1.4. *If not, has the claim been presented within such other period as the Tribunal thinks is just and equitable?*

2. <u>Direct race discrimination (Equality Act 2010 section 13)</u>

2.1. *Was the first Claimant subjected to the following alleged treatment?*

2.1.1. *<u>Alleged treatment (a)</u>. Ms Francesca Purbrick (Director of Homeownership) failing to appoint either the First and/or Second Claimant to one of the three Head of Homeownership roles/vacancies on or about 10 March 2022.*

2.1.2. *<u>Alleged treatment (d)</u>. Francesca Purbrick removed/withheld the third Head of Homeownership vacancy and her subsequent decision not to readvertise the vacancy in or about July/August 2022.*

2.2. *Was the first Claimant subjected to the following alleged treatment?*

2.2.1. *<u>Alleged treatment (a)</u>. Ms Francesca Purbrick (Director of Homeownership) failing to appoint either the First and/or Second Claimant to one of the three Head of Homeownership roles/vacancies on or about 10 March 2022.*

2.2.2. *<u>Alleged treatment (b)</u>. Ms Jacqueline Esimaje-Heath (Growth Director) failed to properly investigate the Claimants' formal grievances complaining of race discrimination and/or failed to uphold them on or about 20 April 2022.*

2.2.3. *<u>Alleged treatment (c)</u>. Ms Gerri Scott (Group Director) failed to properly investigate the Claimants' formal grievance appeals complaining of race discrimination and/or failed to uphold them on or about 30 May 2022.*

2.2.4. *<u>Alleged treatment (d)</u>. Francesca Purbrick removed/withheld the third Head of Homeownership vacancy and her subsequent decision not to readvertise the vacancy in or about July/August 2022.*

2.3. *In relation to each, was this "less favourable" treatment than the way in which the Respondent treated or would treat the relevant comparator? The Claimants rely upon the following comparators:*

2.3.1. *Carly Alliband;*

2.3.2. *Kathryn Bell; and/or*

2.3.3. *a hypothetical comparator, specifically a white employee in the same circumstances as each of the Claimants (so the hypothetical comparators are different in respect of each Claimant), and those circumstances include:*

2.3.3.1. *in relation to alleged treatment (a) and (d) – the same CVs, experience, applications and answers in interview;*

2.3.3.2. *in relation to alleged treatment (b) and (c) – which is a claim brought by the second claimant only – the same grievance/appeal as each of the Claimants, save that the references to race are references to the hypothetical comparators' race (i.e. 'white').*

2.4. *Were the Claimants subjected to the treatment "because of" the Claimants' race? The race of each of the Claimants is 'Mixed – White Black Caribbean'.*

3. ***<u>Victimisation</u>***

3.1. *Did the Claimants do protected acts within the meaning of s.27 Equality Act 2010? The Claimants rely upon the following alleged protected acts:*

3.1.1. *The First Claimant's formal grievance dated 14 March 2022 complaining of race discrimination to Mr Tom Nicholls (Group HR Director). The Respondent admits that this constituted a protected act.*

3.1.2. *The Second Claimant's formal grievance dated 21 March 2022 complaining of race discrimination to Mr Tom Nicholls (Group HR Director).*

3.2. *Were the Claimants subjected to the following alleged treatment (detriments):*

3.2.1. *The Claimants rely upon the following treatment (set out in relation to Direct Discrimination):*

3.2.1.1. *<u>Alleged treatment (b)</u>;*

3.2.1.2. *<u>Alleged treatment (c)</u>;*

3.2.1.3. *<u>Alleged treatment (d)</u>.*

3.3. *Were the Claimants subjected to the treatment "because of" the protected acts?*

<u>Documents and evidence heard</u>

5. The parties produced the following agreed documents:

5.1 A bundle of evidence (503 pages);

5.2 Chronology;
5.3 Cast list; and
5.4 Reading list.

6. The Tribunal heard evidence from six witnesses who produced signed written witness statements, namely:

6.1 The two claimants (Miss James and Miss Saine);

6.2 And, for the respondent:
6.2.1 Miss F Purbrick, director of home ownership;
6.2.2 Miss M Page, recruitment advisor;
6.2.3 Mrs J Esimaje-Heath, growth director; and
6.2.4 Ms G Scott, former group director of customer services.

7. The respondent produced a written opening skeleton argument. The claimants produced written closing submissions. Those written documents speak for themselves. The parties made brief oral closing submissions. The claimants' oral closing submissions were focussed on the issues of comparators and time limits. The respondent's oral submissions covered all matters in the list of issues. The thrust of the respondent's oral submissions was that there was no evidence on which to draw inferences or conclusions that the reason why was because of race or the protected act.

The hearing

8. Adjustments were made to accommodate the Miss Saine's health needs as set out at paragraph 99 of her witness statement. Miss Saine was invited to request breaks as needed. Miss Saine did not require any additional breaks.

9. On the second day, during cross examination of Ms Scott, the claimants made an application to adduce evidence from a publication *Inside Housing*. The Tribunal determined the application applying the overriding objective. Additional pages were inserted into the bundle of evidence at pages 504-505.

10. In closing submissions, Miss James withdrew her section 13 Equality Act 2010 claims relating to detriments B and C. Those claims were dismissed on withdrawal pursuant to rule 52.

11. An extra day was added to the listing (24 January 2024). The parties agreed that judgment would be given orally on the afternoon of 24 January 2024 by video (CVP) and with a panel of two as Ms J Houzer was unavailable.

Findings of fact

12. We took all evidence that we were referred to into account. We only made findings of fact on those matters relevant to the liability issues in the claim. We reached our findings of fact on the balance of probabilities, based on the evidence. References in square brackets are to pages of the agreed file of documents or to the witness statements.

13. The respondent is one of the UK's largest registered providers of affordable housing, employing approximately 3000 people.

14. Miss James' employment with the respondent commenced on 2 April 2007. From 2017 she was employed as regional lettings manager / regional rehousing manager, managing a team of eight. Prior to this she was employed as a team leader from 2012 to 2017, leading a team of six.

15. Miss Saine's employment with the respondent commenced on 20 March 2017. She was employed in a management role by the respondent from March 2019: as regional lettings manager and regional rehousing manager, respectively.

Evidence about diversity

16. In or around September 2020 the G15 group of housing associations (the group of housing associations with the largest representation in London, of which the respondent is one) signed up to a diversity pledge. According to the grievance outcome report of Mrs Esimaje-Heath [155]:

> *The G15 diversity pledge commit[s] us to making meaningful progress to better reflect the ethnic diversity of the communities we represent particularly at senior managerial leadership and board levels resulting in L&Q's 30% target for BAME representation in senior leadership roles.*

17. On 22 July 2021 the publication *Inside Housing* wrote an article which quoted Ms Scott as set out below. Ms Scott confirmed in evidence that this was an accurate quote of what she had said:

> *We want to build relationships based on trust, transparency and fairness, but in recent times we have seen too many cases where L&Q has simply not been good enough. Some of our residents in particular have been badly let down by our response to cases involving racial harassment and hate crime. This independent report spells out the reasons why we are not always getting it right and identifies practical solutions for fixing this. We fully accept the findings of the report and are committed to implementing the proposed action plan, with our resident services board having complete oversight of this work* [505].

18. During cross examination, Mrs Esimaje-Heath stated that the *Inside Housing* article was about a case of racial harassment against one of the respondent's tenants. She accepted that the respondent was sensitive to issues of race because of this.

19. In September 2021 the respondent prepared a diversity report which provided the following information:

    19.1 At page 363 the ethnicity representation of the respondent's workforce was set out in a table. The underlying figures and the number of employees was not provided. The table showed that:

        19.1.1 The majority of the respondent's workforce was white.

19.1.2 White employees were overrepresented at senior and group board level: the proportion of white employees at this level was greater than the proportion of white employees in the workforce overall.

19.1.3 Mixed race employees were overrepresented at senior level. There were no mixed race employees at group level.

19.1.4 Asian employees were overrepresented at senior and board level.

19.1.5 Black employees were underrepresented at senior and board level.

19.2 At page 367 there was a table (again without providing the numbers of employees) which showed the ethnicity of employees who had been promoted at the respondent. The table showed that:

19.2.1 The proportion of internal promotions for white employees was broadly comparable to the makeup of the work force.

19.2.2 The proportion of internal promotions for mixed race employees was greater than their workforce representation.

19.2.3 The proportion of internal promotions for black employees was less than their workforce representation.

19.3 Page 364 paragraph 3 states:

Whilst Asian and mixed ethnicity colleagues maintain their representation right the way up to the highest level of the organisation, black colleagues lose ground early on in the career structure and experience diminishing representation into senior positions. To address this, we have targets for the ethnicity makeup of our talent development programmes that are designed to support colleagues to access promotion opportunities both for the early rungs of the career ladder (aspiring managers) or into leadership positions (emerging leaders). Black colleagues make up 25% of the current aspiring manager cohort and 26% of the emerging leader cohorts. 100% of appointments to senior positions went to people from ethnic minority backgrounds this year, which included black representation.

Mrs Esimaje-Heath stated in evidence, and we accept, that the reference here to *"senior positions"* is to those at executive director level (such as Ms Scott) and those at the second tier below that level (such as Mrs Esimaje-Heath).

19.4 Page 368 paragraph 9 states:

Colleagues from a range of minority backgrounds can access promotions at a rate broadly in line with their representation in the organisation. Black colleagues have not accessed promotions at the same rate as other groups and we have introduced the talent management interventions described above to change this dynamic.

20. Miss Purbrick leads and manages an emerging talent programme which is purely for people from ethnic minority backgrounds.

21. In the three years preceding 2022 there were 86 promotions to leadership and senior leadership group roles. 60 of those promoted were white (British: 52; other: 6: Irish: 2). Two were white black Caribbean. Five were black (Caribbean: 2; African 2; other: 1). Seven were Asian. One was mixed other, one was Chinese, one preferred not to say and eight did not specify [480].

22. From July 2020 to October 2021 Miss Purbrick sat on the interview panel for eight appointments at officer to team leader level [483]. Two of those appointments were to black candidates and the remaining appointments were to white British candidates. In respect of the manager roles she recruited:

    22.1 Team manager appointment in December 2020 (internal and external recruitment). There were 21 applications, 11 were white (British, Irish or other); one was black or black British; two were mixed white and black Caribbean, two were Asian and five did not disclose their ethnicity. There was one appointment made, to a white British applicant.

    22.2 Team manager appointment in November 2021 (internal and external recruitment). There were 37 applicants; 23 were white (British or other); seven were black (British African / Caribbean or other) two were mixed white black Caribbean; one was mixed other; three were Asian and one was not disclosed. There was one appointment made, to a white British applicant.

    22.3 Team leader appointment in October 2021 (internal only). There were two applicants. One was black or black British African and one was mixed white and black Caribbean. The black or black British African applicant was appointed.

23. Miss Purbrick said in evidence, and we accept, that prior to this period, she had been involved in recruitment at officer level, and she had appointed one Asian candidate and one black candidate.

<u>Recruitment process for the Head of Homeownership roles</u>

24. Miss Purbrick is employed within the development and sales directorate. This is a directorate of around 600 employees responsible for generating revenue for the respondent by selling products through initiatives such as shared ownership and right to buy. Mrs Esimaje-Heath said in evidence, and we accept, that the team's target was to generate £100m of income annually.

25. In the summer of 2021, the respondent restructured the development and sales directorate. As part of that restructure, the team leader post was deleted. Three new Head of Homeownership positions were proposed: Head of Leasehold; Head of Resales; and Head of Shared Ownership. That proposal was confirmed in January 2022 with a planned implementation date of 1 April 2022. In terms of the wider restructure of the directorate, there were 62 new roles created and 58 roles were put at risk.

26. At or around the time that the proposal was confirmed, Miss Purbrick contacted someone from outside the respondent to see if he might be

interested in applying for the Head of Homeownership posts, should there have been an external recruitment process. Miss Purbrick stated in evidence that part of her rationale for doing this was to address the lack of diversity she said there was in terms of gender within the team.

27. The respondent's policy is to advertise job vacancies internally first:

    27.1 The respondent's recruitment and selection policy states:

    > *L&Q is committed to providing opportunities for development to existing employees and will normally advertise roles internally before /in parallel with external advertising [346].*
    >
    > *When deciding where to advertise the role, L&Q will look inward to its existing skill base in the first instance to fill a vacancy [349].*

    27.2 Miss Page's witness statement at paragraph six states:

    > *The respondent's policy is to advertise job vacancies internally first so that all employees are given opportunities for development.*

28. In accordance with that policy, the vacancies for Head of Homeownership were initially advertised internally only. Miss Purbrick thought that there would not be sufficient interest internally, and that the respondent would therefore need to recruit externally. However, there was interest in the roles and therefore an internal recruitment process was carried out. The new roles would report to Miss Purbrick.

29. In September 2021 a Head of Homeownership job description was drafted [84-89], which was applicable to all three positions. The job description included a section entitled *technical knowledge / skills* [88]. This included sector/specialist knowledge; demonstrable sales and/or customer service experience gained within the sector at a mid-management level in a fast paced, target driven, customer focussed environment.

30. An internal advert was drafted [395-397]. This stated that the essential requirements of the role were [396]:

    - *Strong understand (sic) of home ownership products that L&Q offers and the legislative framework in which we operate.*
    - *Knowledge of the new build and re sales process.*
    - *Demonstrate a first class understanding of the homeownership customer journey.*
    - *Experience of leading a team in a demanding customer focused environment.*

31. The claimants applied for the Head of Homeownership roles on 18 February 2022 by completing an application form and appending their CVs [184-189; 271-281]. They did not contact Miss Page or Miss Purbrick before the interview to find out more about the role. Miss Page's evidence, which we accept, was that it was common for internal applicants to contact her before an interview to request to speak to the hiring manager.

32. There were six internal applicants for the roles:
    32.1 Ms K Bell (race: white British)
    32.2 Ms C Alliband (race: white British)
    32.3 Ms C Panton (race: black Caribbean)

32.4 Ms James (race: black white British)
32.5 Ms Saine (race: black white British)
32.6 Mr E Perkins (race: white other)

33. Ms Alliband and Ms Bell were already employed in the homeownership team within which the new Head of Homeownership roles would sit. They were line managed by Miss Purbrick. Ms Bell had 19 years of experience in homeownership and 11 years as a people manager [444]. Ms Alliband had around ten years of experience in home ownership and had been in a management role since January 2021 (i.e. for fourteen months at the time of the interview) [452-453].

34. Miss Purbrick knew Ms Alliband and Ms Bell and socialised with them. Miss Purbrick and Ms Bell had worked together in the same department for eighteen years, they were appointed as team managers at the same time and worked alongside each other until Miss Purbrick's promotion in 2020. Ms Alliband and Miss Purbrick had worked together for many years. Ms Alliband's sister had been Miss Purbrick's team leader. Miss Purbrick's oral evidence, which we accept, was that she had known Ms Alliband and Ms Bell socially for ten years.

35. All candidates were invited to interview. We find that there was a shortlisting process, carried out by Miss Purbrick and Miss Page against selection criteria. Although no evidence of that shortlisting criteria was disclosed. We find that the process consisted of checking whether the criteria were mentioned in the application form and/or CV. We made that finding as it was the evidence of Miss Purbrick under cross examination. At the shortlisting stage, the name and race of the candidate is redacted. However, other identifying information, such as current job title, is visible.

36. The job advert stated that the interviews would take place on 2 March 2022. This was postponed by one week to 9 March 2022, to accommodate the annual leave of Ms Bell. As a result of that postponement, the two potential third members of the recruitment panel became unavailable to sit on the interview panel. The interview panel therefore consisted just of Miss Purbrick and Miss Page, and there was no third panel member, as originally envisaged [Miss Page's witness statement paragraph 8]. Miss Purbrick and Miss Page are white British.

37. The candidates were interviewed on 9 March 2022. Interviews were assigned 45 minutes each [218]. The interviews varied in duration from around half an hour to around an hour [172-177]. Ms Alliband and Ms Bell's interviews lasted 30 minutes and 50 minutes respectively. The claimants' interviews lasted 53 minutes and 39 minutes respectively.

38. The four candidates that were not known to Miss Purbrick (all but Ms Alliband and Ms Bell) were asked an icebreaker question: *tell me a bit about you*. Miss Purbrick said that she asked this to put the candidates at ease. Miss Purbrick did not ask Ms Alliband and Ms Bell this question as she felt that it would have had the opposite effect on them, as she already knew them well. The icebreaker question unsettled the claimants as they were not expecting it. The candidates were not marked on the ice breaker question.

39. The candidates were then asked the same six questions. The fourth and fifth questions were technical based, and the sixth question was values based. We find that the candidates had the opportunity, when answering the questions, to provide answers that demonstrated their knowledge of the type of work that they would be undertaking if they were appointed to the role.

40. Miss Purbrick and Miss Page kept notes during the interviews. The notes were brief and self-evidently did not include all that was discussed during interviews which lasted between 30 minutes and an hour. Miss Page's notes were fuller than Miss Purbrick's and she captured some detail missing from Miss Purbrick's notes. Miss Purbrick made some comments in her notes about the view she formed of the candidate's answer. Miss Purbrick accepted in evidence that she did not recall what the claimants said in the interviews and therefore she could not say whether or not the claimants included additional information in answer to the questions, as set out in their witness statements [Miss James' witness statement paragraphs 65-71; Miss Saine's witness statement paragraphs 47-52]. We find that the claimants did provide this additional information during their interviews.

41. Only one candidate (Mr Perkins) was asked a prompt during the interview. When a candidate is prompted, they are marked down. Miss Purbrick's evidence, which we accept, was that she would probably deduct half a point from the candidate's answer, and that she therefore used prompts sparingly to avoid this penalty.

<u>The decision who to appoint</u>

42. The evidence of Miss Purbrick and Miss Page about the scoring process was inconsistent. Miss Page's evidence was inconsistent with her own witness statement. We reject the evidence that Miss Purbrick and Miss Page independently scored the candidates and that they independently gave the candidates the same scores for each question. That was the evidence in their witness statements and Miss Purbrick's evidence under cross examination. This was also what Miss Purbrick and Miss Page told Ms Scott in the grievance appeal meeting [160; 163]. It is unlikely that Miss Purbrick and Miss Page would have independently scored the candidates in exactly the same way for each question. We preferred the evidence of Miss Page under cross examination as we found it more plausible. We make the following findings of fact:

    42.1 Miss Purbrick and Miss Page had a Teams meeting at some stage between 4pm on 9 March 2022 and 3:25pm on 10 March 2022. That was the period between the last interview [177] and the time that interview feedback was delivered to Miss Saine [Miss Saine's witness statement paragraph 36].

    42.2 Before that meeting, Miss Purbrick scored the candidates as set out in her score sheets. Those scores were not subsequently changed. That was Miss Purbrick's oral evidence.

42.3 Miss Page did not score the candidates before she met with Miss Purbrick. We make that finding based on:

42.3.1 Her evidence under cross examination, she said: *"we discussed and agreed the scores… we agreed the scores the next day… I agreed with all the scores"*.

42.3.2 Miss Page's interview notes which did not include the candidates' scores, save in respect of the claimants.

42.4 At that meeting, Miss Purbrick went through her scores and Miss Page agreed with those scores. We reach that finding as it is consistent Miss Page's evidence under cross examination. We find that Miss Page deferred to Miss Purbrick as she felt that she had better knowledge of the technical and other requirements of the role, given that she would be the line manager for the roles. That was Miss Page's evidence under cross examination.

42.5 Miss Purbrick took Miss Page's agreement to mean that Miss Page had scored the candidates in the same way that Miss Purbrick had. That is consistent with Miss Purbrick's evidence on this issue.

42.6 At a later stage Miss Page inserted the scores into her version of the claimants' score sheets. That was done in response to their request to see their score sheets. Miss Page did not score the claimants prior to the meeting with Miss Purbrick. We reach this finding because:

42.6.1 Miss Page could not explain under cross examination why the claimants' score sheets were completed, but the others were not: she said she did not know why this was.

42.6.2 This is the most likely and logical explanation for this.

42.6.3 We do not accept that Miss Page independently scored the claimants before the meeting with Miss Purbrick. That was not her evidence under cross examination and we find that it is improbable that, if she had done so, she would have given the claimants exactly the same scores as Miss Purbrick did.

42.7 By inserting the scores into the claimants' score sheets, Miss Page gave the claimants the misleading impression that she had scored them independently.

42.8 Miss Page's evidence in her witness statement and to the grievance appeal that she scored independently [Miss Page's witness statement paragraph 17-18; 163] was wrong. Miss Page could not explain this error under cross examination. Miss Page must have known that she had not carried out the scoring independently.

42.9 Miss Purbrick's evidence in her witness statement at paragraph 23; to the grievance appeal [160]; and under cross examination was wrong. We find that Miss Purbrick formed a genuine but mistaken belief that

Miss Page had independently scored the candidates in precisely the same way that she had done.

43. The candidates' scores were as follows:

    43.1 Ms K Bell: 15
    43.2 Ms C Alliband: 13
    43.3 Ms C Panton: 12
    43.4 Ms James: 11.5
    43.5 Ms Saine: 9
    43.6 Mr E Perkins: 7

44. Ms Alliband and Ms Bell were appointed to two of the three roles: Head of Resales and Head of Leasehold, respectively.

45. Mr Perkins did not meet the criteria for any of the six questions he was asked. A score of 2 signifies that the candidate completely meets the criteria. Mr Perkins scored 1s and 1.5s for all questions. He had sales experience but did not have leadership experience. He was the weakest candidate.

46. Miss Purbrick said in oral evidence that Miss Panton and the claimants had pretty much the same employment history, and, based on their interviews and *"the fact they all came with the same evidence"*, she would not pick one over the other. We find that this was the opinion formed by Miss Purbrick at the time that the selection decisions were made.

47. There was no benchmark score for appointment. The candidates were not required to meet the criteria for each question asked. That is demonstrated by the fact that Ms Alliband was scored 1.5 for question four.

48. After the scores were agreed, Miss Purbrick and Miss Page discussed the candidates' suitability for appointment and decided who to appoint. That is consistent with the evidence given by Miss Purbrick and Miss Page at the grievance and appeal investigation meetings [131-137; 159-163], and in their witness statements [Miss Purbrick's witness statement at paragraphs 23-24 and 28; Miss Page's witness statement at paragraphs 19 and 22].

49. The decision who to appoint was made by Miss Purbrick. It was made not just on the application form, CV, and performance at interview, but on Miss Purbrick's view of who was suitable for the role. This finding is consistent with the answers Miss Purbrick gave at the grievance meeting on 4 April 2022 to Mrs Esimaje-Heath, where she used the word *"I"* rather than *"we"* and said [134-135]:

    All of interviews were really good – nobody was particularly bad. Isn't anyone I wouldn't see again. Not about the person, it was about how I thought they would fit in and whether they would have enough leadership.

    Not that they are not appointable, but through restructure I have opportunity to have best possible team and opportunity to get a team of people who are 10/10. Not in a position to take on somebody who I am not 100% sure of. Bearing in mind I had only seen internal candidates, and didn't feel 100% comfortable that I was sure of people and confident they can do it – if I had been, I would have appointed. *With manager posts, didn't feel there was anyone in my team, but Carly [Alliband] applied and wowed me and she got it. Always*

interview ppl on paper without best experience, but if they can think outside box I'll take a risk, but on the day both M and I had same thought process and concerns.

F – at end of each interview, Michelle and I briefly touched on each interview. I am quite picky. Carly had it above others as had more relevant/ sales background. Unless I am 100% certain that a person will do the job I won't appoint…

50. As evidenced by her statement to the grievance investigation meeting quoted above, Miss Purbrick's view of the candidates' suitability for appointment was based on who she thought would *"fit in"*, who she was *"100% sure of"* and who she was *"100% comfortable that [she] was sure of"*. This was the subjective view of Miss Purbrick.

51. Miss Purbrick made the decision to appoint Ms Alliband and Ms Bell. Miss Page agreed with and deferred to her on that. That finding is consistent with our findings about how the scoring process was conducted.

52. The third role (Head of Shared Ownership) was not recruited into. Miss Page's witness statement at paragraph 22 states:

Francesca [Miss Purbrick] therefore felt that a more suitable person could be found if we advertise externally, rather than appointing someone who might only partially meet the requirements for the role. I agreed with Francesca's decision and we agreed to only fill two of the roles at that time and advertise the third vacancy externally in the hope of finding a more suitable external person.

53. We find, based on this evidence and the evidence we have found about Miss Page deferring to Miss Purbrick during the scoring process, that it was Miss Purbrick who made the decision not to recruit internally into the third vacant role.

54. In evidence, Mrs Esimaje-Heath and Ms Scott commented that, on the face of it, the difference in race between the successful and unsuccessful candidates *"doesn't look right"* [Ms Scott] and *"looks awful on paper"* [Mrs Esimaje-Heath].

55. Miss Page contacted the candidates on 10 March 2022 to inform them whether they had been successful in their application. She provided them with some brief feedback.

56. On 11 March 2022 Ms James and Miss Saine requested copies of their interview notes and asked whether all three vacancies had been appointed [203; 296]. Miss Page responded, providing the notes, and informing them that two appointments had been made [208].

<u>The grievance and appeal process</u>

57. The claimants raised grievances about the recruitment process on 12 and 21 March 2022, respectively [204-207; 296-299].

58. The respondent accepts that Miss James' grievance contained an allegation of race discrimination.

59. Miss Saine said in her grievance:

In (sic) am aware that several of the other candidates were the same ethnic origin as myself and we were all unsuccessful even though we are competent managers, so it makes me feel whether there (sic) any racial undertones in the recruitment process [298].

60. The respondent (through Mrs Esimaje-Heath and Ms Scott) treated both grievances as if they made allegations of race discrimination. That was their oral evidence, and this is also apparent from the grievance outcome letter sent to Miss Saine [307; 310].

61. Mrs Esimaje-Heath was appointed as the grievance officer. She reviewed the documents listed at pages 142-143. She interviewed the claimants on 30 March 2022 [213-215; 300-302] and Miss Purbrick and Miss Page on 4 April 2022 [131-134]. She interviewed Miss Purbrick again on 11 April 2022 [135-137].

62. In her grievance investigation meeting Miss Page described Ms Panton as *brilliant*; Miss James as *very good* and she said that Miss Saine's interview was *not a great interview* [132].

63. In her grievance investigation interview Miss Purbrick was asked whether technical experience for the role was particularly important. Her response was:

Need an all rounder. So open to anyone who wants to apply and can bring something to table that I may not have thought about. On this occasion, Carly's expertise in sales would fit nicely with resale role and/or shared ownership role. Looking for an all-rounder person, that is why I appointed Carly.

64. The outcome to the grievance was set out in a draft report dated 20 April 2022 [138-155]. This draft was finalised by including some missing details, such as dates and page numbers. The final version of the report was not disclosed as Mrs Esimaje-Heath could not find it. She said that she shared it with Mr Nicholls (Director of HR) via a secure Teams site that was no longer accessible. We find that the draft version that was disclosed was in virtually identical terms to the final version of the report, with no material differences.

65. An outcome letter was sent to the claimants on 21 April 2022 [221-228; 305-311]. The grievances were not upheld. Mrs Esimaje-Heath found two breaches of the recruitment and selection policy regarding shortlisting and feedback [144-145].

66. The claimants appealed the outcome on 28 April 2022. Ms Scott was appointed as the grievance appeals officer. The claimants attended grievance appeal hearings on 16 May 2022 [246-252; 328-332]. Miss Purbrick and Miss Page attended investigation meetings with Ms Scott on 24 May 2022 [159-163].

67. In her investigation meeting, Miss Purbrick stated:

3. What were the essential requirements of the role?

FP said that it was a brand new role, she would need to look at the advert and role profile etc anyone from anywhere in the business could bring anything to the table. She was open

minded, for example she offered an officer post to a car salesman. She didn't necessarily fixate on key responsibilities, someone may be able to bring to the role something different.

GS asked if these were technical experience why were all candidates shortlisted? FP said it wasn't the be all and end all if a link in the past, the role could be really good for someone. Not everyone's always good on paper, they might have the right experience without them realising it. GS asked if that was why she shortlisted all of the candidates FP said that it was a big reason [159].

GS asked if RK had anything else she would like to ask. RK asked what made the appointable candidates appointable. FP said that they had homeowner experience and previous sales experience. She wasn't just looking at it from a homeowner point of view. One worked at L&Q [redacted] years and the other one had new build sales team experience.

RK asked if the others were not appointable. FP said that some answers were brilliant they weren't not appointable they just weren't good enough she had wanted to look at what else was available. FP said that with the answers given they were good at their job now, if they had just tried to link to the job role answers just weren't good enough.

GS asked if they were to advertise externally and not find any successful candidates would they go back and offer the internal candidates. FP said that she wouldn't, not from the interviews the internal candidates gave. GS confirmed therefore that they were not appointable. FP agreed with this [161].

68. The appeal was not upheld. That decision was communicated to the claimants in writing on 30 May 2022 [255-261; 336-342].

69. The claimants allege that Mrs Esimaje-Heath and Ms Scott were appointed to hear the grievance and appeal as they were people of colour, to lend credibility to their findings and to shut down the allegations of race discrimination. Mrs Esimaje-Heath's evidence, which we accept, was that Mr Nicholls requested that she hear the grievances, but that she did not know their contents at that stage. Her view was that she was appointed because she had not heard a grievance for some time. Ms Scott's evidence was that she was also appointed by Mr Nicholls and that she was independent and impartial. She said it was not unusual to be appointed to hear a grievance appeal in your own directorate. We find that Ms Scott and Mrs Esimaje-Heath were appointed as impartial senior employees, and not because of their race.

<u>Detriment D: not recruiting for the third role</u>

70. The third Head of Homeownership role was not recruited. The evidence about whether the role was advertised externally was unclear and contradictory. We accept the evidence in Miss Purbrick's witness statement at paragraphs 41 to 42 as we find that she was the witness best placed to have knowledge and recollection of this issue, as she would have been the recruiting and line manager for the role. Whereas Miss Page was involved in a large number of recruitments at that time, and Mrs Esimaje-Heath was at a more senior level. Ms Scott did not give evidence on this issue, and she was in a different directorate. We therefore find that the role was advertised externally, but that no suitable candidates were found.

71. In June 2022 Miss Purbrick emailed Raj Mason to request not to recruit into the third role, but to proceed with just two Head of Homeownership positions and see how things got on [165]. On 23 November 2022 Ms Purbrick

advised Mr Lumley (strategic sales director) that she had decided not to fill the third vacancy [168-169]. Miss Purbrick's evidence, which we accept, was that she decided to recruit for an administrative role instead, as the current structure (with two Head of Homeownership roles) was working well, and this was a way to save costs [Miss Purbrick's witness statement at paragraph 35]. Mrs Esimaje-Heath stated in evidence, and we accept, that there were budgetary pressures on recruitment, and that the respondent imposed a recruitment freeze at some stage.

Time limits

72. On 8 August 2022 the claimants commenced ACAS early conciliation. That process completed on 19 September 2022, and they presented their claims on 4 October 2022. The claimants' 1 May 2023 application to amend to add a claim of victimisation was determined at a preliminary hearing on 16 November 2023.

73. The claimants' evidence, which we accept, was that they did not present their section 13 Equality Act 2010 claims earlier as they were ignorant of the time limits and believed that they had to complete the internal grievance process first. This was the advice they received from ACAS and UNISON [Miss James' witness statement at paragraphs 116-123; Miss Saine's witness statement at paragraphs 93-95]. The claimants were unwell during this period [Miss James' witness statement at paragraphs 100-102; Miss Saine's witness statement at paragraph 99]. The claimants say, and we accept, that they did not present their victimisation claims sooner as they were ignorant of their right to do so, becoming aware of that right on or about 20 February 2023 [74]. They made an application to amend on 13 March 2023 which was redrafted on 1 May 2023, following legal advice. We accept their submission that the delay in the Tribunal determining their application was outside of their control. The respondent says that it was prejudiced by the delay due to the fading of memories over time.

Evidential comparators

74. The claimants gave evidence about two other employees: Mr Oborne and Mr Goodman [Miss James' witness statement at paragraphs 125-128; Miss Saine's witness statement at paragraphs 100-102].

75. Ms Scott gave oral evidence about Mr Oborne. The respondents' witnesses did not have any further knowledge about these two individuals. The respondent did not adduce any documentary evidence, despite these individuals having been named by the claimants in their further information document of 1 May 2023 as evidential comparators [63-65].

76. We find that:

    76.1 Mr Oborne was a manager in the claimants' and Ms Scott's directorate. Along with the other managers at his level, he was ringfenced for managerial roles in a restructure.

76.2 Mr Goodman joined the respondent in September 2022 as Interim Head of Lettings and Rehousing. This was an external recruitment. The vacancy was not made available to internal candidates.

Legal principles

77. The Tribunal had regard to the case law referred to by the parties in their written skeleton and submissions.

Burden of proof in discrimination claims

78. Section 136 Equality Act 2010 ("EqA") provides that:

> *(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."*

79. We had regard to the guidance in the following cases, and the cases referred to therein: **Igen v Wong** [2005] ICR 931 paragraphs 14 and 37; **Talbot v Costain Oil** UKEAT/0283/16/LA paragraph 27; **Country Style Foods Ltd v Bouzir** [2011] EWCA Civ 1519 paragraphs 30-31; **Pnaiser v NHS England** [2016] IRLR 170 paragraphs 45-48; **Ayodele v Citylink Limited** [2018] IRLR 114 paragraphs 92-93; **Essex County Council v Jarrett** EAT/0045/15 paragraph 32; **Base Childrenswear Ltd v Otshudi** [2019] EWCA Civ 1648 at paragraph 18; **Deman v Commission for Equality and Human Rights** [2010] EWCA Civ 1279 at 19; . **Field v Steve Pye and Co. Limited** [2022] EAT 68 paragraphs 36-42; and **Efobi v Royal Mail Group Ltd** [2021] ICR 1263.

80. Something more than a difference in status and a difference in treatment is required to shift the burden of proof (**Madarassy v Nomura International Plc** [2007] ICR 867). Giving untruthful, inconsistent, or inaccurate evidence may amount to "something more" (**Solicitors Regulation Authority v Mitchell** EAT 0497/12; **Base Childrenswear Ltd v Otshudi** [2020] IRLR 118; **P2CG Ltd v Davis** EAT 1088/20). However, the burden will not necessarily shift simply because the Tribunal rejects the employer's account (**Raj v Capita Business Services Ltd** [2019] IRLR 1057).

Direct discrimination

81. Section 13(1) EqA provides:

> *A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*

82. Section 23 EqA provides, so far as is relevant:

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

83. Section 39(2)(d) EqA provides:

(2) An employer (A) must not discriminate against an employee of A's (B)—
(d) by subjecting B to any other detriment.

84. We had regard to **Amnesty International v Ahmed** [2009] ICR 1450 paragraphs 33-34; **Nagarajan v London Regional Transport** [1999] ICR 877 at 884-886; **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 paragraphs 8, 10-12, and 34-35; **Chief Constable of West Yorkshire Police v Khan** [2001] ICR 1065 at 29; **Martin v Devonshires Solicitors** [2011] ICR 352 at paragraph 30; **Reynolds v CLFIS (UK) Ltd** [2015] ICR 1010 at paragraph 36; **Gould v St John's Downshire Hill** [2021] ICR 1 paragraphs 75-81. **Field v Steve Pye and Co. Limited** [2022] EAT 68 paragraphs 36-42*;* **No.8 Partnership v Simmons** [2023] EAT 140 at paragraphs 34-37*.* This guidance was taken into account in full when reaching our conclusions. In brief summary, the guidance says:

84.1 There is a detriment if a reasonable worker would or might take the view that the treatment was in all the circumstances to his detriment. An unreasonable sense of grievance does not fall into that category.

84.2 Discrimination may be inherent in the act complained of, in which case there is no need to inquire into the mental processes of the alleged discriminator.

84.3 In other cases, the act may be rendered discriminatory by the mental processes, conscious or unconscious, of the alleged discriminator. The question whether the alleged discriminator acted 'because of' a protected characteristic is a question about their reasons for acting as they did. The test is subjective, and it is sufficient that the protected characteristic had a '*significant influence'* on the decision to act in the manner complained of. It need not be the sole ground for the decision. The person who did the act complained of must themself have been motivated by the protected characteristic. The motivation may be subconscious, but such a finding must be supported by clear findings of primary fact from which such an inference can properly be drawn.

84.4 The conventional approach to considering whether there has been direct discrimination is a two-stage approach: considering first whether there has been less favourable treatment by reference to a real or hypothetical comparator; and then going on to consider whether that treatment is because of the protected characteristic.

84.5 There must be no material difference between the circumstances relating to the claimant and the comparator. If the Tribunal constructs a hypothetical comparator, it must ensure that it is comparing like with like. That will generally be done at an early stage permitting the parties to address the hypothetical comparisons in evidence in submissions. Where that is not done the Tribunal may not be in a position to make findings using those comparisons.

84.6 Tribunals can address both stages by considering a single question: the '*reason why*' the employer did the act or acts alleged to be discriminatory. This approach does not require the construction of a hypothetical comparator. It will not always be necessary or

appropriate, particularly where there is no direct comparator to consider the two stage process. It can sometimes be impossible to decide whether there has been less favourable treatment without first determining the reason why. However, although it is legitimate to move straight to the second stage, "*where there is evidence that could indicate discrimination there is much to be said for properly grappling with the evidence and deciding whether it is, or is not, sufficient to switch the burden of proof"* (**Field** paragraph 44).

84.7 When assessing the reason why, the Tribunal must determine why the alleged discriminator acted in the way they did; and what (consciously or unconsciously) was their reason. This is subjective question of fact.

85. The Equality and Human Rights Commission Code of Practice on Employment at chapter 16 deals with avoiding discrimination in recruitment. Paragraph 16.57 states:

An employer must not discriminate at the interview stage. In reality, this is the stage at which it is easiest to make judgements about an applicant based on instant, subjective and sometimes wholly irrelevant impressions. If decisions are based on prejudice and stereotypes and not based on factors relating to the job description or person specification, this could lead to unlawful discrimination. By conducting interviews strictly on the basis of the application form, the job description, the person specification, the agreed weight given to each criterion and the results of any selection tests, an employer will ensure that all applicants are assessed objectively, and solely on their ability to do the job satisfactorily.

Victimisation

86. Section 27 EqA provides that:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because–
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act–
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving information or making a false allegation is not a protected act if the evidence or information is given, or the allegation is made, in bad faith

87. Section 272(d) EqA covers allegations made by the claimant that the employer or another person has contravened the EqA, whether or not they are express. It is not necessary that the EqA be mentioned, but the asserted facts must, if verified, be capable of amounting to a breach of the EqA.

88. The EAT in **Chalmers v Airpoint Ltd** UKEATS/0031/19/SS upheld the Tribunal's decision that a reference to actions which 'may be discriminatory' in a grievance was not sufficient to amount to a protected act.

89. In **Durrani v London Borough of Ealing** EAT 0454/12 the EAT upheld the Tribunal's decision that references to 'being discriminated against' referred to general unfairness rather than detrimental action based on the claimant's

race, although the EAT emphasised that the case should not be taken as 'any general endorsement for the view that where an employee complains of "discrimination" he has not yet said enough to bring himself within the scope of s.27 EqA'. All will depend on the circumstances of the particular case.

90. The Tribunal must determine whether the relevant decision was materially influenced by the doing of a protected act. This is not a 'but for' test, it is a subjective test. The focus is on the 'reason why' the alleged discriminator acted as s/he did (**West Yorkshire Police v Khan** [2001] IRLR 830).

91. The Court of Appeal emphasised the importance of focusing on motivation, rather than 'but for' causation in **Dunn v Secretary of State for Justice** [2019] IRLR 298 at paragraph 44:

'In the context of direct discrimination, if a claimant cannot show a discriminatory motivation on the part of a relevant decision-maker he or she can only satisfy the 'because of' requirement if the treatment in question is inherently discriminatory, typically as the result of the application of a criterion which necessarily treats (say) men and women differently. […] There is an analogy with the not uncommon case where an employee who raises a grievance about (say) sex discrimination which is then, for reasons unrelated to his or her gender, mishandled: the mishandling is not discriminatory simply because the grievance concerned discrimination.'

Time limits

92. Section 123 EqA states, in so far as it is relevant:

(1) …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. …

(2) 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.

(3) 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.

93. As to conduct which 'extends over a period' the Court of Appeal in **Hendricks v Metropolitan Police Commissioner** [2003] IRLR 96, sets out that the burden is on the claimant to prove, either by direct evidence or inference, that the numerous alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of 'an act extending over a period'.

94. In **South Western Ambulance Service NHS Foundation Trust v King** [2020] IRLR 168 Choudhury P (as he then was) in the EAT stated in the context of a continuing act at paragraphs 36-38:

"It will be necessary, in my judgment, for at least the last of the constituent acts relied upon to be in time and proven to be an act of discrimination in order for time to be enlarged." Accordingly, the claimant cannot rely on matters to extend time unless they are actionable.

95. Whilst extension of just and equitable grounds is a broad discretionary power for the Tribunal, the onus is always on the claimant to convince the tribunal that it is just and equitable to extend time and *'the exercise of discretion is the exception rather than the rule*' (**Robertson v Bexley Community Centre** [2003] IRLR 434, at paragraph 25, per Auld LJ).

96. As per Langstaff J in **Abertawe Bro Morgannwg University Local Health Board v Morgan** UKEAT/0305/13 a litigant can hardly hope to satisfy that burden unless he provides an answer to two questions (para 52): *"The first question in deciding whether to extend time is why it is that the primary time limit has not been met; and insofar as it is distinct the second is [the] reason why after the expiry of the primary time limit the claim was not brought sooner than it was*."

97. Per Leggatt LJ in **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] ICR 194, the issue of prejudice is almost always relevant to the exercise of the just and equitable discretion. However as per Laing J to in **Miller v Ministry of Justice** UKEAT/0003/15, prejudice is an important but not a determinative factor, and it is forensic prejudice, rather than just the cost and hassle of meeting a claim that would otherwise be defeated on limitation grounds, that will be crucially relevant to the exercise of the discretion, telling against an extension of time, and it may well be a decisive factor. However, the converse does not necessarily follow: if there is no forensic prejudice that is not a decisive factor in favour of an extension of time.

98. In **Adedeji v University Hospitals Birmingham NHS Foundation** [2021] EWCA Civ 23, the Court of Appeal repeated a caution against tribunals relying on the checklist of factors found in s 33 of the Limitation Act 1980 (which applies to extensions of time for late personal injury claims in the civil courts): *'the best approach for a tribunal in considering the exercise of the discretion under s 123 (1) (b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) "the length of, and the reasons for, the delay"*'.

99. That said, the Limitation Act checklist as modified in the case of **British Coal Corporation v Keeble** [1997] IRLR 336 includes as possible relevant factors: i) the relative prejudice to each of the parties; ii) all of the circumstances of the case which includes: iii) the length and reason for delay; iv) the extent that cogency of evidence is likely to be affected; v) the cooperation of the respondent in the provision of information requested, if relevant; vi) the promptness with which the claimant had acted once she knew of facts giving rise to the cause of action, and vii) steps taken by the claimant to obtain advice once she knew of the possibility of taking action.

Conclusions

100. We took all the findings of fact into account and applied the legal principles set out above. Our specific conclusions on the issues in the claim are set out below.

Detriment A

101. The alleged facts are proven. The respondent failed to appoint the claimants to one of the three Head of Homeownership roles/vacancies on or about 10 March 2022. This was the decision of Miss Purbrick: she scored the candidates, decided who to appoint, and chose not to recruit into the third role.

102. The decision not to appoint the claimants to the Head of Homeownership roles constituted a detriment as the claimants were not promoted.

103. The selection process was not an objective assessment based solely on the job description, application form, and performance at interview. The respondent did not agree weight to be given to the criterion for appointment. This was contrary to the guidance in the Equality and Human Rights Commission Code of Practice, at paragraph 16.57. This guidance relates to the interview stage, rather than the stage of selecting candidates for appointment. Whilst selection decisions will inevitably involve a degree judgement, it is good practice to base such judgements on objective criteria. In this case there was a subjective process whereby Miss Purbrick decided which candidates were suitable for appointment. The decision was made by one person, with Miss Page simply agreeing with Miss Purbrick's view. This increased the risk that the decision was based on prejudice and stereotypes, which is what the Code of Practice cautions against.

104. Miss Purbrick's decision who to appoint to the Head of Homeownership roles was based on she thought would *"fit in"*, who she was *"100% sure of" and who she was "100% comfortable that [she] was sure of"*. This was the subjective view of Miss Purbrick.

105. We find that the named actual comparators of Ms Alliband and Ms Bell were in materially different circumstances to the claimants, given that they had between 10- and 20-years' experience in the homeownership team, whereas the claimants had none. Strong understanding and knowledge of the homeownership products and new build and resales process were essential requirements for appointment according to the job advert.

106. There is evidence from which we can make inferences about how the hypothetical comparator would have been treated, namely:

    106.1 The appointment of Ms Alliband, specifically:

        106.1.1 Ms Alliband's score was very close to Ms Panton's and Miss James' scores. The difference was 0.5 and 1 point, respectively.

        106.1.2 Ms Alliband only had fourteen months of leadership experience. She had less management experience than the claimants (who had management experience from 2017 and 2019 respectively) and Ms Panton.

106.1.3 Ms Alliband did not completely meet the criteria for question four.

106.2 The decision not to appoint Ms Panton to third vacant role:

106.2.1 Ms Panton scored one mark below Ms Alliband and was described as *brilliant* by Ms Page.

106.2.2 The claimants describe their race as white black British Caribbean. We find, based on their evidence to the Tribunal, that the crux of their complaint is that they were not appointed as they were people of colour. Ms Panton is black, and a person of colour.

106.3 The claimants were not appointed. That was notwithstanding that Miss Purbrick said they were *"not not appointable"*, their interviews were *"really good"* and that *"she would not pick one [of Ms Panton and the claimants] over the other"*.

107. We concluded that we could not draw inferences from the following evidence:

107.1 The diversity report. The senior appointments referred to therein are at least two grades higher than the Head of Homeownership roles. The report does not show under representation or fewer promotions for candidates who are mixed ethnicity.

107.2 Ms Scott's statements to *Inside Housing*. This evidence was adduced at a very late stage of the hearing, during cross examination of Ms Scott. The limited evidence we had on this issue was that it was about racial harassment to a tenant, rather than discrimination in employment. This was not a comparable situation.

107.3 The information about Miss Purbrick's former recruitment decisions. The sample size was too small, and we lacked the necessary contextual information about the applicants to draw any conclusions from this.

107.4 The information about details of promotions to leadership and senior leadership promotions in the three years preceding 10 March 2022. This evidence was not the subject of cross examination or closing submissions. We did not have the necessary contextual information about the number of applicants and their race, or the quality of their applications, to draw any conclusions from this information.

107.5 Mr Obourne and Mr Goodman. Mr Obourne was ring fenced in a restructure. Mr Goodman was an external recruit. They were not in a comparable situation to the internal recruitment for the Head of Homeownership roles. We also could not draw any conclusions given the very limited evidence before us, and the fact that they were just two individuals in a workforce of around 3000.

108. We infer from the evidence at paragraph 106 above that the claimants were treated less favourably than a hypothetical comparator (a white employee in the same circumstances as each of the claimants, including their CVs, experience, applications and answers at interview) would have been. We reach this conclusion because:

    108.1 The claimants' performance at interview was very similar to Ms Alliband's. Miss James scored one point less at interview. Although Miss Saine scored lower, Miss Purbrick viewed both claimants as having performed equivalently, as she said she would *"not pick one over the other"*;

    108.2 The claimants had more management experience than Ms Alliband. This was a relevant factor. Miss Purbrick said at the grievance investigation that she made decisions based on whether the candidates had enough leadership experience;

    108.3 Miss Purbrick did not adequately explain why Ms Alliband was appointed to one of the roles, whereas she did not appoint either the claimants or Miss Panton to the remaining vacancy. Miss Purbrick must have concluded that they did not fit in, and she was not 100% sure. However, she also described their interviews in favourable terms and said they were *"not not appointable"*.

109. We conclude that the burden of proof shifts to the respondent. There is *something more* in this case. Specifically, the inconsistent, incorrect, and misleading evidence about the scoring process. This was crucial evidence about detriment A. Miss Page's evidence in her witness statement and to the grievance appeal investigation was inexplicably wrong. She also completed her version of the claimant's scoring sheets with Miss Purbrick's scores, which gave the misleading impression that she had independently scored them, when she had not.

110. We conclude that the respondent has not discharged their burden of proving that the decision not to appoint the claimants to the vacant roles was in no sense whatsoever to do with race. We reach that conclusion because:

    110.1 There was a subjective layer of decision making by Miss Purbrick about who she thought would *fit in* and who she was *100% sure of*. Basing recruitment decisions on such subjective views, or gut feelings, increases the risk of stereotypes and unconscious bias coming into play.

    110.2 Miss Purbrick's decision that the claimants did not fit in, and she was not 100% sure, was at odds with their performance at interview relative to Ms Alliband, and her statements that they were *not not appointable* and their interviews were *really good*. Miss Purbrick took a risk with Ms Alliband, given her score to question four and her relative lack of management experience. She did not afford that generosity of approach to the claimants.

110.3 We considered whether that difference in treatment was because Miss Purbrick knew Ms Alliband so well. We did not reach that conclusion because Miss Purbrick did not give that evidence to the Tribunal or provide that explanation in the grievance or appeal meetings.

110.4 We were therefore left with an inexplicable inconsistency in Miss Purbrick's approach to the claimants. Given this uncertainty, we concluded that the respondent had not proven that this was in no sense whatsoever to do with race. We concluded that Miss Purbrick acted unconsciously. She did not consciously treat the claimants less favourably because of race.

111. The claimants' section 13 Equality Act 2010 claims relating to detriment A are well founded and succeed.

Detriments B and C

112. We find that, contrary to these allegations, the grievance and appeal were properly investigated. Mrs Esimaje-Heath carried out interviews, reviewed relevant documents, asked probing questions, and drafted a detailed report and outcome letter. Ms Scott carried out further investigation at the appeal stage, which is unusual. We have reached a different conclusion to them about the issue of race discrimination. But that does not mean that the internal process was flawed. We reached our conclusions applying specific rules about the burden of proof. We also had different evidence from Miss Page about the scoring process.

113. The grievance and appeal were not upheld. We accept that this represented a detriment to the claimants.

114. Miss Saine alleges that this was less favourable treatment because of race. There is no evidence from which we can infer that a hypothetical comparator would have been treated differently. Miss Saine did not prove a prima facie case. Miss Saine was somewhat confused about the difference between her victimisation and direct discrimination claims. Her evidence was that she believed that she was treated less favourably because of race, because it was the fact of her race that led to her allegation of racism. Contrary to her case, we conclude that the grievance and appeal were properly investigated, and they were rejected because Mrs Esimaje-Heath and Ms Scott genuinely believed and concluded that there was no evidence of race discrimination.

115. The claimants both allege that they were subject to detriments B and C because they did a protected act:

116. Both grievances were protected acts within the meaning of section 27 Equality Act 2010:

116.1 The respondent admits that Miss James' grievance was a protected act.

116.2 Miss Saine's statement: *In (sic) am aware that several of the other candidates were the same ethnic origin as myself and we were all unsuccessful even though we are competent managers so it makes me feel whether there any racial undertones in the recruitment process* [298] was an implied allegation of breach of the Equality Act 2010. Miss Saine was thereby alleging that those of her race were treated less favourably, as they were not successful in the recruitment. Her reference to *racial undertones* is an implied allegation that there was direct race discrimination in the recruitment process.

117. There is no evidence from which to infer or conclude that Mrs Esimaje-Heath or Ms Scott were motivated or influenced by the protected acts. The respondent was sensitive to allegations of race discrimination. This was the evidence of Mrs Esimaje-Heath. We do not infer from that that the respondent would downplay or fail to uphold allegations of race discrimination. To the contrary, such sensitivities could equally have made the respondent more conscientious in investigating and determining such allegations. The claimants have not proven a prima facie case. We conclude that the grievance and appeal were properly investigated, and they were rejected because Mrs Esimaje-Heath and Ms Scott genuinely believed and concluded that there was no evidence of race discrimination.

118. The claims of direct discrimination (second claimant only) and victimsation (both claimants) in relation to detriments B and C are not well founded and are dismissed.

Detriment D

119. The respondent did not recruit into the third Head of Homeownership role. We conclude that this was initially the decision of Miss Purbrick, as alleged, but that the decision was ratified and confirmed at a higher level as evidenced by Miss Purbrick's emails to others on this subject.

120. There was no less favourable treatment of the claimants. This was not treatment of the claimants at all. All prospective applicants were denied the potential opportunity to apply for the role. There is no evidence that a hypothetical comparator would have been treated differently. The claimants have not proven a prima facie case.

121. We considered the reason why and conclude that the third vacancy was deleted as it was not needed in the new structure, whereas an administrative role was needed. The decision was made to save costs.

122. There is no evidence to infer or conclude that the decision was motivated, influenced, or because of the claimants' protected acts or their race.

123. The claims of direct discrimination and victimsation in relation to detriment D are not well founded and are dismissed.

Time limits

124. There are no meritorious in time acts and therefore the claimants cannot rely on there being a continuing act.

125. We find that it is just and equitable to extend time in respect of the section 13 Equality Act 2010 claim for detriment A.

126. The claimants were ignorant of the time limits. They believed they had to complete the internal process first. This was the information they received from ACAS and UNISON. Those beliefs were therefore reasonable ones.

127. Although the claimants' health issues were not the primary reason for the delay, we find that they were exacerbating factors which made it more difficult for them to present their claims in time. However, this was not a determining factor.

128. We balance the prejudice between the parties. If we did not extend time, the claimants would be precluded from a judgment in a meritorious claim. On the other hand, the respondent has not been unduly prejudiced by the short delay. The claim is two months out of time. The respondent says that it was prejudiced due to the fading of memories over time. We do not conclude that there was a material deterioration in the witnesses' memories over that two-month period. The respondent could have taken steps to mitigate against that prejudice by preserving documents and drafting statements at an early stage. The prejudice weighs in favour of the claimants.

129. It is therefore just and equitable to extend time for the section 13 detriment A claims.

130. We reach the following conclusions in respect of the other out of time claims:

    130.1 Although detriments B and C are capable of being a continuing act, as they are part of the same grievance process, there is no meritorious in time act and therefore the second claimant cannot rely on this to extend time.

    130.2 It is just and equitable to extend time for the section 13 Equality Act 2010 claim brought by the second claimant in relation to detriment B. The delay is short (19 days) and this did not prejudice the respondents. The claimants were reasonably ignorant of the time limits.

    130.3 It is just and equitable to extend time for all of the victimisation claims. We reached that conclusion due to the following factors: (1) the cause of action arises from the same facts as the section 13 Equality Act 2010 claims (two of which were in time); (2) the claimants were reasonably ignorant of the time limits before presenting their claim form; (3) the claimants were reasonably ignorant of the existence of the cause of action and acted promptly when they became aware of it; (4) the delay after 1 May 2023 was outside of the claimants' control and due to the Tribunal's availability; (5) there was no delay in the

claims being heard as they were heard in the original listing for the section 13 Equality Act 2010 claims, which were made before the application to amend was determined. Therefore the balance of prejudice falls in favour of the claimants.

Employment Judge Gordon Walker
Dated: 6 February 2024