EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms J Gross	**- V -**	Moorfields Eye Hospital NHS Foundation Trust

Heard at: London Central **On**: 12-25 April 2024

Before: Employment Judge Baty
Mr P de Chaumont-Rambert
Mr D Eales

Representation:

For the Claimant: In person
For the Respondents: Ms J Twomey (counsel)

JUDGMENT

1. The claimant's complaints of direct age discrimination were all presented out of time and it was not just and equitable to extend time. The tribunal does not therefore have jurisdiction to hear those complaints and they are dismissed. If the tribunal had had jurisdiction to hear those complaints, they would all have failed.

2. The claimant's complaint of victimisation at paragraph 9.6 of the agreed list of issues was withdrawn by the claimant and dismissed.

3. The claimant's remaining complaints of victimisation all fail.

4. The respondent's costs application succeeds. An award of costs of £2,450 is made, payable by the claimant to the respondent.

REASONS

The complaints

1. By a claim form presented to the employment tribunal on 20 December 2022, the claimant brought complaints of direct age discrimination and victimisation. The respondent defended the complaints.

This hearing

2. This hearing had been listed over 11 days in person at the London Central employment tribunal. Due to a lack of availability of employee panel members from the London Central tribunal, Mr Eales, who is an employee panel member at the Leeds employment tribunal, kindly agreed to be the employee member on the tribunal panel for this hearing. He attended remotely by Cloud Video Platform ("CVP"). The judge checked at the start of the hearing whether the parties were happy with this arrangement and they confirmed that they were. To that extent, therefore, the hearing was a "hybrid" hearing.

3. Ms Twomey also asked whether it would be possible, given that there was a CVP link to the hearing room in any case, for the parties to have that link so that any witnesses who wanted to observe the hearing without needing to attend in person for the full 11 days could do so via the link. The claimant initially objected to this and appeared concerned that the respondent's witnesses would give their evidence remotely rather than in person. The judge explained that, when they came to give their own evidence, the witnesses would be attending in person, but that the purpose of providing the link would be to enable them to observe the hearing during the rest of the 11 day hearing without needing to attend in person.

4. The claimant then said that she did not want the respondent's witnesses to view the proceedings except when they were giving evidence themselves. The judge explained that the hearing was a public hearing and anyone was entitled to attend should they wish to and that the tribunal would not exclude people at any part of the hearing without a very good reason.

5. The claimant did not object further and indeed then asked if she could be provided with the link as well. The judge said that would be fine provided that it was used only for any witnesses who wished to view the proceedings remotely without having to attend in person, as was the case with the respondent's witnesses. He asked that, if either party wished to expand the use of the link beyond that, they should first ask the tribunal before doing so; this was because the tribunal wanted to have an idea of who was attending the hearing. Other members of the public who might wish to attend could of course always attend in person.

6. The tribunal and the parties were happy to proceed on the above basis and the CVP link was duly forwarded to the parties.

Recordings

7. The judge explained that the hearing would be recorded. The claimant asked if she could have a recording of the hearing at the end of each day. The judge explained that that would not be possible and that, if a party wanted a transcript of the hearing, they could apply for that and it would in due course be transcribed and there was normally a fee for doing so.

8. The claimant then asked if she could record the hearing herself. The judge said that this was not permissible and that to record tribunal proceedings would be contempt of court. The judge was conscious, at this stage, that the claimant had covertly recorded various conversations and meetings which she had had with individuals at the respondent (and indeed, there was a separate transcript bundle which contained transcripts of the recordings of those meetings). Indeed, in relation to one of these meetings, she had first asked whether she was permitted to record it, had been told that she could not, but nonetheless chose to go ahead and record it covertly.

The issues

9. There had been three preliminary hearings for the purposes of managing this case. It is clear from the judges' notes of those hearings that agreeing the list of issues for this case was a difficult process and that the reason for this was to a great extent because of the claimant's tendency to expand on matters rather than to distil them to what was relevant and germane. However, as a result of the last preliminary hearing, on 12 February 2024, a list of issues had been agreed between the parties. A copy of that list of issues was in the bundle at pages 2127-2130. At the start of the hearing, both parties confirmed that this was the agreed list of issues.

10. However, at the start of the hearing, the judge noted that there were two allegations of direct age discrimination set out at paragraph 5 of the list of issues. These related to the failure to select the claimant for two roles in June 2022. The judge, having by that stage read the claim and the response form, noted that the claim appeared to contain allegations of age discrimination in relation to the subsequent appointments to these two roles in early August 2022 and the respondent appeared to have addressed these allegations in its response form. The claimant confirmed that she was indeed bringing allegations of direct age discrimination in relation to these two matters. Furthermore, Ms Twomey confirmed that the respondent was prepared to deal with those issues and therefore did not object to an amendment to the list of issues.

11. The wording of the two additional issues, which were inserted as issues 5(c) and (d) of the list of issues, was agreed between the judge and the parties at the start of the hearing. The parties confirmed that the list of issues as so amended was the agreed list of issues. A copy of that list of issues (including the two additional issues at 5(c) and (d)) is annexed to these reasons.

12. The judge emphasised at the start of the hearing that the tribunal would be determining those issues and no others.

13. The agreed issues were on liability only.

14. During her evidence, the claimant conceded that Ms Naomi Owen, who sent the 4 November 2022 email which is the subject of the victimisation complaint at issue 9.6, did not include the claimant on it because of a genuine mistake; she also accepted the evidence in Ms Owen's witness statement that Ms Owen was unaware that the claimant had brought her grievance (the protected act) when she sent that email on 4 November 2022. The claimant therefore subsequently withdrew the complaint at issue 9.6 and it was dismissed by the tribunal.

15. The tribunal did not therefore have to determine that issue. Furthermore, it was then no longer necessary for the respondent to call Ms Owen as a witness and she was not called.

The evidence

Witnesses

16. Witness evidence was heard from the following:

For the claimant:

The claimant herself; and

Mr Patrick Fagan, the claimant's partner.

For the respondent:

Ms Bola Hassan, who at the times relevant to this claim was employed by the respondent as a Band 8a Business Partner and who conducted a fact-finding investigation at the informal stage of the claimant's grievance;

Mr Richard MacMillan, who was employed by the respondent between September 2019 and December 2022 initially as Head of Legal Services and then General Counsel;

Ms Rachele Johnson, who at the times relevant to this claimant was employed by the respondent as Associate Director of Workforce and OD;

Ms Onai Muchemwa, who is the Managing Director/Principal Consultant of a consultancy firm providing support to employers with employee relations issues and human resources transformation, and who heard the claimant's grievance;

Mr Jonathan Spencer, who is employed by the respondent as Chief Operating Officer;

Ms Jackie Wyse, who is and was at all times material to this claim employed by the respondent as Employee Relations Lead; and

Ms Naheed Phul, who is and was at all times material to this claim employed by the respondent as Chief Pharmacist, and who chaired the panel which heard the claimant's grievance appeal.

17. The respondent also produced a witness statement from Ms Naomi Owen, who has been employed by the respondent since February 2021 and is currently employed as Head of Communications and Oriel Partnership Communications. The tribunal read this witness statement as part of its pre-reading. However, as detailed above, as a result of the claimant's subsequent withdrawal of the complaint at issue 9.6, the respondent did not in the end call Ms Owen to give evidence.

Documents

18. Produced to the tribunal were: a main bundle numbered pages 1-2130; a transcript bundle numbering pages 1-322; three short bundles of what was described respectively as "additional disclosure by the claimant" (two parts) and "additional disclosure by the respondent" (one part); a chronology (not agreed); and two versions of a document described as "cast list and recommended reading list".

Bundle

19. At the start of the hearing, the claimant made various complaints about the bundle. She said that it was difficult to navigate and she said that she was not sure whether all the documentation which she wanted in it was actually in it. The claimant indicated that she thought there were probably about 20 documents which she thought were missing. It was difficult to ascertain with any clarity what the claimant considered should have been in the bundle and what she therefore considered was missing. Furthermore, the bundle had been put together in what was for the most part a chronological order and, whilst it was large, it did not appear to have been put together in any way which could be described as unusual.

20. However, after some discussion at the start of the hearing, the judge agreed with the parties that, whilst the tribunal was doing its pre-reading over the first two days of the hearing, Ms Twomey and the claimant would sit down together and try and ascertain what the claimant thought was missing; the hope was that if the claimant could identify this, Ms Twomey could explain to her where in the bundle that documentation was or, to the extent that it was not there, could provide it; furthermore, the judge said, if it was not possible to reach agreement on this, the claimant should produce a further bundle containing the documents which she said were missing, provided that it was properly indexed and there were enough copies for the tribunal and the respondent.

21. When the tribunal reconvened on the third day of the hearing after the tribunal had done its pre-reading, the judge asked what progress had been

made. Ms Twomey said that they had spent an hour together on this exercise and the claimant had actually informed her that there were 71 documents which she thought should have been in the bundle but were not, and many of these were documents which the claimant had put into an ongoing timeline document which she produced (one version of which the tribunal had already read in the bundle as part of its pre-reading). The claimant complained further about the number of versions of the bundle that had previously been produced and stated that she had a trust issue in terms of the respondent's production of the bundle. However, she appeared to confuse separate bundles that had been produced at the disclosure stage and the inevitable fact that, as further documents came to light, they would be added to the tribunal bundle as time went on.

22. The claimant identified one document which she said had been taken out of the bundle by the respondent but should not have been, namely her CV. The judge said that, in his pre-reading, he had seen the claimant's CV in the bundle and Ms Twomey also confirmed that it was there. The judge reminded the claimant that he had told the parties that, if they could not agree on any further documents that needed to go in, the claimant should produce an extra bundle. The claimant then said that there were only three extra documents which she wanted to add (two "timeline" documents which the claimant had produced and a paper which she had put annotations on (the original paper being in the bundle already)). The judge said that, if the claimant wished to adduce these, she should put them together in a bundle and send them to the tribunal and specifically to the clerk assigned to this case. The claimant said that she would do so. Subject to this, the bundle which the tribunal had was effectively agreed.

23. In fact, no such documents were sent by the claimant to the tribunal.

24. At one point during the claimant's evidence, it became clear that there was an additional email with an application attached to it which the respondent was not aware of and which was not in the bundle. This was duly located and the respondent provided copies of it which were by agreement added to the bundle as pages 2131-2138.

Transcript bundle

25. The transcript bundle contained transcripts of various meetings and conversations which the claimant had had with the respondent (including the informal investigation meeting, her grievance hearing and the two parts of her grievance appeal hearing) which the claimant had herself covertly recorded.

26. Although during the hearing the claimant continued to pursue elements of her case which were at odds with what was set out in these transcripts, Ms Twomey clarified that the recordings had been provided to the respondent by the claimant and the respondent had then got an independent transcription firm to produce the transcripts; the claimant accepted that this was the case.

27. It was, therefore, likely that the transcripts were a very accurate record of exactly what had been said that these various hearings.

Pre-reading

28. At the start of the hearing, the judge discussed with the parties the extent of the pre-reading which the tribunal should do. The judge explained that, ordinarily, the tribunal would read the witness statements and any documents in the bundle to which the witness statements referred, but would not read the entirety of the bundle, as tribunal bundles were frequently lengthy and contained a lot of information which was not necessary for the tribunal to read. He confirmed that the tribunal would proceed on this basis.

29. However, he also noted that, whilst the respondent's original "recommended reading list" contained only a small number of documents (and Ms Twomey confirmed that, if the tribunal was going to read all of the documents referred to in the witness statements, that would cover all the documents on the respondent's reading list as well), the claimant had produced a further version of this recommended reading list which had added a list (which extended some 15 pages) of additional documents to read.

30. This looked like an enormous amount of additional reading and the judge wanted to be sure that it was necessary for the tribunal to read this. The claimant said that it was not necessary, and she identified instead a number of documents which she considered were necessary to read, principally the notes of the various meetings and the transcripts. It was, therefore, agreed that the tribunal would read these documents but would not go through the 15 page list which the claimant had added to the recommended reading list (although it was acknowledged that it was likely that a lot of that documentation would be covered in the reading which the tribunal was going to do anyway).

31. The tribunal proceeded on this basis: it read in advance all of the witness statements and the documents to which they referred; and, to the extent that they were not referred in the witness statements, it read all of the notes of the informal meeting, the grievance meeting and the two parts of the grievance appeal meeting, including the entirety of the 322 page transcript bundle.

Timetable

32. A timetable for cross-examination and submissions was agreed between the tribunal and the parties at the start of the hearing. This was largely based on a provisional timetable which had been set out in the note of one of the case management preliminary hearings.

33. Certain adjustments to the witness order were agreed to accommodate witness availability.

34. At the start, Ms Twomey explained for the claimant's benefit the order in which the respondent's witnesses would be called.

35. The timetable was for the most part adhered to and indeed the hearing finished in 10 days rather than the full 11 days.

Adjustments

36. Ms Twomey explained, before one of the respondent's witnesses started giving evidence, that that witness was dyslexic. She accordingly asked whether she could have some pieces of blank paper to write on by way of an adjustment. The judge explained that this was a common adjustment where a witness had dyslexia. The claimant said that she did not object and the tribunal allowed this adjustment.

37. In fact, when the claimant came to give evidence, she asked whether she could take notes as she was answering her questions. Although this was not an adjustment by reason of a disability, there was no objection to this and the claimant was permitted to do this to the extent that she wanted to, provided that it did not interfere with the smooth running of the hearing. As it turned out, the claimant did not appear to take many notes when she was giving evidence. Rather, her partner, Mr Fagan, who was there throughout her evidence, appeared to be taking notes for her.

Management of the hearing

The claimant's evidence

38. The judge had to interject on many occasions during the claimant's evidence. Frequently, this was to remind her to answer the questions which were being put to her and not to go off on tangents on matters which she wanted to tell the tribunal about, but which were not relevant to or in answer to the questions which she was being asked.

39. He also had to interject repeatedly to remind her not to start answering the question before the question had been completed, which she did a lot; it often seemed as if the claimant was not really listening to the question but was saying what she wanted to say in any event, regardless of what she was being asked.

40. The claimant also had a tendency to assert as fact matters which were simply her assumption and there were a number of occasions when the judge had to interject to clarify whether what the claimant was saying really was something which was within her knowledge or was simply making an assumption (and it was usually the latter).

41. In addition, the claimant had a tendency to misrepresent things which were set out in documents and the judge had to interject to correct this on a number of occasions. To be clear, we do not consider that the claimant was deliberately misrepresenting these matters; rather, she had a fixed view of what she thought had happened which she would not depart from, whatever the evidence to the contrary was, and she appeared in her mind (consciously or unconsciously) to view various documents as being supportive of that view, when in fact they were not.

The claimant's cross-examination of the respondent's witnesses

42. During the claimant's cross-examination of the respondent's witnesses, the judge gave the claimant a lot of leeway in terms of the relevance and focussed nature of her questions. However, when she dwelt on matters which were of no or limited relevance to the issues which the tribunal had to determine, he eventually interjected to say so and to request her to focus on matters which were relevant. The claimant had a tendency to dwell on matters which were of interest to her but of no relevance to the issues of the claim which the tribunal had to determine. On many occasions, the judge had to intervene to explain that, whilst these matters may be of considerable interest to her, cross-examination on these topics would not assist her case or assist the tribunal in determining her case.

43. The claimant's tendency to misrepresent matters and to present as facts things which were merely her assumptions was an issue of concern here too; the judge had to interject on many occasions to explain that what was being put to the witness was an assumption and not a fact, in order to avoid that witness being misled. Similarly, the claimant would assert that something had been said at a meeting when it had not been. She did this so frequently that, when she did put to a witness something she asserted had been said, the judge felt the need to ask her to go to the relevant section of the transcript of the meeting in question in order to clarify the accuracy of what she was putting to the witness; whilst the claimant generally could not find these references, Ms Twomey assisted in finding the transcript page references for her; and on large numbers of occasions, it turned out that what the claimant had stated had been said was materially different to what the transcript actually said.

44. Given the lack of relevance of large chunks of the cross-examination, the judge reminded the claimant at intervals of what the judge had said at the start of the hearing; that, whilst the tribunal would not be prescriptive as to exactly how much time the claimant spent with each witness, there was a limit to the amount of time she could have, which had been agreed at the start of the hearing in relation to the agreed timetable, and that she would not be permitted to exceed that, particularly if the reason why was because she had spent a large amount of cross-examination time asking questions about irrelevant matters.

Submissions

45. At the start of the hearing, the judge explained how the hearing would run, including what cross-examination was and what submissions were.

46. Both parties produced written submissions, which the tribunal read in advance of hearing their oral submissions. The tribunal was about to hear the parties' oral submissions, when the claimant explained that she had marked up the respondent's written submissions document with separate comments of her own in a separate column and indicated that she would like the tribunal to read these. Ms Twomey did not object. The hearing therefore adjourned for a further half an hour in order to enable the tribunal and Ms Twomey to read these comments.

47. Although the judge had explained that submissions was not an opportunity to adduce further evidence but, rather, an opportunity to sum up based on the evidence which had been heard why the party in question considered that it should win its case on the issues, the comments on the respondent's submissions provided by the claimant contained further assertions and allegations which had not been made during the evidence. The judge therefore reiterated that the tribunal could not take these into account.

48. The tribunal then heard the parties' oral submissions. In her oral submissions, the claimant again made a number of assertions including assertions of fact which had not been part of the evidence. The judge again, therefore, explained that the tribunal could not take these into account.

49. The judge then indicated that the tribunal would adjourn to consider its decision with a view to giving that decision and the reasons for it orally at the hearing. Just before it did so, Ms Twomey indicated that it was likely that the respondent would in any event be making a costs application after the tribunal had delivered its oral judgement. As she had done this, the judge decided, for the benefit of the claimant, briefly to set out how the costs regime in the employment tribunal operated, so that she would be better prepared for the application which Ms Twomey had indicated that she would be making. This included the judge explaining that the tribunal may, but was not obliged to, take into account the financial means of the paying party in relation to any costs application and suggesting to the claimant that she should therefore bring evidence of her financial means (including details of her assets and income and liabilities) when the hearing reconvened.

Decision

50. After the evidence and submissions, the tribunal adjourned to consider its decision. When the hearing reconvened, the tribunal gave its decision and the reasons for that decision orally.

Findings of fact

51. We make the following findings of fact. In doing so, we do not repeat all of the evidence, even where it is disputed, but confine our findings to those necessary to determine the agreed issues. We begin with an overview of the facts, before going on to make our more detailed findings of fact.

Overview

52. The claimant commenced employment with the respondent NHS Trust on 30 April 2018. She remains employed by the respondent.

53. At the times relevant to the issues of this claim, the claimant was employed as a Band 5 Executive Assistant ("EA"), initially to two directors of the respondent: namely, Joanna Moss, the Director of Strategy and Business Development; and Kieran McDaid, the Director of Estates, Capital and Major

Projects. Ms Moss left the respondent's employment in October 2022 and was not replaced; after she left, the claimant remained as a Band 5 EA to Mr McDaid.

54. At the start of 2022, the claimant was one of a number of EAs to directors of the respondent. Whilst they worked predominantly for their respective directors on a day to day basis, their line manager was Ms DB, who was the EA to the Chair and the Chief Executive Officer ("CEO") of the respondent (the two most senior individuals at the respondent). Ms DB's role was a Band 7 role.

55. For reasons which we will come to, and following Ms DB's resignation from the respondent in the spring of 2022, the respondent decided on a 6 month interim basis to split Ms DB's role into two separate roles (each at Band 6); these were, firstly, EA to the Chair and CEO; and, secondly, Committee Manager; and to allow the other EAs the opportunity to apply for either or both of these roles.

56. The claimant applied for both of these roles. She was not appointed to either of them. It is that appointment process which forms the basis of her age discrimination complaints.

57. The panel which carried out interviews and made the decisions in relation to the appointments to these roles in June 2022 consisted of Mr Macmillan, Ms Johnson and Mr Jamie O'Callaghan, who was the Interim Head of Corporate Governance.

58. The claimant subsequently raised concerns about these appointment processes in an email of 8 August 2022 to Ms Tessa Green, the Chair of the respondent. This email constitutes the first of the "protected acts" for the purposes of the claimant's victimisation complaints.

59. The respondent considered these concerns under its grievance procedure, firstly at the informal stage, at which a fact-finding exercise was conducted by Ms Hassan. Ms Hassan conducted a fact-finding meeting with the claimant on 30 August 2022. The claimant covertly recorded the meeting, the transcript of which is in the transcript bundle.

60. On 26 September 2022, Ms Hassan issued her fact-finding report.

61. On 4 October 2022, the claimant went on to bring a formal grievance. Her grievance was heard by Ms Muchemwa, who met the claimant on 3 November 2022. The claimant covertly recorded this meeting, the transcript of which is in the transcript bundle.

62. On 14 November 2022, Ms Muchemwa issued her grievance outcome. She upheld the claimant's grievance in one respect but did not uphold the remainder of the grievance.

63. The claimant commenced ACAS early conciliation on 21 November 2022 and this completed on 23 November 2022.

64. On 23 November 2022, the claimant appealed against the outcome of her grievance. This constitutes the second of the "protected acts" for the purposes of the claimant's victimisation complaints.

65. On 20 December 2022, the claimant issued her employment tribunal claim.

66. The grievance appeal was heard by a panel chaired by Ms Phul. The grievance meeting, which overran considerably, took place on 20 January 2023 and 30 January 2023. The claimant covertly recorded both parts of the grievance appeal meeting, both of which transcripts are in the transcript bundle.

67. On 20 March 2023, Ms Phul issued her outcome letter to the claimant's grievance appeal. She upheld the grievance appeal in one respect but did not uphold it in all other respects.

Reliability of evidence

68. Before going on to make our more detailed findings of fact, we make some findings about the respective reliability of the evidence of the claimant and the respondent's witnesses. This is relevant to areas where there is a conflict of evidence between the claimant and the witnesses of the respondent.

The claimant

69. We have serious concerns about the reliability of the claimant's evidence. The claimant was not a straightforward witness. As we have already noted, the judge frequently had to remind the claimant to answer the questions which were being put to her and not to go off on tangents on matters which she wanted to tell the tribunal about, but which were not relevant to or in answer to the questions which she was being asked. He also had to interject repeatedly to remind her not to start answering the question before the question had been completed, which she did a lot; it often seemed as if the claimant was not really listening to the question but was saying what she wanted to say in any event, regardless of what she was being asked.

70. The claimant also had a tendency to assert as fact matters which were simply her assumption and there were a number of occasions when the judge had to interject to clarify whether what the claimant was saying really was something which was within her knowledge or whether she was simply making an assumption (and it was usually the latter).

71. In addition, the claimant had a tendency to misrepresent things which were set out in documents. She seemed to have a fixed view of what she thought had happened which she would not depart from, whatever the evidence to the contrary was, and she appeared in her mind (consciously or unconsciously) to view various documents as being supportive of that view, when in fact they were not.

72. The claimant repeatedly referred to a private WhatsApp chat group between herself and three of the other EA's (Ms JM, Ms AB and Ms TJ), in which they speculated about a variety of matters, including the reasons as to who they thought was likely to be and who was appointed in the appointment processes for the two roles in June and August 2022. Extraordinarily, the claimant seemed to rely on the fact that she and her colleagues speculated about these things as evidence that these things actually happened. She repeatedly referenced that WhatsApp chat as evidence that what she in her mind considered to be the reasons for the appointments were the real reasons. Regardless of the extensive actual evidence to the contrary, she was never deflected from this view.

73. For all these reasons, we have serious concerns about the reliability of the evidence given by the claimant.

The respondent's witnesses

74. By contrast, the witnesses for the respondent were all straightforward. They sought to answer the questions being asked of them, even where, as was the case a lot of the time, the questions put by the claimant were not always clear. They remained consistent in all material respects, both with their own witness statements and the witness statements of the other witnesses of the respondent and with the evidence of the contemporaneous documents.

75. They readily acknowledged when they did not know something or could not remember something or where they had made a mistake. In short, we did not have any concerns about the reliability of the evidence of any of the respondent's witnesses.

76. Therefore, where there is a conflict between the evidence of the claimant and the respondent's witnesses which is not determinable by contemporaneous documents, we tend to prefer the evidence of the respondent's witnesses to that of the claimant.

<u>More detailed findings of fact</u>

The EAs

77. As noted, Mr Macmillan was employed by the respondent as Head of Legal Services and then General Counsel. In February 2022, the previous Company Secretary of the respondent left the respondent and at this stage Mr Macmillan took on the respondent's company secretarial duties as well. The previous Company Secretary had managed the EA function and so, when Mr Macmillan took on those duties, the EA function fell under his responsibility too.

78. Therefore, Ms DB, who was the EA to the CEO and Chair and whose role was at Band 7, reported to Mr Macmillan, albeit this reporting line was for administrative purposes only as, on a day-to-day basis, Ms DB worked for the CEO and Chair.

79. Similarly, the other EAs to directors, including the claimant, reported to Ms DB, albeit they worked primarily on a day-to-day basis for their respective directors. Those other EA's were: the claimant (56 years old at the time); Ms JM (49 years old at the time); Ms AB (50 years old at the time); and Ms TJ (39 years old at the time). Their roles were all at Band 5.

80. In addition, there was a further EA, Ms JP (44 years old at the time), who worked for the Director of Moorfields Private Care. Whilst the claimant repeatedly suggested that Moorfields Private Care was a separate organisation, it is in fact also part of the respondent Trust. Ms JP was also a Band 5 EA who worked for a director.

Nicky Wild's report

81. The general consensus at that time was that the EAs were not happy as a team and were frustrated by a lack of opportunity, development and remuneration. The respondent's CEO, Mr Martin Kuper, therefore decided that the respondent would conduct a review of the current EA support. An HR consultant, Ms Nicky Wild, was asked to conduct the review. She arranged meetings with the EAs and their directors in order to understand the type of support which they and their directorates would need going forwards.

82. Ms Wild produced a report, dated 20 April 2022. It determined that the current EA support structure was not providing optimum support. Ms Wild recommended that the EA team would benefit from a comprehensive review of the structure to provide the EAs with more opportunities to develop their skill sets and progress.

83. Ms Wild's report was provided for management and was never intended to be distributed further. In addition, it also contained some comments taken from her interviews with directors about the EAs, some of which were not complimentary. The respondent did not, therefore, distribute it further and, although some of the EAs asked to see a copy, the respondent refused this.

84. Around this time, in the spring of 2022, Ms DB also resigned. The view of management was that Ms DB's role was an extensive one and that even Ms DB, whose capabilities were highly thought of, found the extent of the duties challenging.

85. Mr Kuper and Mr Macmillan therefore decided that the respondent would split Ms DB's role and create two separate roles of: EA to the CEO and Chair; and Committee Manager. Both these roles would be at Band 6 and they would be advertised as six month interim roles in order to allow the EAs the chance to act up and progress within the team and develop their skills and abilities, thereby responding to some of the concerns outlined by Ms Wild.

86. The roles were advertised as interim to ensure that they could be restricted to the existing EAs given that a permanent post would have required external advertising under the respondent's policies. The aim was to provide the EAs with more structure and opportunities to undertake a more senior role and

develop their skill sets within the team as part of the respondent's response to the issues that had been raised.

87. The respondent did not therefore advertise the roles externally and decided that it would be best to conduct an informal interview process. The respondent was also unsure as to whether this structure was best for the long term, hence the interim solution.

The application process

88. On 6 June 2022, Mr Macmillan emailed the EAs to advise them of the new roles, provide copies of the job descriptions and to inform them that they would be conducting informal interviews. The claimant, Ms AB, Ms TJ, Ms JM and Ms JP were all asked if they would like to express an interest in the new opportunities.

89. At this hearing, the claimant asserted that including Ms JP in the pool of potential applicants was a breach of the respondent's recruitment policy. Although she referred to this repeatedly throughout the hearing and her submissions, it was never clear to us how the claimant thought that the respondent's recruitment policy precluded this, notwithstanding her taking us to various sections of the policy. However, there is nothing in the policy which does preclude this. Furthermore, as Ms JP was also a Band 5 EA to a director, albeit in Moorfields Private Care, we do not consider that there was anything unreasonable about the respondent's including her in the pool of potential applicants.

90. Potential applicants were asked to contact the respondent by way of email if they wanted to be considered for either of the opportunities, setting out which of the positions they would like to be considered for and how they believed they met the requirements within the job description. Of the various applicants, some included CVs and some just an email. The appointments were carried out based on these documents and the answers given by applicants in the subsequent interviews.

91. During this process, the claimant has variously asserted that, rather than using this appointments process, the respondent should have approached her directors and taken feedback from her directors and, furthermore, should have taken into account her performance in an application in relation to a previous separate role which she had applied for earlier in that year (but in relation to which she was not successful). However, the process adopted by the respondent was designed to strip out potential biases that could occur if it had used the approach suggested by the claimant and was designed to assess the candidates on an even playing field basis. It was an entirely reasonable approach for the respondent to take.

92. The claimant also repeatedly asserted that the process adopted was contrary to the respondent's recruitment policy, in particular paragraph 10.2 of that policy which relates to recruitment to acting up roles such as these. Paragraph 10.2 states:

"If there is a post in the department which is supported by a single deputy, then the deputy should be given first consideration for acting up, irrespective of the length of the acting-up period….

If there is no obvious deputy or more than one deputy, the manager is required to ask for expressions of interest via the Recruitment Team for a minimum of five days."

93. The claimant asserted that she was Ms DB's deputy. However, the reality was that, on occasions when Ms DB was on holiday, she may have directed people to contact the claimant in her absence. There was, however, no formal "deputy" arrangement in relation to the claimant being Ms DB's deputy. The respondent's witnesses, including Ms Johnson, who as a member of HR was familiar with the recruitment policies and their meaning, stated that, for this part of the respondent's recruitment policy to apply, there would need to be a formal deputy arrangement. There was not. Therefore, the first paragraph of clause 10.2 of the policy did not apply in this case and the requirement under the policy was therefore to ask for expressions of interest, which the respondent did. The respondent was not, therefore, in breach its recruitment policy.

94. The respondent received the following applications.

95. Ms JM and Ms AB applied for the Committee Manager role.

96. Ms TJ and Ms JP applied for the EA role.

97. The claimant applied for both roles.

Interviews

98. As noted, the interview panel consisted of Mr Macmillan (to whom the EA role would (technically) report); Mr O'Callaghan (to whom the Committee Manager role would report); and Ms Johnson, who was available to provide HR support during the process. Mr Macmillan had overall responsibility for the panel and therefore would have been the final decision-maker had there been any disagreement between the three members of the panel; however, in the end, the decisions taken by the panel were unanimous, so he never needed to do this. It was also agreed that the CEO and Chair would need to be satisfied with the panel's choice for the EA role, given that the person holding that role would be working mainly for them.

99. All candidates who expressed an interest in either role were interviewed by the panel on 22 June 2022.

100. The candidates for all interviews were each asked the same four questions, followed by probing or follow-up questions depending on their answers to the original questions. The claimant has disputed that she was asked four questions. However, the four questions asked are clearly set out at the top of the typed notes of the interviews produced by Ms Johnson, which we refer to below. Furthermore, one of the claimant's assertions about the questions was that only two questions were asked; however, it is clear that any misunderstanding in this respect is based on an incorrect answer which Mr

Macmillan gave to Ms Hassan in her fact-finding exercise where he indicated in an email that two questions were asked; Mr Macmillan acknowledged, however, that this was a mistake and that four questions were in fact asked. That too was the evidence of Ms Johnson at this hearing. We have no reason to doubt that and it is backed up by the reference to the four questions in Ms Johnson's typed notes of the interviews and we, therefore, accept that four questions were asked.

101. We return to the panel's assessment of the candidates in a moment but, in summary: the panel determined that Ms JM was "appointable", and she was therefore appointed to the Committee Manager role for which she had applied; the panel determined that Ms JP was "appointable", and she was therefore appointed to the EA role for which she had applied; the panel determined that Ms AB was "appointable", but she was not appointed to the Committee Manager role for which she had applied (as Ms JM was appointed to that role); and the panel determined that neither the claimant nor Ms TJ were appointable to any of the respective roles that they had applied for.

102. As the process was an informal one for interim positions, there were no detailed score sheets of the interviews produced. Ms Johnson took handwritten notes of the interviews which, shortly after the interviews took place, she typed up into a typed document, which was in the bundle. This document was intended to supersede her manuscript notes, is more comprehensive than the manuscript notes and was intended to replace them. The manuscript notes were disclosed late in the tribunal process and only because Ms Johnson happened to come across the old notebook which contained them when she was clearing her loft when she moved house in March 2024.

103. The claimant has variously asserted at this hearing that Ms Johnson's typed notes were either fabricated or put together at a much later date than she claimed. She appears to have leapt to this conclusion because she herself did not see a copy of those notes until the grievance appeal stage in February 2023. However, she eventually acknowledged that Ms Muchemwa had seen these typed notes in November 2022 at the grievance stage and so they must have been in existence at least at that point (and, as the notes contain comments about the other candidates as well, it is neither surprising nor unreasonable that Ms Muchemwa viewed them herself in determining the claimant's grievance but did not send the document on to the claimant). Typically, the claimant had no evidence beyond her own assertion as to the provenance of the notes. We have no reason to doubt the evidence of Ms Johnson (or Mr Macmillan who corroborated it), and accept that the typed notes were produced, in the form set out in the bundle, shortly after the interviews took place in June 2022.

104. After the candidates have been informed of the outcome of their applications, the claimant met Mr O'Callaghan to obtain feedback on her application. She covertly recorded their conversation and a transcript of that conversation was in the transcript bundle.

Selection

105. We were taken in detail to the contents of the applications and CVs for the candidates and the interview notes of Ms Johnson. Whilst it is not necessary to document all of the differences between the candidates, it is clear from an analysis of those documents that, based on those documents, the candidates who were graded as "appointable" to the roles were better candidates than the claimant.

106. Throughout this hearing, the claimant has persistently sought to argue that there was information about her skills and abilities from other sources which meant that she was a better candidate than those selected; however, regardless of whether or not that is true (and, as noted, we are sceptical about bare assertions made by the claimant), that is not what the claimant was being judged on; the June 2022 process of appointing candidates was based on the applications/CVs and interview performance only.

107. The panel's determination that the claimant was not appointable to either role was based on the following reasons. The claimant had made it clear on multiple occasions both before and during the interview that she wanted to stay in her current role (working for Ms Moss and Mr McDaid) and take on some additional aspects of the new role and to be "upbanded" as a result. This was further evidenced by the claimant's own comments during her feedback meeting with Mr O'Callaghan where she stated *"it's a bit late in the day for me to do anything… other skills set, it was banding up so I thought I would apply for it anyway*" and *"I felt I had to apply but I wanted to continue working for Jo [Moss]"*. The claimant was not enthusiastic about the new roles at interview. This was further evidenced by the claimant's own comments during her feedback with Mr O'Callaghan where she stated *"I was not overawed about either of roles"* and *"to be perfectly honest I was not enthusiastic about either job"*. As Ms Johnson's typed notes record, the claimant stated at the interview that *"the reason she was applying was for a grade increase. No other reason given*."

108. The impact of this was that the panel were left with the overall impression that the claimant was applying for the roles for the wrong reasons, in other words in order to be "upbanded", rather than demonstrating a real interest in carrying out either role. Mr MacMillan candidly accepted that the claimant was *"more enthusiastic"* for the EA role than the Committee Manager role but that, while she did show slightly more enthusiasm for the EA role, this was starting from a very low base. The evidence of Mr Macmillan and Ms Johnson at this tribunal, which we have no reason to doubt and therefore accept, is directly reflective of the feedback which Mr O'Callaghan gave the claimant shortly after the interview (of which we have the verbatim transcript in the bundle); Mr Callaghan stated *"you just wanted it because of the band increase"* and *"the whole reason I never put you forward for the governance one was because I did not think you were that interested in it and two people showed they were really really interested"*.

109. Furthermore, in relation to the Committee Manager role, the claimant did not meet some of the essential criteria for the role, specifically she did not

demonstrate thorough knowledge of governance and/or knowledge of governance and regulatory policies and/or thorough knowledge of relevant legislation and statutory documentation and its application. In her application, she did not give examples of project work; did not demonstrate experience of corporate governance such as responding to requests from auditors, CQC and regulators; did not give an example or demonstrate experience dealing with sensitive and confidential information; did not demonstrate any experience of policy development and working within the confines of acts and codes of governance/trust constitution. At interview the claimant referred to the role as *"relaying messages between the committee and legal team"*; the panel felt this demonstrated an unclear understanding of the role.

110. By contrast, both Ms JM and Ms AB (who applied for the Committee Manager role) demonstrated both in their applications and at interview many of the qualities required; it is not necessary to repeat all of them here and we do not, but they were summarised in Ms Twomey's submissions. Indeed, the claimant herself told us in her evidence that the applications of Ms JM, Ms AB and Ms JP were *"perfect"*. She went on to assert, again and, as was so often the case, without any evidence, that they had been given assistance with their applications, which we do not all accept was the case. However, the claimant's own admission that their applications were "perfect" severely undermines her case that the reasons why they were graded as "appointable" were not because of the quality of their applications/answers at interview but were for other reasons such as age.

111. In short, having reviewed all the evidence, it is clear that, when compared with the other two candidates who applied for the Committee Manager role (Ms JM and Ms AB), the claimant's application and interview was significantly weaker.

112. Similarly, in relation to the EA role, the claimant's lack of interest in the role and focus on "upbanding" was also a significant reason why she was not graded as appointable. In addition, on the evidence of the application and interview, the example that the claimant provided in relation to the EA role did not demonstrate a high level of administrative support; she did not demonstrate experience of the processes and duties that come with managing a team (such as one-to-one's and appraisals and performance development); and the claimant stated that her priority would be onboarding the agency backfill and upbanding the EAs rather than prioritising supporting the EA team to deliver what they needed for the executives they supported.

113. By contrast, in her expression of interest, Ms JP demonstrated experience as a clinic manager where she managed a team of four administrative staff, including recruiting, training new staff, regular one-to-one's, appraisals and recognising the need for ongoing training. Line management was a crucial part of the EA role.

114. Again, having reviewed the documents and interview notes, it is clear that the claimant's application and interview were significantly weaker than those of Ms JP.

115. Both Mr Macmillan and Ms Johnson gave evidence that they were unaware of the specific ages of each of the candidates at the interviews; it was not something that they thought about when they were doing this process. We have no reason to doubt that and we accept it; the age range of the various candidates was from 39 (Ms TJ) through to 56 (the claimant) and it is indeed only these two candidates (in other words the youngest candidate and the oldest candidate) who were not marked as "appointable" to the jobs they applied for. There is no evidence that either Mr Macmillan or Ms Johnson were focusing on age rather than on the criteria for the jobs and we accept that how old the various candidates were was not something that was in their minds when they were carrying out the exercise.

August 2022 changes

116. In late July 2022, Ms JP decided to step down from the EA role and return to her previous role.

117. The respondent initially considered finding a replacement for Ms JP from an agency. However, because the EA role supported the two most senior people within the respondent, the respondent considered that the post needed to be filled quickly and by someone internal who was already familiar with the respondent's processes and personnel. None of the other applicants in the June 2022 appointment process for the EA role had been graded as "appointable". The only two applicants for the Committee Manager role who had been graded as "appointable" were Ms JM, who had taken that role, and Ms AB.

118. Mr Macmillan consulted with Mr Kuper, the CEO, and Ms Sandi Drewett, the Director of Workforce, who wanted to act more quickly. It was therefore decided that they would speak to Ms JM and see if she would like to undertake the EA role and they could then move Ms AB into the Committee Manager role given that she was deemed to be appointable to this position during the interview process. Ms JM and Ms AB agreed to this.

119. On 4 August 2022, Mr Macmillan emailed the EA team to confirm that Ms JP was returning to her previous role; Ms JM would be moving into the EA role; and Ms AB was appointed to the Committee Manager role.

120. The claimant has repeatedly alleged that this process was in breach of the respondent's recruitment policy. Again, it was never clear to us in what way the claimant felt that it did breach the policy. However, clause 8.6.2 of the policy specifically states that:

"If within three months of the recruitment process being completed… an additional vacancy becomes available, hiring managers can appoint to the additional position using the existing pool of candidates providing the following contract details are the same: tenure of contract; grade; post hours; and location.

121. It seems, therefore, that the recruitment policy specifically provided the ability to do exactly what the respondent did in this instance. There was, therefore, no breach of the respondent's recruitment policy. Furthermore, leaving

the policy aside, it was an entirely reasonable thing to do in the circumstances: both candidates were "appointable"; there was a need for this change to be implemented quickly; and it would not be reasonable to expect the respondent to carry out an entirely new selection and interview process when one had been carried out only just over a month previously.

The claimant's grievance

122. As noted, the claimant then raised concerns with the Chair of the respondent, Ms Tessa Green, by an email of 8 August 2022. Whilst the email runs to around three pages, it is essentially a complaint about what the claimant saw us the unfairness of the recruitment process for the EA and Committee Manager roles.

123. The respondent has conceded that this email amounts to a protected act; and that concession applies. However, we are not convinced that it is actually a protected act. At one point, the claimant states in the email *"Personally, in my opinion this could be seen as bullying, discrimination, favouritism and harassment on every level…"*. However, she never states what sort of *"discrimination"* she considers was involved in the process and does not mention age at any point. Litigants in person commonly use expressions such as *"discrimination"*, *"harassment"* and *"victimisation"* in a generalised sense to mean simply unfair treatment without indicating a specific alleged breach of the Equality Act 2010, which is what is required to amount to a protected act. Furthermore, the generic quote which the claimant includes at the end of her email (*"The Equality Duty ensures that all public bodies play their part in making society fairer by tackling discrimination and providing equality of opportunity for all"*) is merely a statement of principle and does not amount to an allegation of a breach of the Equality Act 2010.

124. The respondent has, however, made that concession.

125. However, what is striking about the email is there is no reference to age discrimination at all.

126. Indeed, as the grievance process progressed, what is striking in the light of the claim now brought is the continued absence of an allegation of age discrimination. During the grievance hearing on 3 November 2022, Ms Muchemwa specifically asked the claimant about the reference to discrimination in the grievance. The exchange is worth setting out in full:

OM - *"are you saying Jannette that you feel personally discriminated against because of this process, or harassed, and if you're saying you were, on what grounds would you think that discrimination or harassment is based on?"*

C - "*I think this is an unfair process and that is the grounds for my comments"*.

OM - *"ok because sometimes when we talk about less favourable treatment, we talk about protected characteristics, don't we? We talk about I wasn't given this role because this person was this and I wasn't, or this person has…"*

C - *"well I could go down that road but that's not my nature, my nature is… you know I'm not going to make things up that have not happened".*

127. Not only does the claimant not make any allegation of age discrimination but she implies that, in order to make an allegation of specific discrimination, she would have to *"make things up that have not happened"*. Therefore, even during the grievance process itself, we find the claimant herself did not consider that what had happened amounted to age discrimination; rather she just felt that the process was unfair.

128. This is further borne out by the fact that the claimant was not the only person to raise a grievance about the process; Ms TJ also raised a grievance about the alleged unfairness of the process. The claimant accepted that her complaint about the recruitment process was substantially the same as Ms TJ's. That is evident from a letter sent by the claimant to the tribunal (at page 1155 of the bundle) in which she states *"My colleague and I had tried to submit a joint grievance but were subsequently told by the organisation that it was not possible to do this and that both grievances would be heard separately. However, both these grievances were over the same issue, that of the unfair recruitment process to the [EA and Committee Manager roles]"*.

129. Ms TJ was the youngest of the candidates and the claimant the oldest; it is, therefore, likely that both of them simply thought that the process was unfair rather than either of them considering that it was because of age.

130. The claimant has provided no explanation for why she considers the panel would want to appoint a weaker candidate aged either 44, 49 or 50 years old, as opposed to appointing a stronger candidate aged 56. Furthermore, given the appointment was only for a 6 month interim period, the claimant has put forward no credible explanation for why the panel would not appoint the claimant because of her age. It has not been suggested, for example, that the panel considered the claimant may retire within the 6 month period.

Further assertions by the claimant

131. Finally, the claimant made a number of bare assertions which were not backed up by any evidence. These included: that Ms DB had promised the EA role to "her friend" Ms JP; that Mr Kuper had already asked Ms JM to be his EA on 17 May 2024; that Ms AB had complained about the Nicky Wild report and had only been appointed to the Committee Manager role because she had done so; that Nicky Wild already knew in April 2022 what the respondent was planning to do, ie to appoint Ms JP and Ms JM into the two roles and to appoint Mr RB as Mr Spencer's EA; and that Mr Spencer was involved in all the recruitment processes and was working with Mr Macmillan to appoint Ms JP and Ms JM.

132. We don't accept any of these: they are bare assertions, not backed up by evidence; to the extent that they were put to the respondent's witnesses, they were denied; many of them contradict each other; and some of them don't make any sense; for example, why would Mr Kuper promise Ms JM the EA role in May

2022 when she was in fact originally appointed to the Committee Manager role (he couldn't know that Ms JP would subsequently step back from the EA role such that it could then be filled by Ms JM); how could Ms DB promise Ms JP the EA role when she had already left the respondent before the appointment process started and was not therefore involved in it? Furthermore, the claimant accepted in cross-examination that these assertions were speculations on her behalf, although still maintaining that she believed that they happened.

133. However, more significantly, none of these alleged reasons for the appointments, however underhand they might be if they were the real reasons, are because of the claimant's age. The fact that the claimant makes them therefore undermines her age discrimination allegations even further.

The claimant's grievance appeal

134. As noted, the claimant appealed against the grievance outcome in a letter dated 23 November 2022. This is the second protected act on which the claimant relies for the purposes of her victimisation complaints (or, at least, those allegations of victimisation which post-date 23 November 2022).

135. The respondent has accepted that this was a protected act. Whilst we are again bound by that concession, we are not sure whether we agree with it; whilst the letter sets out a number of grounds for appeal and references again the alleged unfairness of the process, it does not make an allegation of a breach of the Equality Act 2010 (whether an allegation of age discrimination or otherwise).

Victimisation fact finding

136. We leave some of our specific findings of fact relating to the victimisation allegations until the conclusions we make on those allegations. Their self-contained nature means that it will be easier to follow if the facts and conclusions sit next to each other in respect of those allegations.

The Law

Direct age discrimination

137. Under section 13(1) of the Equality Act 2010 ("the Act"), a person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others (direct discrimination). Age is a protected characteristic for these purposes.

138. For the purposes of the comparison required in relation to direct discrimination between B and an actual or hypothetical comparator, there must be no material difference between the circumstances relating to B and the comparator.

Victimisation

139. Section 27 of the Act provides that a person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act or A believes that B has done, or may do, a protected act.

140. Protected acts include the bringing of proceedings under the Act; giving evidence or information in connection with proceedings under the Act; doing any other thing for the purposes of or in connection with the Act; or making an allegation (whether or not express) that A or another person has contravened the Act. However, giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

141. An employer (A) must not discriminate against or victimise an employee of A's (B) by subjecting B to any detriment. Detriment can be anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage. However, an unjustified sense of grievance alone would not be enough to establish detriment.

Burden of proof

142. In respect of the above provisions, the burden of proof rests initially on the employee to prove on the balance of probabilities facts from which the tribunal could decide, in the absence of any other explanation, that the employer did contravene one of these provisions. To do so the employee must show more than merely that she was subjected to detrimental treatment by the employer and that the relevant protected characteristic applied; there must be *"something more"* to indicate a connection between the two (Madarassy v Nomura International plc [2007] IRLR 246). If the employee can establish this, the burden of proof shifts to the employer to show that on the balance of probabilities it did not contravene that provision. If the employer is unable to do so, we must hold that the provision was contravened and discrimination or victimisation did occur.

143. However, if the tribunal can make clear positive findings as to an employer's motivation, then it need not revert to the burden of proof (Martin v Devonshires Solicitors [2001] ICR 352 (EAT)).

Time extensions and continuing acts

144. Section 123(1) of the Act provides that proceedings 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 tribunal thinks just and equitable. The period is extended in relation to periods of time spent on ACAS early conciliation.

145. Section 123(3) provides that, for these purposes, conduct extending over a period is to be treated as done at the end of the period. In Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96, the Court of Appeal held that the burden is on the claimant to prove, either by direct evidence or by

inference from the primary facts, that 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".

146. The tribunal has a very wide discretion in determining whether or not it is just and equitable to extend time. It is entitled to consider anything that it considers relevant. However, it is for the claimant to persuade the tribunal that it is just and equitable. There is no automatic presumption that it will be extended. The exercise of discretion is thus the exception rather than the rule (Robertson v Bexley Community Centre [2003] IRLR 434 CA).

Explanation of the law

147. The judge, for the benefit of the claimant, gave a brief explanation at the start of the hearing of how the law worked in relation to time limits, direct age discrimination and victimisation.

148. He returned to this at times during the hearing in order to explain to the claimant what she needed to demonstrate and focus on in order to establish her claim on the agreed issues. He did this in particular on the many occasions when the claimant appeared to be drifting away from the focus on the issues of her claim.

Conclusions on the issues

149. We make the following conclusions, applying the law to the facts found in relation to the agreed issues.

Direct age discrimination

150. We accept, as the respondent does, that the claimant's not being appointed to either of the two roles for which she applied amounts to detrimental treatment.

151. However, we have set out in our findings of fact above the reasons for the two appointments in June 2022 and in early August 2022 and we cross-refer to those findings in full. We are able to make a clear factual finding that the reasons for those appointments were in no sense whatsoever because of the claimant's age.

152. Rather, the June 2022 appointments were made because the panel unanimously considered that the candidates whom they appointed were, based on the application and interview process, the candidates most suited to the roles.

153. Furthermore, in the light of Ms JP's subsequent decision to return to her original role, the decisions in August 2022 to appoint Ms JM and Ms AB to the EA and Committee Manager roles respectively were because they had both been considered "appointable" in the application/interview process (whereas the claimant had not).

154. All four of the claimant's complaints of direct age discrimination therefore fail.

155. Alternatively, applying the burden of proof, the claimant has not established any facts which could indicate that the reason for any of these appointments was her age; and, even if she had done so, the respondent has established fully non-discriminatory reasons for its decisions.

Comparators

156. For completeness' sake, we address the issue of whether the five comparators relied on by the claimant (Ms JP, Ms JM, Ms AB, Ms TJ and Mr RB) were in fact appropriate comparators.

157. As the respondent accepts, Ms JP and Ms JM were appropriate comparators for the purposes of the June 2022 recruitment exercise. They were both Band 5 EAs to directors who applied in that recruitment round for roles which the claimant also applied for. Their circumstances were therefore not materially different to those of the claimant.

158. Contrary to the respondent's submission, we consider that Ms AB was an appropriate comparator for the June 2022 recruitment process because she was a Band 5 EA to a director who applied in that recruitment round for one of the roles which the claimant also applied for. Her circumstances were, therefore, not materially different to those of the claimant. However, the fact that she is a valid comparator does not help claimant because there was no difference in treatment between them; neither of them were selected for the post of Committee Manager in June 2022.

159. Similarly, as the respondent accepts, Ms AB was an appropriate comparator in relation to the August 2022 recruitment process.

160. We accept the respondent's submission that Ms JM was not, however, an appropriate comparator for the August 2022 recruitment process because at that time she was an interim Band 6 Committee Manager, and was not in a comparable role to the claimant. The circumstances were therefore materially different.

161. For similar reasons to those set out above, we consider, contrary to the respondent's submission, that Ms TJ was an appropriate comparator to the claimant in relation to both the June and August 2022 appointments for the EA role (but not the Committee Manager, which Ms TJ did not apply for); both of them were Band 5 EAs reporting to directors who applied for the EA role. However, this does not assist the claimant because there was no difference in treatment between the claimant and Ms TJ; neither of them were appointed to the EA role (or indeed the Committee Manager role) in either process.

162. Finally, we accept that Mr RB is not an appropriate comparator for either recruitment process because he was a Band 4 employee and was not an

applicant for any of these roles. His circumstances are therefore materially different to those of the claimant.

Victimisation

Protected acts

163. As noted, the respondent accepts that each of the two protected acts relied on by the claimant were protected acts, namely her email of 8 August 2022 to Ms Green and her grievance appeal letter of 23 November 2022.

164. We turn then to the individual allegations of victimisation in the list of issues. As already noted, for the sake of ease of reference, we make any further findings of fact in relation to these alongside our conclusions on these issues.

9.1. Fail to respond and undertake appropriate actions, such as discussing other opportunities with the Claimant, following the Claimants email to Tessa Green on 8 August 2022;

165. This is a somewhat vague allegation, as is the case with a number of the allegations in the list of issues. We make no criticism of this, as it was obviously very difficult over the process of case managing this case to narrow matters down to a list of issues which was capable of being properly understood at all.

166. However, the claimant confirmed during cross-examination that she relied on three opportunities which she alleges were not discussed following her 8 August 2022 email to Ms Green, namely: the Committee Manager role; the EA role; and backfilling Ms JM's original EA role working for Mr Spencer (which, when Ms JM was appointed to the Committee Manager role in June 2022, was subsequently backfilled in July 2022 by Mr RB, who was a Band 4 employee and who was the only individual who applied for that role). The claimant also stated in cross-examination that her complaint was not that she should have been given these roles, but that they should have been discussed with her.

167. The EA and Committee Manager roles had already been filled by 8 August 2022. We do not, therefore, consider that there could be any reasonable purpose in discussing the roles with the claimant at that point and do not consider that it would be detrimental treatment not to do so. However, in any event, these roles were discussed at length with the claimant in a meeting on 22 August 2022 with Mr Macmillan, Ms Johnson, Mr O'Callaghan and the other EAs. The respondent did, therefore, discuss these roles with the claimant. Furthermore, the claimant discussed these roles at length during her grievance and grievance appeal hearings. As the roles were discussed with the claimant, the factual allegation is not made out and this part of the complaint fails at the first stage.

168. As to the backfilling of Ms JM's role, that role had already been filled by Mr RB in July 2022. There was, therefore no point or reasonable purpose in discussing that role the claimant. In any event, the claimant accepted that she did not ask Mr Spencer (or anyone at the respondent) about the possibility of

backfilling Ms JM's former role. A move into Ms JM's former role would in any case have been a "sideways" move for the claimant, as she was already a Band 5 EA to a director (Mr McDaid and Ms Moss, for whom she particularly liked working and indeed with whom she previously clearly indicated that she wanted to stay working).

169. Therefore, while there was no discussion about backfilling Ms JM's role, we do not consider that the absence of a discussion amounted to detrimental treatment and this part of the complaint fails for that reason.

170. In addition, the role was backfilled in July 2022, before the claimant's first protected act on 8 August 2022. Any failure to discuss her taking that role therefore could not be because she made that protected act. This part of the complaint fails for this reason too.

9.2. Fail to provide the Claimant with interview report forms and summary of final selection forms when these were requested on 27 October 2022 and subsequently requested on a number of occasions. The Claimant avers that these have never been received;

171. As we have already found, there were no extensive interview report forms in relation to the June 2022 appointment process. The only such documents which there were and which were available at the time were Ms Johnson's typed interview notes and Mr Macmillan's brief handwritten interview notes. These were provided to the claimant in February 2023 at the grievance appeal stage. The respondent cannot of course provide documents which do not exist. As the available documents were received by the claimant, this allegation fails on the facts at the first stage.

172. Notwithstanding the allegation in the list of issues, the claimant tried to turn this into an allegation that there was a delay in providing her with these documents (as opposed to a complete failure to provide them). We do not consider that it is permissible for us to change the list of issues at this late stage and consider that allegation.

173. However, even if we had done so, we do not accept that there was a delay. The issue arose at the grievance stage and Ms Muchemwa saw these documents. They contained comments about the other candidates as well as the claimant and it was, therefore, entirely reasonable for Ms Muchemwa not to send them to the claimant and the claimant appeared to understand that at the time. When the issue came up again at the grievance appeal, they were provided. There was, therefore, no delay in providing the documents and therefore the allegation is not established on the facts.

174. In any event, the timing of the production of those documents was not because the claimant made her protected acts; rather it was for the reasons already outlined. This allegation fails for this reason too.

175. This complaint therefore fails.

9.3.1. the notes from the original grievance investigation meeting were incomplete and failed to provide an accurate description of what was said including the statements of witnesses who had attended;

176. The claimant alleges that the notes which she was sent from the 3 November 2022 grievance meeting, heard by Ms Muchemwa, were incomplete and inaccurate. However, there were neither incomplete nor inaccurate.

177. They were not a verbatim transcript of the meeting nor were they ever intended to be. They were taken by a separate notetaker and the claimant accepted in cross-examination that there was no obvious reason why that notetaker would draft incomplete notes, describing her as an *"innocent party"*. This process of notetaking was standard at the respondent for notes from a grievance meeting. The claimant did not request the notes to be verbatim. She was subsequently given the opportunity to provide comments on the notes. When she did so, Ms Phul reviewed her document and decided that, although the notes provided by the claimant were more detailed and in full sentences, the substance of the original note was correct. When providing her comments on the notes, the claimant, of course, had the benefit of the recording which she had covertly made of the meeting, which would enable her to include full sentences. When cross-examining Ms Muchemwa, the claimant did not identify any specific parts of the grievance investigation notes which she contended were incomplete or missing and simply suggested that her notes were fuller/longer, which is not in dispute.

178. We do not, therefore, consider the notes provided by the respondent were "incomplete" (in the sense that significant parts of what happened at the hearing were missing from them) or failed to provide an accurate description of what was said. The allegation is not therefore made out on the facts and therefore fails.

179. In any event, the reason the notes were in the form that they were in was because it was standard practice for notetaking within the respondent at such meetings. It was not because of the protected act made by the claimant. This complaint fails for this reason too.

9.3.2. Failure to provide documents that the Claimant had requested throughout the grievance process such as a report produced by Nicky Wild on Executive Administration Support Review. The Claimant avers that this has never been received;

180. Despite the apparent width of this allegation as set out in the list of issues, the claimant's case was limited to the fact that the Nicky Wild report was not provided to her.

181. As we have found, the Nicky Wild report was never intended to be shared more widely than senior management. The claimant had no specific entitlement to see that report. It was a management decision as to whether to share it or not and, given that it contained comments about the EAs by their directors, including EAs other than the claimant, it was entirely reasonable, and

indeed appropriate, not to share it. We, therefore, accept the respondent's submission that, in this context, the failure to provide the report to the claimant did not amount to a detriment. This complaint therefore fails for this reason.

182. Furthermore, the decision not to provide the report (to the claimant and to other EAs) had already been taken and communicated to the claimant prior to her email of 8 August 2022 to Ms Green. This is evidenced by the claimant stating in that email "*"Nicky Wild carried out a review of the exec support office in April and we have all requested sight of that document but have been told it is not possible".* That decision could not, therefore, have been because of the claimant's protected act, because it was taken before that protected act was made. This complaint, therefore, fails for this reason too.

9.3.3. At the grievance hearing on 3 November 2022, Onai Muchemwa (Grievance Manager) deliberately asked leading questions, continually prevented the witnesses from speaking at the hearing and refused to allow a WhatsApp message as evidence;

183. This allegation falls into three categories, which we will take in turn. In the context of all three of them, we have of course read the transcript of the grievance meeting in full and so have been able, on the face of the transcript itself, fully to analyse whether or not the facts of these allegations are made out and, where they are, the context and reasons for them. We should also add that Ms Twomey was scrupulous in taking the claimant to all of the examples in that transcript of where the sort of things which she was alleging might have taken place; for example she took her to all of the questions which Ms Muchemwa asked the witnesses in the context of the claimant's allegation that she asked leading questions of the witnesses. In that context, we do not consider it is necessary for us to set out here every single example in these reasons.

"Leading questions"

184. In the context of "leading questions", we note that very often Ms Muchemwa, quite properly and fairly, set out the context of a question before going on to ask the question itself, and in the majority of cases, the question then asked was open rather than closed (and therefore not leading). Furthermore, we consider that Ms Muchemwa's questions were fair and appropriate in the circumstances and note that investigators often utilise a variety of questions to elicit information/probe/challenge where appropriate. We accept Ms Twomey's submission that the way Ms Muchemwa asked questions was not capable of amounting to a detriment. This aspect of the complaint therefore fails for this reason.

185. Furthermore, we similarly accept that the way Ms Muchemwa conducted the meeting was not because the claimant raised a grievance. The reason she provided context prior to asking questions was to enable a witness to understand the background and relevance of the question. The reason she asked these questions as she did was, therefore, not because of the claimant's protected act. This aspect of the complaint also therefore fails for this reason.

"Preventing witnesses from speaking"

186. As to the allegation of preventing witnesses from speaking, we do not accept that Ms Muchemwa did this. She did interject on some occasions, but these occasions were, for example, when the claimant was asking for something inappropriate from a witness or asking a question in language that was not appropriately moderated. She did so entirely properly and in order to ensure that the hearing was fair. We do not accept that anything she did amounted to a detriment. This aspect of the complaint fails for this reason.

187. Furthermore, the reasons for the interjections were to ensure that relevant and fair questions were asked of the witnesses. They were not because the claimant had done a protected act. This aspect of the complaint therefore fails for this reason too.

188. We would add that, as is evident from the transcript, Ms Muchemwa gave the witnesses the opportunity to provide any and all information they wished to, for example asking Mr Macmillan if he had *"anything else to add"* and checking, after the claimant had asked her questions of the witnesses, whether the claimant *"had any more questions"*. She was not seeking to close matters down but rather gave everybody the opportunity to speak.

189. We would also add that, having had the chance to view the full transcript, and then to observe Ms Muchemwa's calm and measured style in her evidence at this tribunal, we consider that she handled the grievance meeting in an exemplary way, which balanced fairness to the claimant and to the witnesses who attended it.

190. Indeed, in an email to Ms Muchemwa on 7 November 2022 shortly after the grievance hearing, the claimant stated *"Thank you very much for your time and understanding on Thursday and how you put me at ease by saying you had gone through one or two similar processes yourself"*. The claimant herself, therefore, appeared satisfied with the way Ms Muchemwa handled her grievance; this only changed when she received the outcome of the grievance on 14 November 2022, with which she did not agree.

WhatsApp messages

191. After the grievance meeting, the claimant provided to Ms Muchemwa the WhatsApp messages on the private WhatsApp chat between herself, Ms TJ, Ms JM and Ms AB, which we have already referred to in these reasons. Ms Muchemwa gave evidence which, in the light of the general reliability of her evidence and her thoroughness, we have no reason to doubt and therefore accept, that she did consider the WhatsApp messages provided by the claimant. This allegation is not therefore made out on the facts and therefore fails.

192. However, to put it in further context, Ms Muchemwa then determined, having considered them, that they were not appropriate to include in the proceedings because: they were communications between colleagues in their capacity as friends; the claimant had not obtained the permission or consent of

the other members of the WhatsApp group to share it; and they were not relevant to the issues which she had to determine. These are all good reasons for not including them. We, therefore, consider that Ms Muchemwa's decision not to include them was fair and appropriate in the circumstances. As we have already indicated, the claimant appears to attach significance to the subjective and private views of herself and her colleagues in these WhatsApp messages, which amount to no more than speculation, relying on this speculation as if it was fact; however, it was not relevant to the issues to be determined in the grievance.

193. Furthermore, the reason why Ms Muchemwa did not include the WhatsApp messages was for the reasons outlined above. It was not because the claimant did a protected act. This aspect of the complaint therefore fails for this reason too.

9.3.4. Onai Muchemwa was not an independent chair as she was a friend of the Deputy Director of Workforce, Bola Ogundeji, contrary to the Trust's Grievance Policy;

194. The claimant had requested that an external investigator should investigate her grievance. The respondent agreed to this. Ms Bola Ogundeji, the respondent's Deputy Director of Workforce, arranged for Ms Muchemwa to conduct the grievance. Ms Ogundeji was not someone against whom the claimant had made any allegations and did not conduct the June and August 2022 appointment processes. Ms Muchemwa was an external investigator; she did not work for the respondent and she is the managing director of an HR consultancy firm and had a lot of experience in handling grievances. She was not a "friend" of Ms Ogundeji; they had previously met in professional capacities, which was why Ms Ogundeji knew of Ms Muchemwa, but they were not "friends".

195. Ms Muchemwa was therefore an appropriately independent grievance investigator, there was no conflict-of-interest, and there was nothing preventing her from being impartial and fair as grievance investigator.

196. The claimant has not identified any aspect of the respondent's policy which prohibited this arrangement.

197. Therefore, as Ms Muchemwa was independent, was not a "friend" of Ms Ogundeji, and as her appointment was not in breach of the respondent's policy, the factual allegations of this complaint are not made out and the complaint fails for this reason.

198. Furthermore, we do not consider that the appointment of Ms Muchemwa could amount to a detriment; she was appointed because she was an experienced HR professional who undertook grievance investigations and because the claimant herself had requested an external investigator. This complaint fails for that reason too.

199. Furthermore, we accept that there is no basis for the suggestion that Ms Ogundeji, who was a senior HR employee at the respondent and against whom the claimant had raised no allegations, would appoint Ms Muchemwa to hear the

claimant's grievance in order to subject the claimant to a detriment because she had done the protected act. As the decision to appoint Ms Muchemwa was not because of the claimant's protected act, this complaint fails for that reason too.

9.4. Richard Macmillan laughed at the Claimant when she asked questions during the grievance hearing on 3 November 2022;

200. To be slightly more specific, the claimant alleged that Mr Macmillan laughed at her in the grievance hearing on 3 November 2022 at the point when he said *"yes Janette you were very honest in that meeting that's the problem for you"*.

201. The transcript of the meeting is very detailed and specifically records where people laugh (we were taken to numerous examples of this in the transcript bundle). However, there is no laughing recorded for Mr Macmillan at the specific section of the transcript which the claimant relies on (or indeed at any point in the transcript). Furthermore, the claimant did not put this allegation to Mr Macmillan when he gave evidence. Furthermore, Mr Macmillan in his witness statement denied that he laughed, as did Ms Muchemwa, who was also present at the meeting. For the reasons of respective reliability of evidence set out above, we prefer their evidence to that of the claimant. Taken in combination with the fact that the transcript does not record that Mr Macmillan laughed, we find that Mr Macmillan did not laugh at the claimant. This allegation is not, therefore, made out on the facts and therefore fails at the first stage.

9.5. At the grievance hearing on 3 November 2022, Onai Muchemwa repeatedly interrupted the Claimant and prevented a witness, Rachelle Johnson, from answering as to why the Claimant was not appointable to the roles;

202. This complaint has in part been dealt with at issue 9.3.3 above in the context of the claimant's more generalised allegation that Ms Muchemwa prevented witnesses from speaking at the hearing. However, this specific complaint relates to one of the examples considered at 9.3.3 above, in relation to Ms Johnson.

203. The claimant had been asking Ms Johnson for feedback on her performance in the June 2022 appointment process. Ms Muchemwa gave evidence, which we have no reason to doubt and therefore accept, that she felt that it was not fair to ask this question of Ms Johnson when Ms Johnson had not been the sole decision maker and that the interview feedback should have been co-ordinated by the panel as a whole. Indeed, one of the recommendations she went on to make in her grievance outcome was that the claimant should receive feedback. (This was without knowing, of course (because the claimant had not told her), that the claimant had in fact already received feedback from Mr O'Callaghan shortly after the appointment process (a conversation which the claimant covertly recorded)). There was, therefore, no desire on Ms Muchemwa's part to prevent the claimant from obtaining feedback; she simply considered, entirely appropriately, and for the reasons set out above, that it was not appropriate for Ms Johnson to be put on the spot and forced to give feedback at the grievance hearing.

204. We do not, therefore, consider that Ms Muchemwa interjecting at that point was a detriment to the claimant: she was not preventing the claimant obtaining feedback but was simply providing that it should be given at a different and more appropriate time and in a more appropriate way; furthermore, the claimant has already received feedback from Mr O'Callaghan and she had also been offered feedback previously from Mr Macmillan in an email which he sent, but she had not requested any feedback from him. As this was not a detriment, this complaint fails for this reason.

205. Furthermore, Ms Muchemwa interjected as part of her ensuring that there was a fair hearing; in other words one which was fair not only to the claimant but to the witnesses who attended. That was entirely appropriate behaviour. This was the reason why Ms Muchemwa interjected; she did not do so because the claimant had made a protected act. The complaint fails for this reason too.

206. As to the second allegation contained within this complaint, that Ms Muchemwa repeatedly interrupted the claimant, the evidence of the transcript is that she did not. By contrast, she gave her every opportunity to ask questions and to say what she wanted to say. As that allegation has not been established on the facts, this part of the complaint fails at the first stage.

9.7. Fail to consider the Claimant for the role of Jon Spencer's Executive Assistant in November 2022 despite the Claimant having previously supported the work for Oriel under the ex-Director of Strategy;

207. As we have already found, Mr RB was appointed to be Mr Spencer's EA in July 2022, after Ms JM (his previous EA) was appointed to the Committee Manager role. Mr RB was the only person who applied for that role. The claimant accepted in cross-examination the did she did not ask Mr Spencer or anyone at the respondent to become Mr Spencer's EA.

208. In this complaint, the claimant alleges that she should have been considered for the role of Mr Spencer's EA in November 2022. Her argument is that one of her directors, Ms Moss, was principally responsible for work on what was known as Project Oriel and, as she supported Ms Moss, she similarly worked a lot on Project Oriel. Ms Moss left the respondent in October 2022 and Mr Spencer took over responsibility for any remaining work on Project Oriel (which by that time was much reduced anyway). Mr RB, who was the EA to Mr Spencer, supported Mr Spencer in his work, including any work he did on Project Oriel. The claimant felt that, because she had worked on Project Oriel previously (for Ms Moss), she should continue to do so. That is the extent of her argument.

209. However, there was no vacant post for Mr Spencer's EA in November 2022 for the claimant to take. Mr RB was already in that post and had been for several months. We accept Ms Twomey's submission that it could not be a detriment to fail to consider the claimant for a post which was not available. As there was no detriment, this complaint fails.

210. Furthermore, the reason why the claimant was not considered for the role of Mr Spencer's EA in November 2022 was because Mr Spencer already had an EA; it was not because the claimant did a protected act. The complaint fails for this reason too.

9.8. Jon Spencer informed the Claimant that Mr RB was leading on a Gateway Meeting in November 2022;

211. The "gateway meeting" was something connected to Project Oriel. Mr Spencer recalls an interchange in November 2022 but cannot remember any of the specifics of the conversation. However, we accept that Mr Spencer may indeed have said that Mr RB was leading on a Gateway meeting.

212. That is hardly surprising as Mr RB was the EA to Mr Spencer, who was at that point responsible for Project Oriel. It was, therefore logical, given that this work now fell under Mr Spencer's auspices, that his EA would be supporting him on that work. Furthermore, the claimant's role was specific to working for her directors and not specific to a particular project such as Project Oriel. For these reasons, we accept Ms Twomey's submission that this cannot be capable of amounting to a detriment. This complaint therefore fails for this reason.

213. Furthermore, self-evidently, Mr Spencer said that Mr RB was leading on the gateway meeting because Mr RB was indeed leading on the gateway meeting; it was not because the claimant had raised a protected act. The complaint therefore fails for this reason too.

9.9. Richard Macmillan accused the Claimant of purposely excluding him and Martin Kuper from CMS drinks on 6 December 2022; and

214. In cross-examination, the claimant accepted that Mr Macmillan had not accused her of excluding him or Mr Kuper from the drinks. Therefore, on the claimant's own case, Mr Macmillan did not accuse her. Furthermore, Mr Macmillan gave evidence, which we have no reason to doubt and therefore accept, that he did not accuse the claimant.

215. This allegation is not, therefore, made out on its facts and fails at the first stage.

9.10. On 12 December 2022, Jackie Wyse sent the Claimant's grievance appeal hearing documentation attached to a meeting invite which meant that details of the Claimant's grievance were made public to her work colleagues;

216. Ms Wyse was the member of the respondent's HR team who co-ordinated and prepared the necessary paperwork in relation to the claimant's grievance appeal. On 5 December 2022, she emailed the claimant to confirm that a grievance appeal hearing had been arranged and that supporting documents would be sent out shortly. Following this, she sent out a diary placeholder electronically to the claimant, to one of the appeal panel members, to Ms Muchemwa and to another member of HR who was supporting the appeal panel.

In the invite, she attached the supporting documents for the hearing, which amounted to 11 separate documents.

217. At the time, this was the usual process that was followed by the respondent when sending out grievance/appeal documents and Ms Wyse did not do anything different during the claimant's process that she had not done during previous employees' grievance processes. The claimant did not challenge this evidence in her cross-examination of Ms Wyse and indeed appeared to accept that this was indeed the respondent's usual process.

218. As it was, the claimant on 12 December 2022 raised a concern about sending the documents in a meeting invite. Ms Wyse then immediately removed the documents from the meeting invite and sent them to the relevant parties in a confidential email. She informed the claimant that she had deleted and re-sent the documents separately and apologised to the claimant. The respondent has since changed its practice in this respect.

219. During cross-examination the claimant accepted that she *"didn't think Jackie had done it on purpose"* and asked Ms Twomey to direct her to *"where have I said that Jackie did it because of my grievance?"*. The claimant went on to state *"On reflection, at the moment she* [Jackie] *may not have. Not if it was her normal process but I didn't know that at the time."* However, upon further questioning by the judge, the claimant stated *"I personally thought at the time it was because of me and my grievance, I would have taken it as a personal slight".* It was, therefore, unclear as to whether the claimant was continuing to pursue this matter as an allegation of victimisation.

220. However, Ms Wyse gave unchallenged evidence that this was her usual practice and had nothing to do with the claimant's protected acts. We have no reason to doubt that and accept it. As Ms Wyse did not attach the documents to the invite because the claimant did a protected act, this complaint fails.

Summary of substantive complaints

221. In summary, therefore, all of the claimant's complaints fail on their substantive merits.

222. However, we also have to consider the jurisdictional issues in relation to time limits and do so now.

Jurisdiction - time limits

223. ACAS early conciliation commenced on 21 November 2022 and ended on 23 November 2022, with the claim being presented on 20 December 2022. That means that any complaints where the allegation is said to have taken place earlier than 22 August 2022 (three months prior to the commencement of ACAS early conciliation) are prima facie out of time.

224. All of the victimisation complaints are allegations of treatment which was said to have occurred on or after 22 August 2022. They were therefore all

presented in time and the respondent accepts this. The tribunal therefore has jurisdiction to hear the victimisation complaints.

Direct age discrimination complaints

225. However, of the four allegations of direct age discrimination, two relate to actions said to have taken place in June 2022 and the other 2 to actions said to have taken place no later than 4 August 2022. These complaints are therefore all prima facie out of time.

226. There are no successful in time complaints such that the direct age discrimination complaints could be deemed to be in time as being part of conduct extending over a period with successful in time complaints. The direct age discrimination complaints were therefore presented out of time.

Just and equitable

227. We therefore turn to the issue of whether it would be just and equitable to extend time in relation to the direct age discrimination complaints.

228. The reason given by the claimant as to why she did not put in her claim earlier was that she followed the respondent's grievance policy prior to escalating it to the tribunal and only escalated it because she was not satisfied with the "accuracy or thoroughness" of the informal stage of the grievance and the first formal stage of the grievance and the outcome of the grievance issued on 14 November 2022. That is an understandable reason for delaying.

229. However, whilst the claimant contacted ACAS relatively soon after that outcome report was issued (on 21 November 2022), ACAS early conciliation completed on 23 November 2022 and she still waited a further month before submitting her claim on 20 December 2022.

230. Furthermore, as she acknowledged in an exchange in the grievance meeting on 3 November 2022, she was aware of the tribunal time limits having already spoken to ACAS about them.

231. There is prejudice to the respondent in having to defend complaints which are now the best part of two years old, where several of the respondent's witnesses (for example Mr Macmillan and Ms Johnson) have left the respondent's employment and where memories of events a long time ago risk fading.

232. By contrast, there is no prejudice to the claimant in allowing claims to proceed which, as we have already found, fail in any event.

233. We therefore consider that it is not just and equitable to extend time in relation to the direct age discrimination complaints. The tribunal does not therefore have jurisdiction to hear those complaints and they are struck out.

Written reasons

234. After the judge had delivered the reasons for the tribunal's decision on liability orally, he explained that he would, in a moment, ask the parties whether they wanted the written reasons for the decision and that they would be able to request them either now at the hearing or within 14 days of a judgment being sent to the parties.

235. Before doing so, the judge explained, principally for the claimant's benefit, two things. First, he said that, if a party wished to appeal the tribunal's decision, that party would need the written reasons in order to do so, although he stated that an appeal could only be founded if there was an error of law by the tribunal or if its decision on the facts was perverse; there were no grounds for appeal if a party simply disagreed with the factual findings that the tribunal had made. Secondly, he explained that, if written reasons were produced, they would be published online on the tribunal's website and that the tribunal had no discretion as to whether or not to do this. He added that the reasons were searchable by name and that the tribunal was aware that potential future employers might carry out such a search. The judge made these remarks because he wanted the claimant to be aware of the implications of written reasons being produced before making a decision as to whether or not to request them.

236. The judge then asked the representatives if they wanted the written reasons for the decision.

237. The respondent requested written reasons.

Respondent's costs application

238. Ms Twomey then proceeded to make the costs application which she had previously indicated she would be making.

Law

239. The tribunal's powers to make an award of costs are set out in the Employment Tribunal Rules 2013 at rules 74-84. The test as to whether to award costs comes in two stages.

240. First, has a party (or a party's representative) acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted or did the claim or response have no reasonable prospect of success? If that is the case, the tribunal must consider making a costs order against that party.

241. Secondly, should the tribunal exercise its discretion to award costs against that party? In this respect the tribunal may, but is not obliged to, have regard to that party's ability to pay.

242. Before Ms Twomey made her application, the judge again took time to explain for the claimant's benefit what the law in relation to costs in the tribunal was, as summarised above.

Documents

243. At the beginning of the day on which the judge gave the tribunal's oral judgment and reasons on liability (day 10 of the hearing), the respondent had produced a bundle of documents in relation to the costs application extending to some 197 pages. The judge finished giving the oral reasons on liability shortly before midday. The claimant confirmed that she had that bundle of documents at that point, but had not yet looked at it. Ms Twomey said that she would not be referring to every document in that bundle and what was contained in it was simply for completeness' sake so that the respondent could not be accused (as it had previously been by the claimant) of partially providing documents.

244. The judge said that he appreciated that Ms Twomey was likely during the course of her application to take everyone to the parts of the bundle on which she would be relying; however, given the length of the bundle, he decided that the tribunal should not go straight into hearing the costs application at that point but should adjourn early for lunch and start again at 2 PM that day to give the claimant a couple of hours to have a look at the documents.

245. When the hearing reconvened at 2 PM, the claimant said that, having taken advice from her solicitor, she considered going through a 200 page document during this hearing was unreasonable and did not therefore think that the costs hearing should be heard at that point.

246. The judge disagreed. He noted that the claimant had been aware for the last two days that a costs hearing would be forthcoming at this point. Furthermore, as there was time at the end of the hearing, it was the appropriate and usual time to hear such a costs application; an adjournment would involve a long delay and extra cost and it was not clear when the tribunal panel (particularly given that one member of the panel was not from the London Central tribunal) could reconvene to hear the costs application. Furthermore, the claimant had been given extra time to look at the bundle and, having looked at the documents himself, the judge considered that the documents appeared to be documents that the claimant had seen before and should therefore be familiar with. Furthermore, as Ms Twomey indicated, she would only be referencing the parts which were relevant to her application. It was therefore both fair and proportionate to proceed at this point with the costs application.

Application

247. Ms Twomey then made her application, which the claimant opposed. Both parties were given to make given the opportunity to make submissions on the application.

248. The tribunal than adjourned to consider its decision. When it reconvened, the tribunal gave the parties its decision.

Decision

249. The respondent has incurred around £89,000 (excluding VAT) in defending this claim.

250. At the point two days previously when Ms Twomey indicated that the respondent would be making an application for costs, the claimant had asserted (again, without providing any evidence) that she thought that the respondent had indemnity insurance such that any costs of defending the claim would be paid for. Ms Twomey confirmed, however, having checked, that any indemnity insurance which the respondent had did not cover legal fees or defending employment tribunal claims and that all of the legal fees incurred by the respondent in defending this claim were payable by the respondent. We accept that that is the case.

251. In the light of that, Ms Twomey's application for costs was relatively modest. She sought a total award of £2,450, made up of two categories; £1,450 because of alleged unreasonable/disruptive conduct by the claimant in preparing the bundle for the hearing; and £1,000 in relation to 3 of the allegations of victimisation which she said had no reasonable prospect of success.

Unreasonable/disruptive conduct

252. We accept that the claimant conducted herself unreasonably and disruptively in relation to completing the bundle for the hearing.

253. The bulk of Ms Twomey's application involved her taking us through the huge amount of documentation in relation to the production of the bundle which evidences this. In short, over the period from the last preliminary hearing on 12 February 2024 up to the start of this full merits hearing, there was a huge amount of correspondence between the claimant and the respondent's solicitor in relation to the bundle. It was entirely unnecessary because of the unreasonable conduct of the claimant.

254. The respondent had included all of the disclosure documents in the draft bundle straight after that preliminary hearing; notwithstanding this, the claimant continued baselessly and repeatedly to accuse the respondent's solicitor of purposely removing documents, which she had not done so. She repeatedly asked the respondent's solicitor to identify particular documents in the bundle which she could easily have checked herself but which she requested the respondent's solicitor to do for her. The respondent's solicitor politely and patiently responded to her unreasonable requests, including on many occasions setting out indices to the bundle which highlighted documents sought by the claimant, even though the claimant could very easily have located these herself.

255. The total costs of agreeing the bundle over this period amounted to £2,929.70 (excluding VAT). Ms Twomey acknowledged that there would be some costs incurred in preparing the bundle anyway but, very generously in the light of the huge amounts of unnecessary work created unreasonably by the claimant,

sought only £1,450 by way of the unnecessarily incurred costs as a result of the claimant's conduct. Having seen the extent of the work the respondent's solicitor was unnecessarily put to, we are surprised that the amount came to no more than that; however, we readily accept that £1,450 worth of unnecessary work was incurred directly as a result of the claimant's unreasonable and disruptive conduct in relation to the preparation of the bundle.

No reasonable prospects

256. Ms Twomey then identified three of the victimisation allegations which she said had no reasonable prospect of success.

257. The first of these was the failure to provide the Nicky Wild report (allegation 9.3.2). The claimant had already been told that she would not be provided with that report before she made her first protected act on 8 August 2022. Therefore, that allegation had zero prospect of success.

258. The second of these was the exclusion of the claimant from the email sent by Ms Naomi Owen regarding the Secretary of State visit (allegation 9.6). The claimant accepted that at the time of this she did not know why she was not included and therefore had no positive case at all. She also accepted that Ms Owen didn't know about her grievance (and if she did not know about grievance, she could not have subjected her to a detriment because of it). The allegation therefore had no reasonable prospect of success. The claimant withdrew this allegation before Ms Owen was called to give evidence. However, the respondent had already had to prepare the witness statement for Ms Owen, which cost of £533 (excluding VAT).

259. The third allegation was that of Mr Macmillan accusing the claimant of purposely excluding him and Mr Kuper from the CMS drinks (allegation 9.9). On the claimant's own case in her witness statement, she said that that did not happen; Mr Macmillan did not accuse her. On that basis, this claim had no reasonable prospect of success, indeed no prospect of success at all.

260. All three of these allegations, therefore, had no reasonable prospect of success.

261. Ms Twomey sought £1,000 by way of costs in relation to these allegations. We have no doubt that the costs actually incurred by the respondent in defending them were far in excess of this. Therefore, we consider that £1,000 is an entirely reasonable sum to claim by way of costs in relation to these three allegations.

Discretion

262. As noted, we have already found that the sums sought were, firstly, most certainly incurred by the respondent and, secondly, flowed from the unreasonable conduct of the claimant/fact that the allegations had no reasonable prospect of success respectively.

263. Furthermore, in a without prejudice save as to costs letter dated 26 March 2024, the respondent had specifically warned the claimant that, if she continued to pursue her claim, it reserved the right to make an application for its costs at the end of the hearing. The claimant was, therefore, completely on notice that this could happen.

264. The claimant confirmed that she would be able to pay the costs sought. She remains in employment and said that the costs sought amounted to roughly a month's pay. Taking her financial means into account, therefore, she is perfectly able to pay the costs.

265. For these reasons, we have no hesitation in making an award of costs in the full amount sought of £2,450, payable by the claimant to the respondent.

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Employment Judge Baty

Dated: 26 April 2024

Judgment and Reasons sent to the parties on:

14 May 2024
……

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For the Tribunal Office

Public access to employment tribunal decisions

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Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/

Annex

Agreed List of Issues

Time Limits

1. Given the date the Claim Form was presented and the dates of early conciliation, any complaint about something that happened before 22 August 2022 may not have been brought in time.

2. Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

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

2.2. If not, was there conduct extending over a period?

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

2.4. If not, were the claims made within a further period that the Tribunal thinks is just and equitable?

2.5. Why were the complaints not made to the Tribunal in time?

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

Direct Age Discrimination: Section 13 of the Equality Act 2010

3. The Claimant's age is 57 and she compares herself with people in the age group of people under 50. The Respondent avers that Ms JM was 49 in June 2022 and Ms JP was 44 in June 2022.

4. Has the Claimant proved facts from which, in the absence of any other explanation, the Tribunal could decide that the Respondent treated the Claimant less favourably because of the protected characteristic than it treated or would treat others contrary to EqA10, s13?

5. The less favourable treatment relied upon by the Claimant is:

a. Failure to be selected for the post of Interim Executive Support Manager and Executive Assistant to the Chair and CEO in June 2022;

b. Failure to be selected for the post of Committee Manager in June 2022;

c. Appointing Ms JM rather than the Claimant to the post of Interim Executive Support Manager and Executive Assistant to the Chair and CEO in or around 2022; and

d. Appointing Ms AB rather than the Claimant to the post of Committee Manager in or around August 2022.

6. The Claimant relies on Ms JM (aged 49 in June 2022) and Ms JP (aged 44 in June 2022) as comparators.

7. The Tribunal will decide if the Respondent did the following things:

7.1. Did they appoint someone other than the Claimant to the posts, for reasons related to the Claimant's age?

7.2. Was that less favourable treatment? The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated. The Claimant says she was treated worse than Ms AB, Ms TJ, Ms JM and Ms JP.

7.3. If so, was it because of age?

7.4. Did the Respondent's treatment amount to a detriment?

7.5. Was the treatment a proportionate means of achieving a legitimate aim? The Respondent says that its aim was to ensure that all EAs had the requisite level of experience to support the Senior Executives over the long-term, including covering for each other, and offering those that were less experienced fixed term roles to gain that experience was a proportionate means of achieving this.

7.6. The Tribunal will decide in particular –

7.6.1. Was the treatment an appropriate and reasonably necessary way to achieve those aims;

7.6.2. Could something less discriminatory have been done instead;

7.6.3. How should the needs of the Claimant and the Respondent be balanced?

Victimisation: Section 27 of the Equality Act 2010

8. The Respondent accepts that the Claimant made the following protected acts, as defined by s27(2) EqA:

8.1. A written grievance to the Respondent's Chairwoman, Tessa Green on 8 August 2022; and

8.2. An appeal against the outcome of that grievance on 23 November 2022.

9. Did the Respondent do the following things:

9.1. Fail to respond and undertake appropriate actions, such as discussing other opportunities with the Claimant, following the Claimants email to Tessa Green on 8 August 2022;

9.2. Fail to provide the Claimant with interview report forms and summary of final selection forms when these were requested on 27 October 2022 and subsequently requested on a number of occasions. The Claimant avers that these have never been received;

9.3. Fail to handle the Claimant's grievance correctly by doing the following things:

9.3.1. the notes from the original grievance investigation meeting were incomplete and failed to provide an accurate description of what was said including the statements of witnesses who had attended;

9.3.2. Failure to provide documents that the Claimant had requested throughout the grievance process such as a report produced by Nicky Wild on Executive Administration Support Review. The Claimant avers that this has never been received;

9.3.3. At the grievance hearing on 3 November 2022, Onai Muchemwa (Grievance Manager) deliberately asked leading questions, continually prevented the witnesses from speaking at the hearing and refused to allow a WhatsApp message as evidence;

9.3.4. Onai Muchemwa was not an independent chair as she was a friend of the Deputy Director of Workforce, Bola Ogundeji, contrary to the Trust's Grievance Policy;

9.4. Richard Macmillan laughed at the Claimant when she asked questions during the grievance hearing on 3 November 2022;

9.5. At the grievance hearing on 3 November 2022, Onai Muchemwa repeatedly interrupted the Claimant and prevented a witness, Rachelle Johnson, from answering as to why the Claimant was not appointable to the roles;

9.6. Deliberately exclude the Claimant from an email trail on 4 November 2022 regarding the Secretary of State visit on 24 November 2022;

9.7. Fail to consider the Claimant for the role of Jon Spencer's Executive Assistant in November 2022 despite the Claimant having previously supported the work for Oriel under the ex-Director of Strategy;

9.8. Jon Spencer informed the Claimant that Mr RB was leading on a Gateway Meeting in November 2022;

9.9. Richard Macmillan accused the Claimant of purposely excluding him and Martin Kuper from CMS drinks on 6 December 2022; and

9.10. On 12 December 2022, Jackie Wyse sent the Claimant's grievance appeal hearing documentation attached to a meeting invite which meant that details of the Claimant's grievance were made public to her work colleagues.

10. By doing so, did it subject the Claimant to detriment?

11. If so, was it because the Claimant did a protected act?

12. Was it because the Respondent believed the Claimant had done, or might do, a protected act?