Neutral Citation Number: [2026] EAT 24

Case No: EA-2024-000545-OO

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 30 January 2026

Before :

HIS HONOUR JUDGE AUERBACH

- -

Between :

DR B JONES

Appellant

- and –

VIIV HEALTHCARE UK LIMITED
AND OTHERS

Respondents

- -
- -

Deshpal Panesar KC and **Rad Kohanzad** (Direct Access counsel) for the **Appellant**
Laura Bell (instructed by Eversheds Sutherland (International) LLP) for the **Respondent**

Hearing date: 27 November 2025

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JUDGMENT

SUMMARY

RACE DISCRIMINATION; SEX DISCRIMINATION

Burden of Proof

Sections 136(2) and (3) **Equality Act 2010** provide;

"(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

The statute says nothing about what facts might or might not, in the given case, amount to facts satisfying that provision.

The section 136 test is, in terms, fact-sensitive. Consideration of whether the facts of the case at hand fulfil the test cannot be carried out by the mechanistic application of a generalised rule of thumb. In the overall context of the particular facts of the given case, a particular factual feature *may* be found to cause, or contribute to, the shifting of the burden in that case. But such a finding, in one case, does not give rise to a rule of law; and it does not follow that the presence of a particular feature of that general kind will always cause the burden to shift, whenever it appears in another case. All depends on the overall relevant factual picture and context of the given case.

In the present case the tribunal did not err in its approach to the burden of proof, and properly reached positive conclusions about conduct impugned as being acts of direct race and sex discrimination and/or victimisation, when dismissing those complaints. This included the tribunal giving due and proper consideration to the claimant's case that particular words used to describe her behaviour pointed to her having been adversely stereotyped as a Black woman.

HIS HONOUR JUDGE AUERBACH:

Introduction

1. The claimant in the employment tribunal brought multiple complaints of direct sex and race discrimination and victimisation (as well disability discrimination, whistleblowing, and other complaints which are not the subject of this appeal) against her former employer and individual respondents. There was a multi-day hearing before EJ Heath, Ms S Evans and Ms F Whiting, at London South. In a reserved decision the tribunal dismissed all of the complaints.

2. This appeal relates to the decision to dismiss certain of the complaints of direct discrimination and victimisation. It contends, in particular, that the tribunal erred with respect to the burden of proof.

The Facts

3. At the tribunal hearing the claimant represented herself. The respondents were represented by Laura Bell of counsel. The tribunal had around 2000 pages of documents. It heard evidence from the claimant, and from ten witnesses for the respondents.

4. The tribunal's decision ran to some 90 pages, with a list of issues attached running to some 20 pages. The findings of fact, and the section setting out the tribunal's conclusions, were lengthy and detailed. In a number of passages the tribunal referred to, and summarised, a number of lengthy and detailed documents that were before it. The following summary, which I take from the tribunal's decision and other undisputed facts, is, compared to the tribunal's findings, fairly brief.

5. The first respondent is a pharmaceutical company specialising in HIV medicines and research. It is part-owned by GlaxoSmithKline (GSK). To avoid confusion, I will refer to it as the company, and to other individual respondents, having identified them as such, thereafter by name.

6. The claimant has an undergraduate degree in biochemistry and a PhD in pharmacology. She has worked in the pharmaceutical industry since 2000. She identifies her race as Black.

7. The claimant was employed by the company from 30 March 2020 as Head of Medical Affairs, Strategy and Operations. She reported to Dr Perry Mohammed (the second respondent). He reported to Dr Harmony Garges (the third respondent).

8. The claimant had two direct reports. The tribunal found that her relationship with one of them, Dannae Brown (the sixth respondent), was, from an early stage, difficult. Ms Brown began to consider leaving the company. The claimant's other direct report, Mr Budnik, would later tell an internal investigator that she was dismissive of team members' opinions. The tribunal observed that "on any view the claimant's new team were not working well together and communication and relationships were poor."

9. In around May 2020 the claimant sought an individual salary review. A key factor in considering this was performance. The claimant had yet to receive a formal performance appraisal.

10. On 22 June 2020 there was a team meeting, set up by the claimant, to discuss working relationships. It was chaired by Dr Mohammed, and was with the claimant, Ms Brown and Mr Budnik. The tribunal found that, despite the meeting, Ms Brown was still considering whether to stay with the company, as working with the claimant had begun to affect her mental and physical health.

11. The claimant had been interviewed for her role by Dr Mohammed and his predecessor (who had moved to another role with the respondent), Mr Aboud. Ms Marguet, a Talent Acquisition Lead and Account Manager, had also been involved. Ms Marguet later told an internal investigator that, about three months into the claimant's role, she, Ms Marguet, had spoken to Mr Aboud about the claimant's working style. He had told her that it had not been working out that well, and that they "might need to look at a backfill for her." He had told her that he had spoken to Dr Mohammed about the claimant's "direct approach". Ms Marguet also reported to the investigator her own experience of the claimant being "authoritative" [*sic*] with her and "pushing back".

12. The tribunal's conclusion about this episode was that a number of concerns were being raised about the claimant's performance and ways of working with people, which had come to the attention of Mr Aboud. There did not appear to have been "active plans to get rid of her, just perhaps a recognition that they may have to look again to fill her role if things continued not to work out." The tribunal noted that neither Mr Aboud nor Ms Marguet was in the claimant's line of management.

13. On 29 June 2020 Ms Brown was encouraged by Mr Aboud to apply for another internal role, for which three people had so far been interviewed who were not found suitable. After various conversations Ms Brown applied, but did not use the company's application portal, which would have required her to have first notified the claimant. She was subsequently interviewed. Dr Mohammed put the claimant in the picture about this. Ms Brown was subsequently offered the role in July.

14. The claimant spoke to James Harris of HR (seventh respondent), indicating that she was unhappy that Ms Brown had not informed her about leaving her role. On 17 July 2020 the claimant emailed him a letter raising various issues about Ms Brown's behaviour, which, she wrote, "fit the description of microaggression" and was "particularly counter-productive to the inclusive and diverse work environment." Subsequently she sent Mr Harris some email chains as examples. The tribunal observed that "[o]n the face of these emails, no hostility or aggression from Ms Brown is apparent." Mr Harris regarded this as an "interpersonal conflict". He did not pick up in the wording of the letter any reference to race. He spoke to Ms Brown, and also to Dr Mohammed and Dr Garges, who both agreed that Ms Brown should have told the claimant herself about her leaving the claimant's team.

15. The claimant was required by the company's systems to sign off on Ms Brown's appointment. She emailed Mr Harris on 4 August 2020 that she would not support Ms Brown's promotion in view of her own concerns, and the evidence she had provided, which, she wrote, was a "crystal clear" demonstration of "racism in the workplace". Meantime, Ms Brown, supported by Mr Harris, had drafted an apology to the claimant for not telling her about the move, and sent it on 5 August 2020.

16. Mr Harris escalated the claimant's concerns to his superior and to GSK's Employee Relations Centre (ERC). The conclusion of discussions was that Mr Harris should convey back to the claimant the view that there was no evidence of racism, so the matter would not be formally investigated; but that he would suggest mediation to her and to Ms Brown. Mr Harris spoke to the claimant, who did not accept that there was no evidence of racist conduct, and followed up with a further email on 27 August 2020. Following further exchanges he escalated the matter to Liam Thompson of the ERC.

17. Meantime, Dr Mohammed had told the claimant that a 360 report would be prepared to gauge her performance as part of her requested salary review. The tribunal did not accept the claimant's case that this was a bogus exercise as part of a campaign to dismiss her. The report was, the tribunal found, likely produced at the end of August 2020. There was some positive assessment of certain of the claimant's work. The majority of scores were modest or reasonably poor. The claimant scored particularly poorly in questions to do with leadership, and her ability to adapt her style to diverse audiences and to make good long-term decisions under pressure. Feedback from Dr Mohammed included criticism of her communication style and her "very direct approach". He referred to her having reacted emotionally on a particular occasion. But he also identified a number of strengths.

18. In September 2020 the claimant emailed Mr Harris requesting that her 360 review not be used for reviewing her salary, given her short time in the role. Mr Harris agreed and said that an assessment would be carried out based on comparison with others, and the external market, and performance assessed by the line manager. The claimant's salary was assessed as being at market value.

19. Returning to the complaint about Ms Brown, Mr Thompson invited the claimant to meet with him, and also spoke to Ms Brown. On 5 October 2020 he emailed Ms Brown that he had not found racism on her part. Having first spoken to the claimant, he produced an outcome of his review on 17 October 2020. He identified the claimant's concerns about her experience of "microaggressions". He considered there were examples of things that Ms Brown could have done differently; but he did

not judge a formal investigation or allegation of misconduct to be appropriate. He praised the claimant's courage in raising her concerns and enabling a broader discussion on a challenging subject.

20. Meantime, starting in July 2020, the claimant led a recruitment process for a number of roles that would report to her, working with Ms Young and Ms Marguet from HR. Dr Mohammed was copied in on some of the emails, and began to have concerns about how the claimant was handling the exercise. These included: whether she was being honest in saying that the salary she proposed to offer to a particular candidate was "what HR have come up with"; the number of cancelled interviews; and a number of applicants dropping out of the process, apparently after speaking to the claimant.

21. In response to Dr Mohammed's enquiries about two candidates, Ms Okoli and Mr Daka, the claimant told him that both of them had withdrawn. He spoke to both candidates. Mr Daka told him that he had not had a good conversation with the claimant. He had not withdrawn his application. Ms Okoli was "similarly negative about her interaction with the claimant." The tribunal observed that Mr Daka and Ms Okoli are both Black, though Dr Mohammed did not know Mr Daka's race before speaking to him. The tribunal found that he was going to speak to two other candidates, both white, but that did not happen, as it was decided that there would be an independent investigation. Ms Marguet and Ms Young raised concerns with Mr Harris about how the claimant was conducting the exercise. Ms Marguet considered the claimant to be rude and combative. Both expressed concern about the number of people dropping out of the process.

22. The tribunal found that there was considerable disquiet from Dr Mohammed, Mr Harris and Dr Garges, including Dr Mohammed and Mr Harris being concerned about whether the claimant had been honest about some things, and worried that the organisation could be put at risk. On 8 October 2020 Mr Harris, Jocelyn Brown (Head of HR) and Mr Thompson met to discuss the situation. All three were of the view that the matter should be escalated to an investigation. It was thought best to focus on the issues of a false statement that a candidate withdrew and the claimant's assertion that an

unworkable salary offer had been approved by HR. Mr Harris advised against including other matters, to avoid confusing the focus "or causing the appearance of targeting/retaliation". The tribunal observed that HR was alive to the possible appearance of victimisation and/or whistleblowing detriment, as the outcome of the complaint about Dannae Brown was about to be communicated.

23. An HR lead, Ms Attwal, was appointed. It was decided to use an external investigator, Ms Slater of a firm called CMP. The claimant was informed of the investigation and the allegations and invited to a meeting with Ms Slater. In an email of 20 October 2020 to Ms Slater the claimant registered her concern about "escalating acts of retaliation" by Dr Mohammed since she had reported the "issue of microaggression to HR". In an email of 12 November she said that she had been the victim of racial prejudice from him, and that labels such as "autocratic", "incapable", "incompetent" and "dishonest" were common stereotypical labels stemming from racial prejudice.

24. At some point during November the claimant went off sick. Mr Harris referred her to OH who produced an initial report on 20 November and an update report on 9 December.

25. Meantime, having completed her investigation, Ms Slater produced a report.

26. In relation to the salary issue Ms Slater concluded that there was no evidence that the claimant had sought to alter the grading of the post in question without Dr Mohammed's approval, and that he had misinterpreted her email about that. There was no case to answer.

27. In relation to "dishonest account of candidate status" Ms Slater made detailed findings about the claimant's interactions with Ms Okoli, Mr Daka and another candidate, Ms Christopherson, as well as finding that Dr Mohammed had made Mr Daka aware that there had been concerns about the claimant's conduct of the process. She considered that it was "inconclusive" whether the claimant had said that Ms Okoli had withdrawn, and, while there might be an alternative explanation to her being dishonest about Ms Okoli and Mr Daka's applications, the claimant's accounts were deemed

unreliable and lacking in consistency and credibility. She concluded that there was no case to answer in respect of dishonesty, but a case to answer in respect of transparency.

28. The third allegation was of serious breach of duty regarding consistency of treatment of candidates and treating them fairly and with respect. Ms Slater concluded that there was a case to answer in respect of transparency, and how the claimant discharged her duty of care to candidates, with respect to her communications and how they experienced her approach and the process.

29. Following receipt of the Slater report, on 8 December 2020, there were communications among management as to the way forward. Mr Harris indicated that, once she returned to work, the claimant should be informed of the outcome of the investigation and that she would be required to attend a disciplinary hearing. Ms Attwal would begin a without prejudice conversation "aiming for a Mutual Settlement exit". Mr Harris told colleagues that a disciplinary process would be unlikely to result in a finding of gross misconduct leading to dismissal, and would be likely to result in a formal warning. If the claimant did not agree to an exit, the next step would be to initiate the Performance Management policy, based on performance to date and the findings of the Slater investigation.

30. The claimant returned to work on 14 December 2020. Following this she was provided with Ms Slater's report and invited to a disciplinary hearing on 6 January 2021 before Ms Guitard, VP Global Finance Risk Management & Controls. The invitation referred to the three allegations considered by Ms Slater, while indicating that Ms Guitard had determined that there was no evidence to support the first allegation. The claimant provided a written response to the allegations, which stated that they were an act of retaliation by Dr Mohammed and Mr Harris, because of the mishandling of her microaggressions concerns. She attended the disciplinary hearing, supported by a colleague, and provided a further document to Ms Guitard following the hearing, in which she said that there had been a corporate lynching by Dr Mohammed and Mr Harris.

31. At a meeting on 12 January 2021 Ms Guitard informed the claimant of the outcome.

Allegation 1 had been withdrawn, but Ms Guitard highlighted some learning points. As to allegation 2, the allegation of dishonesty had been withdrawn, but Ms Guitard observed that there was a lack of due diligence in the process, and advised the claimant about steps to take in any future recruitment exercise. Allegation 3, of breach of duty, was not upheld, but Ms Guitard found that the claimant had been disrespectful to applicants on occasions and also to HR support. She noted her apparent lack of awareness of the impact of her style on others. There followed an outcome letter of 21 January 2021.

32. On 12 January 2021 the claimant put in what the company calls a Speak Up complaint. She complained of an ongoing attempt to terminate her employment dating back to June 2020, of retaliation, and of other matters, including that the recruitment investigation had focussed on Black candidates (that is, Ms Okoli and Mr Daka). She asked to report to a different manager. The Speak Up complaint was assigned to Mr Lord, a Special Investigations Director.

33. The claimant was off sick from 13 to 21 January 2021. On 18 January Dr Garges had a general discussion with the claimant. Dr Garges took over various aspects of her line management on an interim basis, although Dr Mohammed retained some involvement. The claimant thanked Dr Garges.

34. On 27 January 2021 the claimant issued emails about attendance at a meeting. Ms Dang, the Head of Affairs in the Asia-Pacific region (APAC) queried why two individuals (whose surnames were Hong and Hu), who worked in the US, had been included, and no-one from APAC had been included. The claimant replied that she had "simply assumed they were based in APAC from their names, silly me …". Ms Dang took offence and raised the mater in a Speak Up complaint. Following consideration by HR Ms Garges discussed the matter with the claimant. The claimant maintained that she had done nothing wrong and that Ms Dang's complaint was malicious. There followed email exchanges between the claimant and Ms Dang, which the tribunal set out. This led Dr Garges to email the claimant that the intended purpose had been for the claimant to apologise, not to justify her comment; and that her response had contributed more issues, instead of working to heal any offence.

35. On 4 February 2021 the claimant emailed HR and Mr Lord complaining about having been twice reprimanded in emails by Dr Garges, about what she said Dr Garges had said in a meeting with her, about having transferred one of the claimant's direct reports to Dr Mohammed. She said that she continued to report her activities to him, but there was still "a good amount of hostility from his end." The tribunal found that, in the meeting in question, the claimant, who saw herself as the victim of an attack from Ms Dang, felt that she was being attacked. But the tribunal found that Dr Garges had likely stuck to the script she had been given by HR regarding Ms Dang's complaint; and that Dr Garges did not use the words that the claimant attributed to her, and did not threaten the claimant.

36. Mr Lord interviewed a number of people, examined the documentation provided to the Slater investigation, and commissioned a targeted email review which flagged up 400,000 documents. He produced his report on 17 February 2021. In summary, he found no evidence to support the claimant's various specific allegations, in particular against Dr Mohammed, Mr Harris and Dr Garges. However, he did find evidence that there had been a conversation between Mr Aboud and Ms Marguet about the claimant outside of normal channels; and he commented that it was inappropriate for Dr Mohammed to have shared with Mr Daka that other complaints had been raised against the claimant.

37. Mr Lord also observed that there was a significant breakdown of trust between the claimant and colleagues, particularly her line management; and that as a result, communications and actions of colleagues were viewed negatively by her, and the worst was assumed. He also observed that the claimant had quoted a number of people saying specific things to her which had been categorically denied by them. While it was impossible to categorically prove or not whether the words were spoken, it was concerning that a pattern appeared to be forming. Whether that was a result of "poor listening skills, poor communication or more nefarious reasons by the parties remains unanswered."

38. It was decided by HR, with Ms Jocelyn Brown being "finally accountable" for this decision, that the claimant would be told that Mr Lord's investigation had been completed, and that the

respondent now sought a mediation to resolve a breakdown in working relationships that appeared to have occurred. This was communicated to the claimant by Ms Hardy of HR on 1 March 2021, following a "script". The claimant was told that no further information could be shared, in order to respect the privacy of the parties against whom allegations were raised. Ms Hardy offered her the opportunity of an independent mediation to explore whether the breakdown could be remedied.

39. The claimant complained the next day about her conversation with Ms Hardy, and the secrecy around the conclusions of the Lord investigation. She was not opposed to mediation, but it was not possible for her to report to Dr Mohammed, as he had inflicted serious damage on her reputation and made clearly documented attempts to have her dismissed in a "most vicious manner". The tribunal expressed some sympathy with the claimant's complaint that she was not made aware of the detailed findings of Mr Lord, but noted that this was something the respondent "retained in its procedure" and that it appeared to comply "just" with the ACAS Guide on Discipline and Grievances at Work.

40. On 9 March 2021 Ms Hardy wrote to the claimant informing her that she was being suspended because of a serious breakdown in working relationships impacting on trust and confidence in her continuing ability to remain in her role. There would be further investigations. The offer of mediation remained open. Ms Austin would be the HR manager taking the matter forward. The claimant was subsequently informed that Ms Allman, Head of Compliance, would be the investigator.

41. On 19 March 2021 the claimant submitted a grievance, which the tribunal described as essentially a repetition of the complaints that had been investigated by Mr Lord. The claimant said that she had been suspended solely because she had called out microaggressions and discriminatory treatment against herself as a Black woman and Black candidates. She complained of not being given details of the allegations. She repeated her request to be moved to a different manager. Ms Austin informed her that the grievance would be considered as part of Ms Allman's investigation.

42. During April 2021 the claimant began a period of sickness absence with stress and also

suffered a bereavement and travelled abroad to attend the funeral. In the weeks that followed OH provided periodic updates on her mental health and ability to participate in Ms Allman's investigation. On 19 May, following HR advice, Ms Allman sent the claimant an investigation summary and questions, to enable her to respond to the witness evidence gathered thus far. To date 13 people had been interviewed, including line management, direct reports and peers and colleagues. On 28 May the claimant provided thorough responses and thanked Ms Allman for adjustments she had made.

43. There were further exchanges in June and July 2021. The claimant identified further witnesses who she asked Ms Allman to interview. Ms Allman did not agree to the claimant speaking to them herself first, nor to provide the claimant with witness statements during the investigation. On 15 July OH reported that the claimant had been referred for psychological assessment, was commencing medication and receiving counselling, and would not be able to attend a meeting.

44. On 6 August 2021 Ms Allman produced reports into the serious breakdown in relationships and into the claimant's grievance. Appendices to the former included witness statements and documentary evidence. The tribunal noted that it gave considerable detail, but summarised its findings in about one and a half pages. My summary of that report is further condensed from that.

45. Multiple witnesses gave evidence that the claimant had not taken accountability for her actions, misrepresented situations and not followed specific guidance. Eight witnesses reported having experienced, observed, or been told, of, aggressive or hostile behaviour, in the form of words used, tone of voice and body language. Multiple witnesses gave evidence that the claimant did not demonstrate inclusive or collaborative team behaviours, in various ways which the tribunal described. Eleven witnesses reported that the claimant had had a negative impact on their own health, well-being or ability to perform, or had observed this in others. Seven said her behaviour negatively impacted their mental and physical health. There was evidence of people being visibly upset and in tears on multiple occasions after interactions with her. At least four members of the team, including direct

reports, said that they would have to consider leaving if the claimant returned to her role. Multiple witnesses said that they did not want to work with her due to her hostility or aggressive behaviour. There was evidence to support that the claimant's style of leadership and behaviours caused an irretrievable breakdown of relationships with direct reports, line management and Mr Harris of HR.

46. This first report recommended that a hearing manager should consider whether the claimant's relationships with colleagues had deteriorated to such an extent that it was no longer possible to continue any viable employment relationship.

47. The second report, into the grievance, concluded that there was nothing new requiring further investigation that had not been previously investigated by Mr Lord. It recommended that a hearing manager consider whether any further action was needed. Its appendices included the Lord report.

48. The claimant was invited to a hearing before Mr Rea, Head of External Affairs & Communications, to consider both Allman reports, whether the relationship had irretrievably broken down, and whether, on that account, the claimant should be dismissed. The claimant was provided with the reports and appendices including witness evidence. She provided written responses to both reports. She chose not to attend the hearing, which was on 10 September 2021. Mr Rea thereafter raised questions of her and offered a further meeting. She did not take up that offer, but provided written answers. On 11 October 2021 he sent an outcome letter dealing with both matters.

49. Mr Rea did not uphold the grievance. He considered that Mr Lord had done a thorough job and no new evidence had been provided that would challenge the outcome of his investigation.

50. In respect of working relationships Mr Rea upheld each of the allegations. He concluded that multiple witnesses had reported that they had experienced hostile, derogatory or aggressive behaviour, or had observed such behaviour. He had considered the options of mediation, moving the claimant to a different role or dismissal. He acknowledged the challenges of joining during the

pandemic, but considered it a reasonable expectation given the claimant's grade, experience and the necessity for her to build positive and authentic work relationships, that she deliver against her objectives effectively. He had seen no evidence of her ability to do this and felt that the only option was dismissal. The claimant was dismissed effective on 11 October 2021 with pay in lieu of notice.

51. The claimant's appeal was considered by Ms MacDiarmid, Head of Global Commercial Strategy. One of her grounds was that she had been the victim of discrimination on grounds of both race and sex. There was a hearing by Teams in which the claimant participated. On 23 February 2023 Ms MacDiarmid wrote dismissing the appeal. Her conclusions included that she agreed with Mr Rea's decisions, and there was no evidence of race or sex discrimination. She concluded that HR did not lack an understanding of the impact of racism and sexism in the workplace. The evidence supported an irretrievable breakdown in trust and confidence. The difficulty of joining the respondent during lockdown was acknowledged "but the level of disharmony was not replicated elsewhere".

52. The tribunal's description of Ms MacDiarmid's conclusions also included [201(k)]:

> **"It was recognised that words such as "hostile" and "aggressive" can be used in racial stereotyping, but there was no evidence of racism or discrimination as a basis for the allegation of breakdown in relationships or the decision to dismiss."**

53. Ms MacDiarmid also concluded that there was no evidence of sex or race discrimination. The decision to dismiss was said to be reasonable, consistent and fair to the claimant and other employees. There was not a realistic scenario where the claimant and others would feel comfortable and safe.

The Tribunal's Decision

54. The tribunal's decision included a section headed "reliability of evidence". The tribunal referred to the well-known (to lawyers) observations of Leggatt J (as he then was) in **Gestmin SGPS SA v Credit Suisse (UK) Limited** [2013] EWHC 3560 (Comm); [2020] 1 CLC 428 about the fallibility of human memory, the impact which the litigation process can have on witnesses' recollections and perceptions of past episodes, and the evidential value of contemporary documentary

evidence. The tribunal noted that these comments were made in the context of commercial litigation, but considered them applicable in the context of employment litigation.

55. The tribunal then made some specific observations about the reliability of evidence. It said that it found the claimant's evidence unsatisfactory in a number of respects, and gave some examples, also observing that her narrative was at times "inconsistent, and contrary to the weight of evidence before us", and she at times "exaggerated or embellished". This included the following [226(e)]:

> **"She gave shifting and inconsistent accounts of some matters, usually as documents put in cross examination did not support her account. For example, in relation to documents provided in the course of the disciplinary process, her starting point was that she was not provided with the "full documents". As she was questioned on email correspondence and annexes to the Slater report her account changed to an allegation that there were documents embedded in correspondence that she could not access. Then she claimed that she did not receive Annexe 2 (the Lord report) and "transcripts" of evidence of witnesses. Finally, that she could not read documents as she was too unwell."**

56. The tribunal then observed:

> **"227. We have not used the above examples to paint the claimant as an inherently unreliable witness but have considered the evidence in respect of all issues on its merit. However, all other things being equal, where there is a conflict between the claimant's evidence and that of a respondent's witness, we would prefer the latter."**

57. This passage in the tribunal's decision is not criticised as such, in this appeal.

58. The tribunal's self-direction as to the law included the following passage:

> **"235. In respect of direct discrimination, Section 13(1) of the EqA provides as follows:**
>
> **A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favorably than A treats or would treat others.**
>
> **236. Section 23(1) of the EqA deals with comparisons, and provides: -**
>
> **On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.**
>
> **237. The EAT in Chief Constable of West Yorkshire v Vento [2001] IRLR 124 made clear that using examples of individuals who were not true comparators was a proper way of constructing a hypothetical comparator.**
>
> **238. The burden of proof provisions (which apply equally to harassment) are set out in section 136 EqA 2010: -**
>
> > ***(1) This section applies to any proceedings relating to a contravention of this Act.***
> >
> > ***(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold***

that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

239. When considering direct discrimination, the tribunal must examine the "reason why" the alleged discriminator acted as they did. This will involve a consideration of the mental processes, whether conscious or unconscious, of the individual concerned (*Amnesty International v Ahmed* [2009] IRLR 884). The protected characteristic need not be the only reason why the individual acted as they did, the question is whether it was an "effective cause" (*O'Neill v Governors of St Thomas More Roman Catholic Voluntary Aided Upper School and anor* [1996] IRLR 372).

240. Guidance on the application of the burden of proof provisions of the Sex Discrimination Act 1975 (which is applicable to the EqA) were given by the Court of Appeal in *Igen v Wong* [2005] IRLR 258:

"(1) Pursuant to s 63A of the SDA 1975, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s 41 or s 42 of the SDA 1975 is to be treated as having been committed against the claimant. These are referred to below as "such facts".

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

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases, the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

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

(5) It is important to note the word "could" in SDA 1975 s 63A (2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

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

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s 74(2)(b) of the SDA 1975 from an evasive or equivocal reply to a questionnaire or any other questions that fall within s 74(2) of the SDA 1975.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s 56A (10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

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

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

> **(11) To discharge that burden, it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.**
>
> **(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.**
>
> **(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."**
>
> **241. Tribunals are cautioned against taking too mechanistic an approach to the burden of proof provisions, and that the tribunal's focus should be on whether it can properly and fairly infer discrimination (*Laing v Manchester City Council* [2006] ICR 1519). The Supreme Court has observed that provisions "will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence, one way or the other" (*Hewage v Grampian Health Board* [2012] UKSC 37).**
>
> **242. The Court of Appeal has emphasised that "The bare facts of a difference in treatment, without more, sufficient material from which the tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination" (*Madarassy v Nomura International plc* [2007] IRLR 246). "Something more" is needed for the burden to shift. Unreasonable behaviour without more is insufficient, though if it is unexplained then that might suffice (*Bahl v Law Society* [2003] IRLR 640).**

59. The tribunal also set out section 27 **Equality Act 2010** (the concept of victimisation) and referred to relevant authorities on the concept of subjecting a person to a detriment.

60. In the course of its fact-finding the tribunal noted that the respondent had accepted that the claimant had done a number of protected acts (for the purposes of section 27 **Equality Act 2010**). It identified each of these by reference to the numbering used in the agreed list of issues exhibited to the decision, in particular: the July and August 2020 emails to Mr Harris, the 12 November 2020 email to Ms Slater, the 2 March 2021 email following the discussion with Ms Hardy, the 19 March 2021 grievance, the presentation of tribunal claims (the first of three was on 12 August 2021 and the second on 17 January 2022), the claimant's responses to the Allman reports, her appeal against dismissal, and a further communication with Ms MacDiarmid.

61. In the agreed list of issues, there was a single list of matters which were the subject of the

complaints of both direct sex and direct race discrimination. That approach was explained in the first paragraph of this part of the list of issues in the following way:

> **"The Claimant's race is Black and her sex is female. The Claimant considers that she was subjected to direct discrimination because she is a Black woman and as a result of stereotypical and prejudicial views of Black women in the workplace. As a result, the following acts of direct discrimination are pleaded on the combined basis of race and sex."**

62. The list of conduct said to amount to direct sex and race discrimination ran to 40 lettered sub-paragraphs. The list of matters complained of as amounting to acts of victimisation was shorter, but overlapped (as did the lists of complaints invoking other causes of action).

63. The tribunal's conclusions worked through all of the complaints in the list of issues. It is not necessary for me to summarise every one of them separately. I will refer to a number of particular passages in what follows. But, in summary, the structure and presentation was as follows.

64. Where particular alleged treatment was said to have amounted to more than one of direct race and sex discrimination, harassment, victimisation, whistleblowing detriment, and/or disability discrimination, all of those complaints relating to that treatment were considered together. The tribunal also grouped complaints relating to aspects or phases of the same general matter together.

65. In each case the tribunal began its conclusions by referring back to the earlier paragraphs which set out its relevant findings of fact. There then followed further discussion about what the tribunal had found, and concluded, about the matter or topic, and the complaints, in question.

66. In some instances the tribunal did not accept the claimant's characterisation of what had factually occurred, nor, relatedly, that it amounted to less favourable and/detrimental treatment. For example, it did not accept that the June 2020 conversation between Mr Aboud and Ms Marguet was indicative of an attempt to remove the claimant from her role; nor that Mr Harris had "failed properly and without delay" to address the concerns about Ms Brown raised in her email of 17 July 2020.

67. The further discussion of each matter set out, in one form of words or another, what the

tribunal made of the conduct of the respondents in respect of that matter, including further findings about, for example, what had led to the conduct, and whether it was reasonable or surprising or unusual. In a number of instances the tribunal made a further concluding statement of the reason why the conduct occurred, and that it had "nothing to do with" the claimant's race, sex or previous complaints, or words to that effect. In most cases, after referring to its findings of fact, and setting out its other conclusions and observations about what it made of the conduct, the tribunal stated that there was "no evidence from which we could conclude" that the claimant's race or sex or protected acts "had any bearing whatsoever" on the conduct in question, or other similar forms of words.

68. In each case the tribunal concluded that "[w]e do not uphold these claims".

The Law

69. I have extracted above, the passage in the tribunal's decision in which it set out the text of section 136 **Equality Act 2010** and referred to relevant authorities concerning that provision (or its predecessors), and to the "because of" test of direct discrimination found in section 13, as well as setting out section 27. No challenge is advanced by this appeal to the tribunal's self-direction as to the law. It is indeed accurate and the tribunal's citation of authority is pertinent. I do not need to set out the same provisions and passages from the authorities a second time. However, I do need to say something more about section 136 **Equality Act 2010** relating to the burden of proof, given that it is the foundation on which this appeal is advanced.

70. Section 136(2) provides:

> **"If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred."**

71. The statute says nothing, at all, about what facts might or might not, in the given case, amount to facts satisfying that provision. That is hardly surprising, given the high level and generalised nature and application of this provision – which applies, as section 136(1) provides, to "any proceedings

relating to a contravention of this Act" – and the expressly fact-sensitive nature of the test.

72. The present tribunal correctly reminded itself at [241] not to take too mechanistic an approach to this provision. In **Royal Bank of Scotland plc v Morris**, UKEAT/0436/10 at [32] the EAT said, of the approach of the tribunal in that case, to a predecessor of section 136:

> **"The Tribunal's approach is a good illustration of how tribunals purporting to apply the burden of proof provisions in section 54A and its cognates can too often be led into an inappropriately mechanistic approach. The exercise required by the section remains one of fact-finding not box-ticking."**

73. In **Jaleel v Southend University Hospital NHS Foundation Trust** [2023] EAT 10, the EAT noted at [36], when considering how section 136 (and its predecessors) added to the common law:

> **"The position was captured some time ago now by Elias P for the EAT in the following passage in Network Rail Infrastructure v Griffiths-Henry [2006] IRLR 865.**
>
> > **"19. We accept Ms Cunningham's submission that nothing in the new statutory burden of proof alters the evidence needed to establish a *prima facie* case as that concept was used in the well known authority of King v Great Britain-China Centre [1992] ICR 516. Nor does it affect, in our view, the analysis of how evidence is to be assessed when determining at the second stage whether the employers have provided an adequate (in the sense of non-discriminatory) explanation as laid down by the Court of Appeal in Bahl v The Law Society [2004] EWCA Civ 1070; [2004] IRLR 799. The significant legal change is that whereas formerly under the analysis in King the Tribunal could but was not obliged to draw an inference of discrimination if there was a *prima facie* case and no adequate or satisfactory answer, now the Tribunal must draw such an inference in those circumstances. Whether in practice Tribunals did frequently take advantage of their discretion not to find discrimination where the conditions referred to in King were established, is a moot point.""**

74. The EAT in **Jaleel** continued at [38]:

> **"… the *dictum* of Mummery LJ in Madarassy, referred to in Otshudi and many other authorities, is not a rule of law. It was also by way of a response to a submission that the burden automatically, in all cases, is shifted *merely* by a difference in status and in treatment. But in no case do these features, if present, occur in a factual vacuum. The process of considering whether, or what, inference to draw, and whether the burden shifts, is situation and fact-specific. The task of the tribunal is always to apply the law to the particular pertinent facts and features of the case before it."**

75. At [42], the EAT added:

> **"…the exercise of reviewing and evaluating the particular facts and circumstances of the case, in order to decide whether the burden shifts, is one for the appreciation of the employment tribunal. Accordingly the EAT can and will only intervene if the tribunal has wrongly stated, or plainly wrongly applied, the law, or reached a conclusion on that question which is in the legal sense perverse."**

76. Consideration of whether the facts fulfil the section 136(2) test cannot be carried out by the mechanistic application of a generalised rule of thumb. In the overall context of the particular facts of the given case, a particular factual feature *may* be found to cause, or contribute to, the shifting of the burden in that case. But such a finding, in one case, does not give rise to a rule of law; and it does not follow that the presence of such a feature will always cause the burden to shift, whenever it appears in another case. All depends on the overall factual picture and context of the given case.

77. The present tribunal also correctly directed itself, citing **Laing v Manchester City Council** [2006] ICR 1519, and **Hewage v Grampian Health Board** [2012] UKSC 37; [2012] ICR 1054, that it is not an error for the tribunal not to proceed by way of the two stages in section 136 in a case where it is able to make positive findings about the reasons for the conduct. The EAT's decision in **Field v Steve Pye & Co (KL) Ltd** [2022] IRLR 948 does not purport to say otherwise. Rather, as the EAT put it in **Mefful v Citizens Advice Merton and Lambeth Limited** at [62]:

> **"… what the discussion in Field *does* point up is that, if the tribunal goes straight to the reason why, without considering a factual feature that might have shifted the burden of proof, it may risk failing to consider whether that same factual feature could also have influenced its view as to whether the thing relied upon by the claimant could confidently be excluded as a material influencing factor on the decision in question."**

The Grounds of Appeal

78. There are three grounds of appeal, in summary, as follows.

79. Ground 1 is headed "stereotypes and the burden of proof". It notes that one of the things said to have contributed to the breakdown in trust and confidence on account of which the claimant was dismissed was "aggressive or hostile behaviour." It contends that where a worker is described in conformity with a stereotype, that will provide the "something more" in what it calls the **Madarassy** sense, alternatively that it ordinarily will do so, alternatively that the tribunal should at least consider whether it does do so. This error is said by the ground, as set out in the notice of appeal, to have affected the tribunal's decisions dismissing the direct discrimination complaints relating to (a) the dismissal; (b) Mr Aboud having raised "backfilling" the claimant's role three months into her

employment; (c) Dr Mohammed's criticisms of the claimant in the 360 report; and (d) the decision to suspend the claimant on the same basis as she was ultimately dismissed.

80. Ground 2, as set out in the notice of appeal, relates to the complaint of victimisation regarding the institution of the Slater investigation into the claimant's conduct in relation to the internal recruitment process. It contends that the tribunal erred in failing to find that "the disproportionately serious allegation of dishonesty and its timing" were the "something more" in the **Madarassy** sense.

81. Ground 3 is headed "failure to examine the reason for the breakdown". The tribunal is said to have erred "in operating the burden of proof provisions" and by failing to ask whether the fact that the claimant had made numerous allegations of discrimination contributed to the breakdown of trust and confidence which led to her suspension and dismissal. It is said that, on the face of the chronology, her allegations of discrimination appear to have contributed to the breakdown. So, the tribunal erred by failing to find that the burden of proof shifted, or to consider whether it did so.

82. The judge who directed on paper that all three grounds proceed also directed the claimant to serve a schedule setting out to which issues each of the grounds was said to be relevant. Such a list, of "particulars" was then provided. The respondent responded by tabling a document which identified in a tabular form, in respect of each complaint listed by the claimant, what it said were the passages and paragraphs containing "positive conclusions" by the tribunal relating to that complaint.

Discussion and Conclusions

83. At the hearing of this appeal the claimant was represented by Deshpal Panesar KC and Rad Kohanzad of counsel. The respondents were represented, once again, by Ms Bell of counsel.

84. Before turning to the individual grounds I observe that I do not consider that the tribunal lost sight of section 136 when reaching its conclusions. Apart from the self-direction as to the law referring to it, and citing from pertinent authorities, the references at various points to there being no

evidence "from which we could conclude" plainly alluded to it. But nor did the tribunal rest its conclusions upon a failure to satisfy section 136(2). Rather, the concluding section is replete with positive findings and conclusions about what happened and why, but also conveys that the tribunal sense-checked outcomes by reference to the section 136(2) test.

Ground 1

85. One of the ways in which direct discrimination can occur is by stereotyping, in particular by conduct which is materially influenced by the (conscious or not) attribution of a negative trait to an individual, or an adverse evaluation of their conduct, on the basis of a generalised belief or assumption about persons who possess their characteristic. There are many illustrations in the authorities. An example was **Morris** (above), in which a black employee who raised a complaint was asked, in one form of words or another, whether he was alleging race discrimination. The EAT observed at [33]:

> **"The relevant findings are in fact very stark. Mr Arnett made a comment to the Claimant to the effect that he was alleging racial discrimination. Crucially, the Claimant had said nothing to provoke that comment. It must follow that Mr Arnett said what he did as a result of an assumption – or, to use another word, the application of a stereotype: "he is a black employee complaining about his treatment by a white colleague – he must, or at least may, be alleging race discrimination". In our view, on the Tribunal's factual findings, Mr Arnett must have been motivated by some such assumption; and it follows that his comment was made on racial grounds."**

86. In the present case the claimant claimed that she had been the victim of stereotyping, in the sense that, for example, descriptions of her behaviour, as "aggressive" had been (consciously or not) materially influenced by false beliefs or assumptions about Black women being aggressive, such that the same behaviours by a white man would not have been viewed in the same way. The ground also highlights other adjectives used, in particular "hostile" and "direct." Mr Panesar KC submitted that, given also that the respondents relied on the claimant's behaviour having given rise to a fundamental breakdown in working relationships, it was particularly important that the tribunal give a careful and nuanced consideration to whether stereotyping – conscious or not – may have been at work.

87. I agree with that general submission. But the adjective "aggressive" (as is the case with the

other adjectives relied on), is not inherently, as a word, in itself race-related or an overt racial or sexist slur. There can be no generalised rule about the implications of its use for section 136 purposes. Where a claimant contends that the use of such a word was an indicator or red flag that they have, indeed, been the victim of direct discrimination by stereotyping, that must be considered in the context of all the relevant facts of the case. What matters ultimately is whether the tribunal has, whether through the two-stage process of section 136, and/or in reaching positive findings about the reason for the conduct, given sufficient attention to the use of that language, and the light that it may cast.

88. In the present case, I consider that, reading its decision fairly as a whole, the tribunal plainly understood, and duly considered, the claimant's case that she had been the victim of stereotyping. That this was in general her case was, as I have noted, expressly flagged up by the opening paragraph of the relevant section of the list of issues. That it was specifically her case that the use of certain particular words to describe her behaviour was indicative of stereotyping, was also plainly appreciated and considered by the tribunal. This appears from the decision as a whole, as well as the particular passages relating to the specific complaints to which ground 1 was identified as relating.

89. In relation to Mr Aboud's "backfilling" discussion with Ms Marguet, reliance was placed by the claimant on the latter having referred to the former's concerns about her "direct approach" and her own experience of the claimant "being authoritative" with her and "pushing back". The tribunal gave careful consideration to what was going on in this conversation. At [37] it said:

> **"The explanation which best fits the facts, and which we come to having regard to evidence, which was later to emerge in a 360 report, and in a subsequent investigation about the breakdown of working relationships, is that there were a number of concerns being raised about the claimant's performance and ways of working with people. It is unsurprising that these may have come to the attention of Mr Aboud, though it does not appear that it was Dr Mohammed raising them with him. It is not unlikely that some sort of a conversation took place between Mr Aboud and Ms Marguet in which he indicated that things did not appear to be working out with the claimant, who both had recruited. There do not appear to have been active plans to get rid of her, just perhaps a recognition that they may have to look again to fill her role if things continued not to work out. In any case, neither Mr Aboud nor Ms Marguet were in the line management line of the claimant."**

90. At [280] the tribunal concluded:

> **"Our findings in relation to this issue are set out at paragraphs 36-7 above. We have found that there was no intention or attempt to remove the claimant from her role, just a conversation between two people, not in the claimant's management line, who had been involved in her recruitment after Mr Aboud had become aware of performance issues. The claimant has not established facts from which we could conclude that this conversation was because of, or in any way related to the claimant's race or her sex."**

91. The tribunal, in substance, expressly rejected the claimant's case that this conversation, including the language used, was a "smoking gun" bespeaking an intention or attempt by Mr Aboud and/or Ms Marguet to have her removed from her role by reason of sex and race, or at all.

92. Turning to the 360 report, the tribunal expressly considered the language used in it at points by Dr Mohammed, on which the claimant relied, in the following passage [84]:

> **"We find that Dr Mohammed's comments were balanced. He was positive about her strengths, but frank about some difficulties which he and others had observed, or which had been brought to his attention during the first few months of the claimant's employment. We further find that his observations about her "direct approach" which could be interpreted by the team as "autocratic" and how non-verbal cues could affect others were valid, evidence-based observations stemming from concerns raised with him by team members or observed by him. Additionally, his observation about her having "reacted emotionally" on one occasion was a genuine observation based on what he had seen. We find, as a whole, that the members of staff who inputted into the 360 reviews provided their scores and comments as a genuine assessment of her performance. Dr Mohammed undertook the 360 reviews in the manner expected, in that he made observations that were positive, others that were of a developmental nature and gave specific examples of areas for improvement."**

93. In its conclusions the tribunal said [288 – 290]:

> **"We did not find that Dr Mohammed required the claimant to complete the 360- review contrary to standard practice. The claimant had herself requested for her salary to be reviewed very shortly after starting employment, and before any formal appraisal process had been carried out to assess her performance, which would be a key component of any salary review. Setting up a 360 to gauge performance in these circumstances seems a perfectly reasonable response, and we can find no evidence from which we could conclude that the claimant's race or sex, or her previous complaint had anything to do with this decision.**
>
> **289. Dr Mohammed did (as the issues suggest) intimate that the 360 review would be relied on for the salary review. The respondent accepts this, and the claimant appeared to accept it during employment. When the claimant requested that the 360 review should not be used in her salary review (having received it and presumably seen its contents) the respondent immediately acceded to this request. Again, there is no evidence from which we could conclude that race, sex or previous complaints played any part whatsoever in these decisions.**
>
> **290. We have made reasonably detailed findings on the contents of the review and noted that Dr Mohammed's remarks and comments within the 360 reviews are not out of step with other contributors, are balanced and evidence-based. Although the Slater report, the Lord report and the Allman reports covered different points in time, the consistency with which concerns arise from multiple sources about the claimant's communication, interactions with others and, perhaps, performance in general, bolster our conclusion that Dr Mohammed's comments were genuinely held, and evidence based. He was relating his own and others' observations, not applying stereotypes. There is no evidence from which we could conclude that race, sex or**

previous complaints played any part whatsoever in the making of these comments."

94. The claimant's counsel contended that it was not sufficient to say that Mr Mohammed's remarks were "evidence-based", because that failed to consider whether the way that others who contributed to the 360 review had themselves characterised the claimant's behaviour might have been materially influenced by stereotyping. Mr Panesar KC also submitted that placing reliance on the multiplicity of similar complaints and reports from different managers, peers and reports of the claimant was an impermissible form of reasoning, that risked undermining the statutory protection.

95. I do not agree. The tribunal properly, and thoroughly, evaluated the witness and documentary evidence. It considered the 360 report itself, which the tribunal described as being in 5 sections and a lengthy document. The tribunal analysed, in some detail, its methodology, including its question and answer format and scoring methods. It set out a balanced summary of the responses, and a very full summary of Dr Mohammed's own conclusions under a number of different topics, including favourable conclusions. It also specifically found that the exercise was carried out to inform the salary review requested by the claimant. This was all before coming to its conclusion at [84]. The tribunal also, it must be remembered, had the benefit of hearing from Dr Mohammed as a witness.

96. The tribunal, in my judgment, also properly took into account that the observations that the claimant contended were informed by stereotyping came from multiple colleagues. It also properly stood back and noted, when considering its conclusions, the wider picture emerging from the Slater, Lord and Allman reports over time, and that the 360 report was not out of kilter with these. There are, of course, and can be, no hard and fast rules. In a given case a tribunal might conclude that multiple reports or complaints were the product of group-think, confirmation bias, a general toxic environment, or even collusion. Each case must depend on the tribunal's appreciation of the overall factual matrix in that case. This is the territory of the tribunal, not the EAT or higher courts.

97. Also included in the longlist particulars of complaints to which this ground was said to relate,

were complaints related to the allegations about the recruitment process that led to the Slater enquiry, and what ensued. This was not among the areas identified in ground 1 as originally drafted, or the arguments specifically developed in relation to it; but I note that this general topic was the subject-matter of the victimisation complaints to which ground 2 relates, and to which I will come.

98. However, I can set out here that the tribunal recorded at [107], in the course of its findings about the 12 November 2020 email to Ms Slater, that the claimant believed that:

> **"…labels which had been applied to her, such as autocratic, incapable, or incompetent and dishonest, were common and stereotypical labels stemming from racial prejudice."**

99. As to the questioning of the claimant's honesty in this context the tribunal said [299]:

> **"We are uncertain that this would be racial stereotyping the claimant. But in any event, the reference to dishonesty was based on concerns validly held at the time, even if later not proceeded with."**

100. In my judgment, this is an illustration of the tribunal being alive to the detail of the claimant's case on stereotyping, and giving reflective and careful consideration to it, and the particular language on which she relied as being indicative of it. The tribunal continued with this positive finding [300]:

> **"The reason why an investigation was initiated was because the respondent had valid concerns about the claimant's conduct based on evidence. It had nothing to do with her race, sex or previous complaints."**

101. The tribunal similarly analysed, thoroughly, and with care, the reasons for the decision to suspend, and then later on to dismiss and in respect of the appeal against dismissal, giving careful consideration to the claimant's case. In relation to the suspension, drawing on its earlier findings of fact, the tribunal made positive findings about the reasons in the following passage:

> **"326. The reason why the respondent suspended the claimant and instigated an investigation in breakdown was nothing to do with sex, disability, race, or previous complaints. At this stage the claimant had asked for line management to move from Dr Mohammed to Dr Garges. Subsequently she had levelled allegations at Dr Garges and wanted line management moved again. There had also been the Ms Dang situation. She had told OH (see paragraph 124) that her working relationship with her manager was damaged beyond repair and she did not feel safe working with him. The Lord report (see paragraph 148) had raised concerns about a breakdown in working relations. As this picture emerged and solidified, we find that it was entirely understandable that the respondent would instigate an investigation into the breakdown of working relationships. We find nothing from which we could conclude that the instigation of the investigation had anything to do with the claimant's race, sex, medical condition or previous complaints.**

> **327. Against this background, there did not appear to be anyone who could manage the claimant. The nature of what was being investigated (breakdown in working relationships) lends itself to suspension. This is all the more appropriate in circumstances when multiple people had mentioned how their physical and mental health had been affected by their interactions with the claimant, and how some had mentioned that they would consider leaving if she came back. Suspension was reasonable in the circumstances and there is no evidence from which we could conclude that the claimant's race, sex, medical condition or previous complaints had anything to do with the decision."**

102. In relation to the dismissal, the tribunal made very full findings about the process followed, the case advanced by the claimant, and Mr Rea's decision and the reasons for it, at [185] – [196]. This included, specifically, that it was part of the case she advanced to him that, as the tribunal summarised it at [188], Dr Mohammed had "plotted to replace her due to her being a Black woman", there had been a campaign of "racist microaggressions" by Ms Brown and Dr Mohammed, and Mr Harris had not acted transparently and had raised investigations against her in retaliation.

103. The tribunal's conclusions in the course of the fact-finding included, at [194]:

> **"Mr Rea concluded from the evidence within the investigation report that multiple witnesses reported that they experienced hostile, derogatory and aggressive behaviour against them or had observed such."**

104. In its conclusions the tribunal made the following express positive finding [342]:

> **"We find that the reason why Mr Rea dismissed the claimant was that he was satisfied and genuinely believed that there had been an irretrievable breakdown in working relationships based on a wealth of evidence. It was not because of her race or sex, or because she had made previous protected disclosures."**

105. As to the appeal, the tribunal's summary of Ms MacDiarmid's findings included at [201(f)]:

> **"HR did not lack an understanding of the impact of racism and sexism in the workplace."**

106. As I have noted, specifically as to stereotyping, the tribunal said, at [201(k)]:

> **"It was recognised that words such as "hostile" and "aggressive" can be used in racial stereotyping, but there was no evidence of racism or discrimination as a basis for the allegation of breakdown in relationships or the decision to dismiss."**

107. In the course of its conclusion the tribunal said:

> **"d. We do not conclude that Ms MacDiarmid did focus on dishonesty and misrepresentation of facts as can be seen from her outcome letter, which focuses on working relationships and**

> **not dishonesty.**
>
> **e. Ms MacDiarmid did not overly focus on aggression, but simply made reference to the perceptions of a number of the claimant's colleagues. This was not unreasonable in a hearing dealing with the breakdown of working relationships where multiple witnesses made reference to the effect of the claimant's behaviours on either themselves or colleagues.**
>
> **f. Ms MacDiarmid specifically did address the issue of stereotyping but did not conclude this was at play here."**

108. For all of the foregoing reasons the tribunal did not err in its approach to the fact that the claimant complained that she had been the victim of stereotyping by reference to the language used to describe her behaviours, whether with respect to section 136 or by otherwise failing properly to consider this aspect of the case when reaching its conclusions. Ground 1 does not succeed.

Ground 2

109. This ground relates to the complaints of victimisation concerning the allegations against the claimant of misconduct in the recruitment exercise. The tribunal is said to have erred by failing to find that the burden of proof was shifted, in particular by (a) the fact that a "disproportionality serious" allegation of dishonesty was raised; (b) the timing of the launching of the Slater investigation following the claimant having recently raised complaints amounting to protected acts, in July and August 2020; and/or (c) the findings made at [113], which are said to plainly imply that the respondents wanted to dismiss the claimant, regardless of the outcome of that investigation.

110. In the course of its findings of fact about this general subject, at [97] to [103], the tribunal made specific findings about: Dr Mohammed's concerns having been prompted by sight of emails relating to the process; candidates for one particular role having dropped out; and what he had been told by Mr Daka and Ms Okoli. It also found that the HR recruiters raised concerns of their own. It found that Dr Mohammed and Mr Harris were "concerned about whether the claimant had been honest in some of the things that she had been saying". It also found that at a subsequent meeting of Mr Harris, Ms Jocelyn Brown, and Mr Thompson "all three human resources professionals were aligned on how to take the matter forward." These were all positive findings of fact.

111. The tribunal plainly did not overlook the overlap in the timelines relating to the recruitment exercise and its aftermath and the claimant's complaints about Ms Brown. It specifically found that Mr Harris was mindful of this, when considering the scope of charges, and observed at [101] that HR "was alive to the possible appearance of victimisation" as disciplinary proceedings were being contemplated around the time that the determination of the complaints against Ms Brown was about to be communicated. The plain sense of this finding was *not* that HR was alive to the fact that what colleagues wanted to do *would* amount to victimisation, and looking to help them cover their tracks, but that it was alive to the risk of the *appearance* of victimisation, because of the timing.

112. As to the claimant's case that the Slater investigation was initiated on the premise of "baseless prejudicial allegations", the tribunal said that it had found that there were "genuine concerns held by a number of people about the way the claimant was conducting the recruitment exercise", including HR professionals and some job applicants; and it did not accept that there was "some form of plot between management and HR to discredit the claimant". [297] It also said that to suggest that the Slater investigation "completely exonerated" the claimant was "overstating it". [298] That conclusion fairly drew on its specific factual findings about the content of the Slater report.

113. As already noted, at [299] the tribunal found that, when the terms of reference for the investigation were drawn up "the reference to dishonesty was based on concerns validly held at the time"; and at [300] it reached the positive conclusion that the reason why the investigation was initiated was because the respondent had "valid concerns" about the claimant's conduct "based on evidence", and that it had "nothing to do" with her previous complaints. The tribunal discussed, in its findings of fact, what this evidence was.

114. The tribunal also reached positive conclusions about various impugned actions of Ms Slater herself, such as inviting the claimant to investigation meetings [301], and failing to investigate concerns which the tribunal found were beyond the scope of her investigation and were later

considered in the Lord investigation [302]. As to Dr Mohammed's comments to the investigation, the tribunal found that these reflected his "genuine concerns about the claimant's manipulating the truth." [303] It also found that he spoke to Mr Daka and Ms Okoli because he was "genuinely concerned" about how the claimant was carrying out the exercise based on what he had observed in emails, what recruiters had told him, and the number of people dropping out. [304].

115. In paragraph [113] the tribunal made its findings about the discussions between Mr Harris, Dr Mohammed and Dr Garges following the Slater report, including that, as well as a disciplinary process being begun, without prejudice discussions about a "mutual settlement exit" would also be opened. This paragraph also referred to Mr Harris's "candid" advice that the disciplinary process would be unlikely to result in a finding of gross misconduct, and the contemplation that a performance process might follow. For the claimant it is contended that the obvious implication was that, when the Slater investigation was set up, the view had already been formed that, whatever its outcome, one way or another, her employment would need to come to an end.

116. But it does not follow that the tribunal should therefore also have concluded that this view had been materially influenced by the claimant's earlier protected acts. The tribunal plainly did not consider the raising of allegations of dishonesty to have been an "overreaction", nor influenced by the prior complaints. It plainly also did not consider that the claimant had been "exonerated" by the Slater report, nor that Dr Mohammed and Ms Garges' abiding concerns, following the report, were influenced by her complaints. It also found that it had been made clear to the claimant prior to the disciplinary hearing that the first allegation would not be pursued beyond conveying some learning [305]; and that the claimant was invited to a disciplinary hearing "because an independent thorough report had concluded that there were two allegations where there was a case to answer". [306]

117. In light of these various positive findings and conclusions, ground 2 is not made out.

Ground 3

118. Ground 3 relates to the victimisation complaints concerning the suspension and dismissal. The nub of the criticism is that there was failure by the tribunal, in a case where the employer was relying on a fundamental breakdown in working relationships, to consider whether that breakdown had itself been materially influenced by the claimant's prior protected acts.

119. As I have already set out, the tribunal made specific positive findings at [326] and [327] about the reasons why the claimant was suspended. In particular, it drew on its findings of fact about: the claimant's day to day line management having been moved from Dr Mohammed to Dr Garges; about the Ms Daka episode; about the claimant, despite Dr Garges' efforts to support her, having wanted her management moved again; and about the concerns raised by the Lord report. As the tribunal put it in those paragraphs, as this picture "emerged and solidified" it was "entirely understandable" that the respondent would instigate an investigation into the breakdown of relationships, there "did not appear to be anyone who could manage the claimant", and the nature of the issue to be investigated "lent itself" to suspension, which was also indicated by the fact that "multiple people" had mentioned that their health had been affected by their interactions with the claimant.

120. These positive findings provided a complete answer to the complaint that the decision to suspend the claimant was an act of victimisation.

121. The same is true of the positive findings as to the reasons why the claimant was dismissed and the reasons why her appeal against dismissal were dismissed, which, again, I have already discussed when considering ground 1, and do not need to repeat. In short it is clear that the tribunal found that the claimant was dismissed because of genuine and specifically evidenced complaints and concerns about the claimant's behaviour on the part of multiple colleagues, including not just managers, but a number of peers and reports, and not because of her own complaints against her managers or others.

122. For all the foregoing reasons, ground 3 also fails.

Outcome

123. The appeal is dismissed.