Case Number: 2206044/2017

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON CENTRAL**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT**
MEMBERS: **MS J CAMERON**
DR V WEERASINGHE

BETWEEN:

Ms C Spragg

Claimant

AND

Richemont UK Ltd

Respondent

ON: **3, 4, 5, 8, 9, 10, 11, 12, 15, 16 and 17 October 2018**
IN CHAMBERS ON: **18, 19, 25 and 26 October 2018**

Appearances:
For the Claimant: **Mr C Khan, counsel**
For the Respondent: **Mr M Fodder, counsel**

RESERVED JUDGMENT

The Judgment of the Tribunal is that the claims succeed in part:

1. The claims for direct discrimination succeed unanimously on issues (a), (d), (h), (z), (dd) and (ee), save that on part of issue (a) on the issue of whether the claimant would have been appointed to the role, this is a majority decision.
2. Issue (w) succeeds unanimously on the claim for racial harassment.
3. Issues (ff), (jj) and the issue of covert surveillance succeed unanimously as victimisation.
4. The remaining claims fail and are dismissed.

REASONS

1. By a claim form presented on 14 June 2017, the claimant Ms Cheryl Spragg

claims race discrimination. The claimant has worked for the respondent, or an associated employer, since 23 May 2006 as an account manager. The claimant remains in the respondent's employment.

2. The respondent is part of a group of companies registered in Switzerland owning a number of luxury brands, in particular jewellery, watches and pens. The respondent is the UK and Ireland distribution platform for a number of prestigious brands.

The issues

3. The claims before the tribunal of for direct discrimination because of race, harassment in relation to race and victimisation.

4. The issues are as follows:

Direct race discrimination

5. Was the claimant treated less favourably by the respondent?

6. Was any less favourable treatment because of the claimant's race? The claimant is black and of Jamaican descent.

7. Did any less favourable treatment form a continuing act or ongoing state of affairs; or, if not, would it be just and equitable for the tribunal to extend time for any less favourable treatment that would otherwise be out of time?

8. The acts of less favourable treatment alleged by the claimant are:

    a) When the claimant applied for the position of controller in March 2013, the failure by Mr Catto and/or Mr Foden to (i) consider the claimant's qualifications before appointing Ms Sarah Ait Maamar, (ii) consider the claimant's application properly and to appoint her to the role. The claimant relies on Ms Sarah Ait Maamar, the successful French-Algerian candidate as her comparator and a hypothetical comparator ;
    b) Mr Robert Foden, Financial Controller's comment that she would need a solicitor and Mr Kevin Boltman's comment (Managing Director MONTBLANC) that "*Mr Catto is more South African than I am*"; both in July 2013 when a restructure left the claimant under Mr Greig Catto, the respondent's Chief Financial Officer, (CFO). The claimant relies upon hypothetical comparator
    c) Mr Foden prohibiting the claimant from attending a Global Blue event at the Savoy Hotel in or around July 2013. She relies upon a hypothetical comparator.
    d) Mr Pensa and/or Ms Maranon (white Spanish) appointing Ms Piedad Diez Roman, a white Spanish candidate, as cover for Ms Ait-Maamar during her maternity leave in July 2014 without giving the claimant the opportunity to apply, even though she had informed Mr Foden and HR that she was interested in the role. Ms Roman and a

hypothetical comparator relied upon.

e) The reduction of the claimant's line management responsibilities over Ms Amy Utteridge from 1 August 2014 by Mr Foden from 1 August 2014 and Mr Foden bypassing the claimant to communicate directly with Ms Utteridge and give her tasks to carry out. Hypothetical comparator is relied upon

f) Ms Aoife Hennessy (HR Manager) construing an email sent by the claimant to her on 6 August 2014 as a complaint against Mr Foden and forwarding the email to Ms Sandy Porter, HR Manager. Hypothetical comparator.

g) Mr Foden and/or Mr Catto transferring the claimant's responsibility for the sales/monthly report to Ms Camille Ricard a white French comparator, on 5 March 2015. The claimant also relies upon a hypothetical comparator.

h) in or around June 2015, Mr Pensa or the relevant decision maker failing to appoint the claimant to a Controller role and instead appointing Ms Pauline Railhac a French white woman. Ms Railhac and a hypothetical comparator are relied upon.

i) Mr Catto reducing the scope of the claimant's role in September 2015 and giving key responsibilities to Mr Byron Burgess including communicating with customers, checking customer credit ratings, signing reports and making decisions on customer orders. Mr Burgess and a hypothetical comparator.

j) Mr Pensa or Ms Ait Mamaar failing to introduce Ms Railhac to the claimant on Ms Railhac's first day on 9 November 2015 but introducing her to all other team members present in the office. The comparator is Ms Juliette Clark and a hypothetical comparator.

k) Ms Railhac's subsequent refusal to talk to or respond to the claimant. Comparators: Mr Foden and hypothetical.

l) Ms Di Ivory or the relevant decision maker removing claimant's details from the contact lists that were circulated to boutiques sometime prior to December 2015. The respondent provided an amended second list containing the claimant's details indicating that the details should have been included initially. Comparators: Ms Ricard and hypothetical.

m) Mr Foden assigning the claimant the clerical aspects of Ms Nicola Rose's role when she went on maternity leave from December 2015 and giving the controlling aspects to Mr Burgess comparators: Mr Burgess and hypothetical.

n) Mr Foden's refusal to recognise and record the claimant's achievements in her appraisal of 16 December 2015 and telling the claimant that if she did not sign a version of the appraisal that omitted her achievements that she would not be considered for a bonus or pay rise. Hypothetical comparator

o) Mr Foden permitting the claimant to take only three days compassionate leave when her brother died even though Ms Di Ivory, Retail Director of Montblanc, had been allowed to take several weeks when her sister died. Comparators: Ms Ivory and hypothetical.

p) Mr Catto's listening to the claimant's telephone call on 24 December 2015. Comparator – hypothetical.

q) Mr Pensa failing to introduce Ms Cecilia Boudet to the claimant on Ms Boudet first day in the office in January 2016 but introducing her to all other members present in the office. Comparator: Ms Clark and hypothetical.
r) Ms Boudet's subsequent refusal to talk to or respond to the claimant. Comparator: Mr Foden and hypothetical.
s) Mr Foden dealing with a complaint from Ms Utteridge against the claimant in January 2016 in a way that was designed to intimidate the claimant and leave her feeling unsupported and isolated, including by banging his fists on a table and speaking to her with his face unduly close to hers. Hypothetical comparator.
t) conversations between the claimant's colleagues, including Mr Burgess and Ms Utteridge within earshot of the claimant as to whether she would leave her position with the respondent and Mr Catto's comment to the claimant that she was "*ok only for now"* implying that she should leave. Hypothetical comparator.
u) Mr Burgess, Ms Julia Maestri and Ms Clark changing the settings on the claimant's work telephone without her knowledge or consent on various occasions between February 2016 in January 2017 with the effect that she was less able to perform her role. Comparators: Ms Decort and hypothetical.
v) Ms Beata Grzegorczyk-Rapacewicz and Ms Sara Decort excluding the claimant from staff lunches in February and March 2016. Comparators: Ms Railhac, Ms Boudet and hypothetical.
w) The refusal by Mr Burgess, Ms Sara Decort, Divya Patel, temporary accounts payable assistant and Ms Beata Grzegorczyk-Rapacewicz to enter a lift with her on 24 May 2016 and laughing and joking about the matter in full view of the claimant. Hypothetical comparator.
x) The failure by Ms Charlene Saint-Cast and Mr Foden to show any interest or concern over the claimant's referral to counselling for work-related stress by the company private health insurance in or around June 2016 contained in emails of 6 and 13 June and 13 July 2016 and the failure to follow up an offer to provide a company doctor despite several reminders from the claimant. Hypothetical comparator
y) Mr Burgess, Ms Clark or another colleague adjusting the claimant's chair without her knowledge or permission on 30 November 2016 that with the result that when she sat down she jarred her back. Hypothetical comparator. In evidence this allegation was put against Mr Burgess alone.
z) During a meeting in December 2016 Ms Saint-Cast's failure to take seriously the claimant's indication that she wished to bring a grievance; telling the claimant that she could not explain her grievance in full as it would take too long and suggesting that the claimant look for another job. Hypothetical comparator
aa) the placing of rubbish and files on the claimant's chair on 21 December 2016. Hypothetical comparator.
bb) Ms Ivory's failure to communicate with the claimant about significant changes within the respondent company including the closure of the Bond Street boutique in or around January 2017 which detrimentally

affected the claimant's ability to perform her role. Hypothetical comparator.

cc) requiring the claimant to move to a desk on 16 January 2017 and sit with the back-office section. Hypothetical comparator.

dd) Ms Welch-Ballentine's failure to investigate, address and respond adequately to the claimant's grievance email of 9 January 2017 either at the meeting of 23 January 2017 or in the subsequent decision letter. Hypothetical comparator,

ee) failure to investigate, address and respond adequately to the claimant's appeal against the outcome of her grievance in the hearing on 13 March 2017 or in the subsequent decision letter. Hypothetical comparator.

ff) In the grievance meeting of 13 March 2017 Ms Caroline Welch-Ballentine telling the claimant that she was required to take her mobile phone to IT to delete footage of the lift incident (issue (w) above) and telling the claimant to stop contacting HR hypothetical comparator.

gg) On the first day of her phased return to work 13 March 2017 an unknown colleague having piled up three boxes and a large bag of paperwork on her desk that needed moving even though she had back problems. Hypothetical comparator.

hh) the refusal of Mr Carlo Pensa, and Ms Juliette Clark to say hello to the claimant or acknowledge her presence when they encountered each other in the kitchen on 13 March 2017. Comparator Mr Foden and hypothetical

ii) Ms Maria Medeiros reducing the scope of the claimant's job role and responsibilities further on 16 March 2017 and increasing the volume of administrative work that she was required to carry out.

jj) In an email dated 30 March 2017 being bullied into signing a statement to delete the CCTV footage and being threatened with disciplinary action by Ms Welch-Ballentine. Requesting the claimant to attend a disciplinary hearing on 7 April 2017 due to the refusal to sign the statement and threatening that this could lead to dismissal.

For the avoidance of doubt (ii) and (jj) are only relied upon as direct discrimination and not as harassment and victimisation.

<u>Harassment</u>

9. Was the claimant subjected to unwanted conduct related to her race?

10. Did such conduct the purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

11. The claimant relies on issues (a) to (hh) above being the same as relied upon for direct race discrimination. The same time limitation issue arises.

<u>Victimisation</u>

12. Was the claimant subjected to detriments because she did a protected act or because the respondent believed that she had done or may do a protected act?

13. Do the following acts qualify as protected acts under section 27 of the Equality Act namely:

    i. The email of 1 July 2016 to Mr Foden commenting on comments made by Mr Foden in his email of 8 June 2016.
    ii. The contents of the claimant's meeting with Ms Charlene Saint-Cast (HR Manager) on or about 16 December 2016 (the grievance pre-meeting).
    iii. The claimant's email to Ms Saint-Cast on 9 January 2017. The respondent accepted in submissions that this was a protected act.
    iv. The bringing of proceedings in the Employment Tribunal. The respondent accepted that this was a protected act.

14. The claimant relies upon the acts listed at paragraphs (a) to (hh) above as the detriments, in so far as they postdate each protected act or the relevant person's belief that the claimant had done or may do a protected act.

15. The claimant relies upon further detriment of the respondent instructing and undertaking and the manner of a covert surveillance and intelligence gathering operation on the claimant which continued until at least 9 December 2017. On day 10 of the hearing the respondent accepted that covert surveillance was potentially a detriment.

<u>Remedy</u>

16. The claimant seeks the following:

    i. an award of compensation for injury to feelings including aggravated damages
    ii. compensation for personal injury and associated financial losses
    iii. a recommendation that the respondent's employees undergo training to raise awareness of race discrimination and harassment
    iv. interest

17. On day 9, Mr Khan for the claimant said that the claims for harassment and victimisation should have read issues (a) to (jj) and not (a) to (hh) on both lists. Mr Fodder raised the point on day 1 confirming that (a) to (hh) were not raised as harassment and victimisation but were only relied upon as direct discrimination. The claimant did not contradict this on day 1.

18. The claimant agreed that the list of issues had been in place in that form since the Order of Employment Judge Tayler on 5 March 2018.

19. Issue (ii) is against Ms Mederios who by day 9 had already given evidence and neither harassment nor victimisation was put to her nor knowledge of

protected acts. It was agreed that issue (jj) was in a different category as we had yet to hear from Ms Welch-Ballentine so that it could be "put right". Mr Khan only therefore pursued it in relation to issue (jj) and it was linked to issue (ff). The claimant considered it would be "a shame" from a justice point of view if we were to find that issue (jj) was not direct discrimination but was harassment or victimisation and it would obstruct natural justice.

20. We decided unanimously that issue (jj) could be included as Mr Fodder agreed that the issue could be "put right" but that issue (ii) was not included as Ms Medeiros had given evidence and had not been cross-examined on it. This applied to both harassment and victimisation.

Witnesses and documents

21. The tribunal heard from the claimant.

22. For the respondent the tribunal heard from 15 witnesses:

    i. Mr Robert Foden, former Financial Controller and claimant's line manager – retired as of 31 July 2017.
    ii. Mr Greig Catto, Chief Financial Officer.
    iii. Mr Kevin Boltman, former Managing Director of Montblanc UK Ltd, retired as of 31 August 2018.
    iv. Mr Carlo Pensa, Head of Controlling.
    v. Ms Maria Medeiros, Head of Retail Back Office and Internal Controls.
    vi. Ms Aoife Hennessy, HR Manager.
    vii. Ms Beatriz Maranon, HR Director for the UK.
    viii. Ms Charlene Saint-Cast, HR Manager.
    ix. Ms Caroline Welch-Ballentine, at the relevant time the Global HR Director. Ms Welch-Ballentine was no longer employed by the respondent at the date of this hearing but remained employed by a Group company.
    x. Mr Byron Burgess, Senior Credit Controller.
    xi. Ms Beata Grzegorcyk-Rapacewicz, Accounts Payable Assistant.
    xii. Ms Divya Patel, Temporary Accounts Payable Assistant, who no longer works for the respondent.
    xiii. Ms Sara Decort Senior Accounts Payable Assistant.
    xiv. Ms Mei Lei Lee, Accounts Payable Assistant.
    xv. Mr Damian Ozenbrook, CEO of surveillance company Blue Square Global Ltd.

23. A set of documents was contained in four bundles. There was a separate bundle of witness statements.

24. We also had an agreed cast list and chronology, a reading list and an opening note from the claimant.

25. We had detailed written submissions from both counsel to which they spoke and a bundle of authorities from the respondent. The submissions are not replicated here. All submissions and authorities were fully

considered even if not expressly referred to below.

Findings of fact

The background to the respondent's structural operation

26. In 2012 the respondent's holding company took steps to improve operational efficiency in the UK. An announcement was made to managers on 31 January 2013 as a result of which, certain reporting lines were changed. A decision was made upon a formal integration of the respondent with Montblanc (UK) Ltd (Montblanc) with effect from 1 April 2014.

27. The contracts of employment of those within the Montblanc finance department moved to the respondent and this included the claimant. Those who transferred with the claimant were Mr Robert Foden who was her line manager, Ms Nicola Rose, credit controller and Ms Amy Utteridge accounts payable, who were her two direct reports. The department in which the claimant worked was small and this limited opportunities for advancement (claimant's statement paragraph 2).

28. At the date of transfer the claimant and her three colleagues were based in an office in Richmond upon Thames.

29. In 2015 a decision was made to consolidate office locations into a single corporate HQ in Walmar House, Regent Street, London W1. The respondent's finance department including the claimant moved to Regent Street on 14 September 2015. The claimant and her colleagues worked in the finance department on the second floor and all other Montblanc staff were located on the fourth floor. The claimant was happy in the new office between September 2015 and December 2015. It was not until the end of December 2015 or the beginning of January 2016 that things began to change for her.

30. Having transferred from Montblanc the claimant and her three colleagues were located with those in the respondent's finance department comprising about 20 employees. They worked in an open plan office. The CFO Mr Catto had his own office.

31. Financial administration at the respondent was split between two functions, accounting and controlling. The head of the accounting function was Ms Juliette Clark and the head of the controlling function was Mr Carlo Pensa. The claimant is and was part of the accounting function.

The claimant's role

32. The claimant joined Montblanc on 25 May 2006 as an Accounts Manager reporting to the Financial Controller Mr Robert Foden and she remains in the respondent's employment. The claimant's role involves retail back-office functions including liaising with boutiques selling Montblanc

products and dealing with customers queries, reconciling credit card accounts, dealing with bank statements, cash books and assisting with credit control. The claimant does not deal with VAT returns or the production of monthly accounts although these had originally been part of her job description.

33. The respondent company employs about 800-1,000 people. Worldwide across the Group, there are close to 30,000 employees.

The claimant's first application for a Controller post

34. On 30 January 2013 the claimant applied online via the respondent's careers site for the post of Controller. The recruitment process was led by Mr Greig Catto assisted by HR. The respondent's grading structure was opaque. Mr Catto did not know the claimant's grade or the grade of the Controller role. Although the normal process is to take internal applications first and then if necessary involve an external agency, the internal and external applications were opened at the same time. There were three internal applicants: the claimant, Ms Sarah Ait-Mamaar from Richemont in France and a further candidate from the Japanese company. As the Japanese candidate did not have the right to work in the UK, that application was not progressed. An agency also submitted 4 to 5 CVs.

35. Ms Hennessy's evidence (HR Manager, statement paragraph 15) was that the usual criteria which apply to internal applications are that the candidate must have at least two years in their current position, be performing satisfactorily in their existing role and have the recommendation of their manager. We did not see these exact criteria in any policy. We find that the policy is as set out below.

36. The respondent's policy, aimed at internal applicants, was at page 225 of bundle 1 and said as follows:

> *Interested in moving within the Group?*
> *The group has established a staffing strategy approach which should facilitate and encourage internal mobility.*
> *We want to ensure the future of our organisation and also to secure the long term employability and development of our employees.*
> *Career development is a co-responsibility between employee and manager.*
> *However, the first actor in this development is you. If you are interested in moving within the Group then you should remember the following points.*
>
> *…..*
>
> - *Before submitting an application you should first inform your manager and second human resources*
> - *In exceptional cases the employee's manager may refuse to approve the application in agreement with human resources.*
>
> *…*
>
> *The job alert will inform you via email each time a new vacancy is posted which corresponds to the criteria you selected.*
>
> *All employees who apply will be interviewed by the human resources department*

concerned by the vacancy. In case you do not have the profile requested, HR will provide you with personalised feedback at the end of the process.

37. The claimant's application was at page 229 of bundle 1. There was a dispute as to whether she had her line manager's recommendation or approval to apply and/or whether she needed it. We find that there is no requirement for the line manager's approval. The requirement is to inform the line manager of the application and in exceptional circumstances the line manager may refuse to approve it, in agreement with HR. Ms Maranon's evidence (UK HR Director) was that agreement from HR was necessary to ensure that line managers did not unnecessarily block their direct reports' career progression.

38. Mr Catto was the lead on the recruitment exercise. He asked Mr Foden as the claimant's line manager, to review the claimant's CV and consider whether he thought the claimant was suitable for the role.

39. The email dated 27 February 2013 was at page 245 and we accept Mr Foden's evidence and find that Mr Catto asked him to write it but did not tell him what to say. The request was made in a phone conversation in which Mr Catto asked what Mr Foden thought about the application. Mr Foden said on the phone that it was "*not black and white*" there were some ways in which the claimant could do the role and other ways in which she would need support. He thought she was not a 100% fit for the job and that he would have to make a conditional response. He did not say that the claimant should not be shortlisted or that she was unsuitable for interview. Under the terms of the policy, he agreed that the claimant's was not an exceptional case. Therefore he agreed and we find that this was not an exceptional case in which he could block the application in agreement with HR. He did not disapprove the claimant's application.

40. In the email of 27 February 2013 he said that he thought that if the claimant were to be appointed to the position, she would require considerable support. He expressed some reservations.

41. In submissions the claimant accepted that Mr Foden was an honest and balanced witness who did not have an intention to block her application. We find that Mr Foden did not intend to deprive the claimant of a first round interview.

42. Mr Catto discussed the application with the Managing Director Mr Boltman whose view was that the claimant did not have the required skills or experience (Mr Catto's statement paragraph 28 and Mr Boltman's statement paragraph 20). Mr Catto said in his statement that Mr Foden had not recommended the claimant. We find that his recommendation was not necessary to secure a first round interview other than in exceptional circumstances, which these were not.

43. Mr Catto was very much of the view that the claimant was not performing her current job to the required standard but this was not a view shared by

her immediate line manager. For example, Mr Catto initiated an inquiry as to whether the claimant's degree qualification had been properly verified.

44. The claimant agreed in evidence that the internal control work she did was not the same as a Controller's role which involves more data analysis and budget forecasting. The claimant accepted that her role was not the same and also accepted that she would need training to do the role. She said she should have been given a fair chance to have an interview and have her application considered.

45. We find that it was Mr Catto and Mr Boltman who prevented the claimant from being interviewed out of the two eligible candidates (the third candidate not having the right to work in the UK). Mr Foden had reservations about the claimant's ability to fulfil the role. We find that her abilities should have been tested at interview in line with the career development policy for internal candidates.

46. The claimant was informed by email on 1 March 2013 that she had not been successful. The successful candidate Ms Ait Maamar had been working as a Controller in Paris within the Group for just over a year before she made her application. She had the relevant experience.

47. The claimant's evidence was that Mr Foden did not act in a race discriminatory manner until July 2013 by which time they had worked together for about seven years. The tribunal asked Mr Foden what he thought had changed. He said that there were two points at which he thought things changed for the claimant. The first was in April 2013 when the announcement was made that the Montblanc finance department would be merged with the Richemont Group and the second was in September 2015 when the members of the Montblanc finance team moved from Richmond to Central London. The integration did not go particularly well from the point of view of either the claimant or Mr Foden. There was a lack of a transparent process for integration. Mr Foden described it as "*shambolic*".

48. The claimant told Mr Foden that as a result of the merger, she feared for their job security. Mr Foden was confident about the assurances he had received that their jobs were secure, but as he described it, the claimant was right. Mr Foden ultimately lost his job as a result of the merger and opted to take retirement in July 2017.

<u>Mr Kevin Boltman</u>

49. The claimant's case is that in July 2013 she attended a meeting with the Managing Director of Montblanc, Mr Kevin Boltman at which he informed the team of proposed structural changes within the finance department that would come under the umbrella of the Richemont Group. Mr Greig Catto was the CFO.

50. The claimant's case is that at that meeting Mr Boltman said of Mr Catto "*he is more South African than I am*". Both originate from South Africa. The respondent Group is 50% owned by a South African and many of the key officeholders are South African. Mr Boltman came to the UK in 1989. In his witness statement he denied making the comment. In oral evidence said he did not recall making it.

51. The claimant said she understood the comment to mean that Mr Boltman was saying that he was a racist and Mr Catto was more of a racist. Mr Boltman had known Mr Catto professionally for many years as they were part of the same Group. They got to know each other better after the integration of Montblanc in September 2015. Mr Boltman knew nothing about Mr Catto's political leanings, beliefs or whether he had any prejudices. Mr Boltman could not say who, between Mr Catto or himself, had a stronger South African accent. Both have been in the UK for decades. Mr Boltman's view was that sadly his South African heritage was always going to cloud people's judgment of who he was and what he believed but he did not subscribe to this.

52. Mr Catto was born in South Africa and has lived in the UK for 29 years and is a British citizen. His evidence (statement paragraph 34) was that as a white South African he is particularly careful about race issues and takes care not to make comments which could be misconstrued. Within his team there are at least 10 people from ethnic minorities

53. The comment was made in the presence of Mr Foden who remembered it clearly. We find on a balance of probabilities that the comment was made because it was remembered by the claimant and Mr Foden and Mr Boltman simply did not recall it.

54. We find that in making the comment Mr Boltman was not admitting to being a racist and was not saying that Mr Catto was more racist than himself. We find that it is inherently unlikely that such admissions would be made. Member Dr Weerasinghe agreed with the finding that it was not because of race or related to race and took the view that the claimant's perception although incorrect was reasonable because she is black and because Mr Boltman's comment was unusual.

55. The claimant also says that at that meeting Mr Foden told her she would need a solicitor and then he laughed. The claimant was taken aback by the comment and she took it to mean that Mr Catto, as a white South African racist, would not treat her fairly.

56. Mr Foden's evidence was that as they walked back to the office, the claimant asked him what would happen if they were not all integrated into the UK team and they were made redundant. The claimant told Mr Foden that she was very much of the opinion that their jobs were on the line. Mr Foden said that it was at this point he said that they would all need solicitors and that he was speaking about himself as much as the claimant and other members of the team.

57. We find that the comment was made by Mr Foden in the context of the fears about job security and the risk of redundancy which might mean they would all need a solicitor. We find it was not a comment about needing a solicitor because of likely unfair treatment because of or related to race.

The Global Blue invitation

58. In July 2013 the claimant was invited to a corporate event at the Savoy Hotel. The invitation came from a company named Global Blue which facilitates VAT refunds for international shoppers. The claimant's case is that she asked Mr Foden whether he would be attending and that he told her he was not and that she would not be able to attend either because it was not her place and it was not for people like her. He told her that it was for people like Mr McLaughlin the former Operations Director. The claimant's case is that Mr Foden told her that if she turned up for the event and Mr Catto was there he would go mad and would ask Mr Foden why he had allowed her to go.

59. The generic invitation to the event in June 2013 was in bundle 3 at page 135. We also had the invitation to the same event for June 2014. The invitations did not give individuals' names.

60. Mr Foden was invited to the event but said he would not have dreamt of going. His understanding was that the event was primarily a sales pitch aimed at managing directors and senior decision-makers on sales who could make decisions about purchasing more services from Global Blue.

61. Mr Foden agreed that he told the claimant that it was inappropriate for her to attend and explained to her that he would not be attending because it was not aimed at his or her level of employee, but at decision makers such as Mr McLaughlin.

62. Mr Foden was not a decision maker on sales and that is why he considered that the event was not suitable for someone like himself. He considered that the same reason applied to the claimant. Mr Catto's evidence was that he would have had no problem with the claimant attending the event. As part of her role in the Retail Back Office part of the business, she would have had contact with Global Blue and he had no problem with her attending.

63. In reply to an email dated 23 June 2014 to Mr Obhrai, who had sent the 2014 invitation, the claimant said: *"Thank you for the invite, Montblanc and Richemont seem to be of the view that despite you sending me an invite these should be reserved for company directors, hence I did not accept the invitation"* (page 260 bundle 1).

64. We find that Mr Foden certainly discouraged the claimant from attending. He did not think it was appropriate. He was not planning to attend. We find on a balance of probabilities that Mr Foden was of the view that it was

for senior decision makers only and not for people at his or the claimant's level. Our view on this is confirmed by the email referred to above when the claimant herself said that it appeared to be reserved for company directors. We find that this was nothing to do with the claimant's race, it was not related to her race but was related to the seniority of those attending the event and whether they were decision makers on sales and purchasing.

The claimant's second application for a Controller post

65. In July 2014 the new Controller Ms Ait-Maamar was due to go on maternity leave and the claimant expressed an interest in covering the role. During 2013 Mr Catto appointed Mr Carlo Pensa as Head of Controlling. Mr Pensa led the recruitment exercise for the maternity cover.

66. The post was advertised in three places, the intranet, externally and on Linked In.

67. The respondent's recruitment authorisation for advertisement was at page 255 of bundle 1, for a fixed term contract for one year. Ms Beatriz Maranon the UK HR Director posted the advertisement on the respondent's intranet on 11 June 2014. This stayed open until 25 June. The external application period stayed open until 9 July 2014. The Linked In advert showed a closing date of 25 July 2014. We accepted Ms Maranon's evidence that the company did not necessarily have control over the Linked In advertisement period. It was within the control of Linked In as to when they put advertisements up and when they took them down and it did not always happen as the respondent wished or directed.

68. Ms Maranon also sent the vacancy details to her European HR colleagues (256) asking if there were any suitable internal candidates. Mr Diego Vilarino in Spain sent the details of Ms Piedad Diez Roman, a white Spanish candidate (257). Ms Maranon is also Spanish. We find that Ms Maranon knew of the claimant's potential interest in the role as she knew that the claimant had applied in January 2013 and had been rejected at shortlisting stage and without an interview (her statement paragraph 9).

69. Ms Maranon has had no Equality and Diversity training. She does not arrange it for her HR team. She has been in post as the UK HR Director for five years.

70. Ms Maranon's evidence was that there were three external candidates in addition to Ms Roman. She said that she did not receive an application from the claimant. We find that when emailing her HR colleagues across Europe as to whether they knew of anyone suitable, she knew that the claimant had applied 18 months earlier and was therefore potentially interested. She took no steps to ensure that the vacancy was brought to the claimant's attention. This could have been done at the same time as casting the net further afield to her European colleagues.

71. No one at the respondent knew the view of Ms Roman's line manager in terms of her applying for this role or whether any exceptional circumstances applied, as per the policy. Ms Maranon simply relied on Mr Vilarino in Spain. She did not ask about the applicant and she did not check the circumstances. In his email sending over the CV Mr Vilarino gave Ms Maranon the line manager's details, should she need any more information. This was not followed up.

72. Ms Roman worked in the Barcelona office and was due to be made redundant. She had an offer of alternative employment in Madrid but she preferred not to take this and wanted to take the role in the UK.

73. The claimant did not accept that it was advertised internally and said that the respondent was not telling the truth about this. She said she had an alert

74. set up on the system, as envisaged in the policy and said she was not alerted to the advert. The claimant only learned about the vacancy from Linked In on 16 July 2014 (page 198a bundle 3).

75. On that same day, 16 July 2014 (page 263), the claimant raised with Ms Hennessy the issue of cover for Ms Ait Mamaar's maternity leave. In an email she said: "*with reference to Sarah Ait Mamaar role, as she will be going on maternity leave in September, was enquiring whether someone will be required the role in her absence. This would be an opportunity to gain the group experience (as I was told that I required this to do the role)".* Ms Hennessy told the claimant that she did not look after that role and Ms Maranon dealt with this recruitment and she was on holiday. There was no follow up from HR on the claimant's enquiry.

76. On 4 July 2014 Mr Pensa interviewed Ms Roman. He describes himself as French speaking, Swiss and Italian and his line manager was Mr Catto. Ms Roman had been doing exactly the same role in one of the Group companies in the Iberian market. In terms of Ms Roman's skills and experience, Mr Pensa considered her the perfect match. We had her CV details at pages 258-259. She had been working as a Controller for Spain and Portugal.

77. Mr Pensa's only reservation was Ms Roman's level of English. He admitted (statement paragraph 20) that her English was not perfect, he considered it 'good enough' and it was fixed term appointment for maternity cover. The offer to Ms Roman was at page 262a on 10 July 2014, six days before the claimant found out about the vacancy.

78. The claimant's case was that Ms Roman's English was very poor. Mr Foden admitted in his statement (paragraph 33) that initially Ms Roman's English was difficult to understand because it was heavily accented and it took her a few weeks to master English pronunciation.

79. Mr Catto was asked to endorse the decision to appoint Ms Roman. He

carried out an interview with her and approved the decision. We saw no notes of this interview.

80. The claimant missed the opportunity to apply because she did not see the internal advertisement and she was not alerted to it or informed about it. The appointment had been made before the claimant knew about the vacancy. Her line manager Mr Foden, Mr Catto and HR knew or ought reasonably to have known from her earlier application that she was interested in the role.

81. The respondent has an emphasis on internal career progression. Their policy makes clear that they want to ensure the future of the organisation and secure the long-term employability and development of their staff. They had a potential candidate sitting in the London finance office who spoke perfect English and who had previously applied for the role. The claimant was not given an opportunity to demonstrate that she could fulfil the role at least for a year as maternity cover. It was not a permanent appointment.

Line management responsibility for Ms Utteridge from 1 August 2014

82. The claimant's case is that from 1 August 2014 her line management responsibility for Ms Utteridge was taken away from her and given to Mr Foden.

83. In the Richmond office, the claimant and her two direct reports were on the second floor together with Mr Foden. On 1 August 2014, Ms Rose and Ms Utteridge were moved to the ground floor. The claimant stayed on the second floor but in a different and better office. The claimant said that when Ms Utteridge moved to the ground floor, she would come upstairs and see Mr Foden. The claimant accepts it made communications more difficult when Ms Rose and Ms Utteridge moved to the ground floor. She said that Ms Utteridge was inclined to go direct to Mr Foden. This was confirmed in evidence by Ms Mai Lai Lee, an Accounts Payable Assistant, who worked in the same office.

84. The claimant said in evidence that it was "*Amy who was bypassing me"* and that Mr Foden told her to go to the claimant. When reminded that her case was that it was Mr Foden who was the alleged discriminator, she said that it was Mr Foden bypassing her as well.

85. Mr Foden's evidence was that he did not have reason or capacity to take on line management of Ms Utteridge (statement paragraph 42).

86. Mr Foden explained that one of the reasons for Ms Rose and Ms Utteridge being moved to the ground floor was because in the light of recent changes it left only one employee as a constant presence on the ground floor (many others were out and about for different reasons) and she was shouldering the burden of visitors and deliveries. Mr Foden was not particularly happy with the physical split of the team because it meant

more running up and down stairs for all of them.

87. We find, based on the evidence of both the claimant and Mr Foden, that it was Ms Utteridge who was inclined to go to Mr Foden rather than the other way round. It was not Mr Foden who was seeking to reduce the claimant's responsibilities and he encouraged Ms Utteridge to go to the claimant. He did not have the capacity to take on line management of Ms Utteridge. This allegation fails on its facts.

The claimant's email of 6 August 2014 to Ms Aoife Hennessy

88. On 5 and 6 August 2014 there was an email exchange between the claimant and Ms Hennessy in HR page 264 of bundle 1. It related to the finance team's motivation in connection with the move from Richmond to London saying that staff was suffering from symptoms of bereavement and asked if Ms Hennessy had any suggestions.

89. Ms Hennessy replied: "*Sorry to hear this. Anyone in the healthcare scheme has access to free bereavement support/counselling, all they have to do is call health care helpline. I am on holiday and no other details at hand I am afraid."*

90. The claimant responded at 08:41 hours "*so sorry, I got your out of office and contacted Sandy Porter, I did not expect you to reply while you were on holiday. Please enjoy your holiday and relax. I have got to send you another email but it is not something I expect you to action while you are away".*

91. Ms Porter was then the Head of HR. The email relied upon by the claimant was at the bottom of page 265-266 in bundle 1 sent at 09:41 hrs. In that email she complained about matters relating to Mr Foden's discussions on issues concerning the move to the London office.

92. The claim is that Ms Hennessy construed the email as a complaint about Mr Foden and that construing it as such was an act of discrimination. The claimant agreed that it was a complaint and she intended it to be such. Therefore we find that there was nothing wrong with Ms Hennessy construing it as a complaint when that is what it was.

93. The complaint was also that of sending it to Ms Porter. The claimant said she had told Ms Hennessy not to send it to Ms Porter. There was no evidence of this in the emails. The email of 08:41 hours said that the claimant did not expect Ms Hennessy to action the matter while she was on holiday. This is not the same ask telling Ms Hennessy not to action it or send it to Ms Porter. Ms Hennessy's evidence in any event was that she did not forward it to Ms Porter.

94. This allegation fails on its facts because the act of discrimination was said to be construing the email as a complaint and the claimant accepts that it was a complaint. We accept Ms Hennessy's evidence and find that she

did not forward it to Ms Porter. There was no evidence otherwise and we find the claimant did not ask Ms Hennessy not to send it to Ms Porter.

Transfer of responsibilities for the sales/monthly report to Ms Ricard

95. On 5 March 2015 the claimant says that Mr Foden and Mr Catto transferred her responsibilities for preparation of the sales flash report to Ms Camille Ricard who is white and French.

96. The parties agree that Ms Ricard did not start in the respondent's employment until July or August of 2015. She was not employed with the respondent on 5 March 2015.

97. The claimant relied upon an email she received on 5 March 2015 at page 292 of bundle 1, from Mr Olaf Wahl, who is based in Hamburg. He was in charge of the Montblanc brand. The claimant considered this email to be a fabrication and not truthful. The email said:

> *Dear Cheryl*
> *Thank you very much for your precious input.*
> *After reviewing all the reporting tools we have decided to further streamline.*
> *With the weekly Sales Forecast, Strategy Meeting, regular Market Visits and phone conferences we believe that we have meanwhile established a very efficient and sufficient communication between the markets and headquarters.*
> *Therefore I am very happy to inform you that you do not have to create the monthly Sales Flash as from now on.*
> *Thank you and your colleagues for having provided it to us during the last years.*
> *Best regards*
> *Olaf*

98. Mr Foden's evidence was that originally this task was done by Ms Ivory's assistant who left. The claimant picked it up, keenly and voluntarily. Once Ms Ricard joined some of the claimant's non-core duties were taken away and given to Ms Ricard. We find that the sales flash task was not transferred to Ms Ricard in March 2015 because she did not join the respondent until four or five months later. It was transferred to Ms Ricard when she joined.

99. We accept the email the Olaf Wahl at face value. The email from Mr Wahl removing the duty, was not initiated by Mr Foden or Mr Catto. We find that the duty was removed from the claimant at the initiation of the Hamburg office for the reasons set out in the email and was not because of the claimant's race and was not related to her race.

Reduction in scope of the claimant's role in September 2015

100. The claimant's case is that in September 2015 Mr Catto reduced the scope of her role giving key responsibilities to Mr Burgess including communicating with customers, checking customer credit ratings, signing reports and making decisions on customer orders. Mr Burgess was a Senior Credit Controller and more senior than the claimant.

101. The claimant accepts that from September 2015 Mr Burgess worked more closely with Ms Rose. They were both working on accounts receivable. Ms Rose was due to go on maternity leave.

102. Changes inevitably happened in September 2015 because that is when the Montblanc team moved to Central London to become integrated with the Richemont team which included Mr Burgess.

103. One of the things that was taken from the claimant was credit list blocks. This is a list of orders that are blocked, either because an account is overdue or because customer has gone over their credit limit. The change was that after the move, Mr Burgess held the authority to release a customer from the credit list block. Mr Burgess investigated client credit risks as part of his role. It made sense once the team integrated for this to be done by him as the Senior Credit Controller. In terms of checking customer ratings, that was only done when a new account was opened and that was rare.

104. We find that there was a transitional approach to integration and there was a process whereby Mr Burgess as the Senior Credit Controller was taking responsibility for the credit control aspects of the Montblanc team that he already held for the Richemont team. We find that Mr Catto's instructions to Mr Burgess were not because of the claimant's race or related to her race. It was because of the necessary changes on integration and Mr Burgess's particular role.

<u>The claimant's third application for a Controller role in June 2015</u>

105. On 9 June 2015 the claimant made a further application for a Controller role which had arisen due to company expansion. This was a permanent role and the recruitment exercise was carried out by Mr Pensa assisted by Ms Saint-Cast in HR. The advertisement was at page 300 in bundle 1. On page 302 it stated a requirement for 5 years relevant experience and strong analytical skills in the operational aspects of finance and business.

106. The claimant accepts that this was a more senior position to her own and agreed that it was a very strategic role. She accepted that she did not have five years of relevant experience.

107. Ms Saint-Cast brought the claimant's application to the attention of Mr Pensa because she was an internal candidate. Ms Saint-Cast said it was her decision not to shortlist the claimant and she said Mr Pensa agreed. This was notwithstanding that in evidence Mr Pensa told the tribunal that he thought the claimant's CV was, to quote him, "*strong and good*" and she was an internal candidate already working in the relevant team.

108. We find based on his evidence (statement paragraph 82) that Mr Foden as line manager was not involved in this application. He had no recollection of having any conversations with Ms Saint-Cast about the claimant's suitability. Mr Pensa said in cross-examination that he was

aware that Mr Catto had a negative view of the claimant. Mr Catto had final approval on the candidate to be appointed.

109. Asked if on his own, he would have invited the claimant to an interview, Mr Pensa said "*possibly yes*". He said it was a joint decision between himself and Ms Saint-Cast not to take the claimant's application forward.

110. Twenty-two applications were received only one of which was from the UK and that was the claimant. Nine candidates were shortlisted and two went through to interview on the CV's, Ms Pauline Railhac and Ms Cecelia Boudet another internal applicant. They are both French and white. The claimant was not shortlisted.

111. Ms Pauline Railhac was identified as a suitable candidate. Her CV was in bundle 1 at page 314. She had worked as a Management Controller. Ms Railhac made a speculative application to the Managing Director of Cartier, Mr Feniou, who is also French. Cartier is part of the Group of companies including the respondent. Her email to Mr Feniou sent at 20:56 hours on 25 May 2015 was in the bundle, in French, at page 297. We had an agreed English translation at page 297a.

112. Ms Saint-Cast made the decision not to shortlist the claimant based on the job description of the Controller role and by looking at the claimant's appraisal. We were not told why we did not have a copy of the 2014/2015 appraisal before us or why this had not been disclosed by the respondent. Ms Saint-Cast said she looked at it, but we do not know what it said. The only relevant appraisal before us was the 2012 appraisal which was positive. Ms Saint-Cast decided that the claimant was more in a processing role than an analytical role and decided that she should not be shortlisted. Ms Saint-Cast decided that the claimant did not have the capacity to step up to the new role.

113. Ms Maranon, the HR Director, did not deal with this recruitment process in her witness evidence at all, yet she was involved. She was the recipient of the original email from Mr Feniou who sent it to her at 17:28 hours on 26 May 2015. It was also copied to Mr Pensa who responded to Ms Maranon the following morning saying that he would like to shortlist Ms Railhac for interview (page 295 bundle 1).

114. Ms Maranon obtained finance approval within a remarkably short time of receipt of the Ms Railhac's CV from Mr Feniou. The finance approval came from a European HR colleague at 09:29 hours on 27 May 2015, page 298 bundle 1. Within 12 minutes of receiving the finance approval Ms Maranon emailed Mr Pensa saying that HR would advertise the role and start sharing CV's with him. The decision to proceed with the recruitment process was almost instant upon receipt of Ms Railhac's CV.

115. Ms Maranon agreed that it would have been a good idea to have two people marking within a shortlisting exercise, but this did not happen. She also agreed that it would have been a good idea to have kept a formal

interview record with a scoring sheet, but this did not happen. It was a common refrain from Ms Maranon and other HR witnesses that they dealt with things on a "case by case" basis.

116. Mr Pensa interviewed and wished to appoint Ms Railhac and asked Mr Catto to approve his decision. Mr Catto carried out an interview with Ms Railhac and approved the decision. She was also interviewed in Geneva by the European CFO Mr Christian Klever. We saw no notes of these interviews. The date of Ms Railhac's appointment was 15 July 2015 (agreed chronology).

117. The claimant had to chase up a response to her own application. She first chased this on 7 July 2015 almost a month after she made her application. She received a response from Ms Saint-Cast (page 316, bundle 1) on 7 July 2015 informing her that they were looking for a person with strong experience in controlling with a minimum of five years relevant experience with strong analytical skills. She said the hiring manager wanted someone who was more experienced than Ms Ait Mamaar who could be his right-hand person and whom he did not need to teach from the beginning.

118. The claimant had to press for the name of the hiring manager, who was Mr Pensa. She was not told until 15 July 2015 (page 302 bundle 1). Ms Saint-Cast could give no good reason why it took a month to respond to the claimant's job application other than pressure of work.

119. We find that there was a lack of transparency on all three recruitment decisions for the Controller role. Ms Saint Cast is an HR Manager who did not work in a finance role and we find she was not qualified to decide that the claimant could not step up to the role. There were no interview notes and there was no shortlisting scoring process. We were not shown the person specification. There was no structured process and the third process was approved the moment Ms Railhac, a speculative applicant, had been identified as a suitable candidate. Ms Saint-Cast also contradicted herself in evidence about having a conversation about the claimant with Mr Foden. Mr Foden also said she did not and we find she did not have such a conversation.

120. Looking at the three Controller vacancies in totality we find that there was a preference for white continental Europeans. Ms Railhac was a speculative external applicant from France whose application was processed with remarkable speed. Ms Maranon made a proactive search across the European Group for a suitable candidate for the second vacancy without looking to a potential candidate in the relevant department in London. Ms Roman, a white Spanish candidate, already had the offer of a job with Group company in Madrid but was given the given the opportunity to move to the UK and secured the role despite concerns about her communication skills in English. The unsuccessful candidate on the third vacancy, Ms Boudet, went on to secure a different role with the respondent as Finance Co-Ordinator in the Retail Back Office. She came from a group company in France. Ms Mederios as

Head of Retail Back Office was appointed without there being any advertisement of the role. Mr Catto had the final say on all three Controller appointments and he had a negative view of the claimant.

Would the claimant have been appointed if shortlisted and interviewed?

121. The claimant relies on the failure to be appointed. By a majority (Employment Judge and Ms Cameron) we find as follows. The Controller role was a business analysis role. The claimant accepted it was not the role she had been doing. Ms Ait-Mamaar had more recent relevant experience within the respondent's organisation and the claimant would not have been ready to start in the role from day one.

122. On issue (d) which was the maternity leave cover, we were not asked to consider a failure to appoint. The issue was not giving the claimant the opportunity to apply. Following ***Scilcluna*** we have taken a strict approach to the list of issues and not gone on to consider the failure to appoint. If we are wrong about this, we find that the claimant would not have been appointed, because the amount of support that she needed was particularly relevant for a temporary appointment as there was not enough time to give her a learning opportunity.

123. On the third application there was a requirement for five years experience in Controlling which the claimant did not have (advertisement on page 301 of bundle 1). We find that the claimant did not meet the requirements set out in the advertisement on page 301 and would not have been appointed if interviewed.

124. The minority view (Dr Weerasinghe) on the first Controller application took account of the claimant's witness evidence paragraph 6 and in oral evidence and in her cover letter for the application asked for an opportunity to gain further experience. She wanted an opportunity to develop and implicitly admitted that in a fair competition she might not succeed. Dr Weerasinghe finds that this aspiration is entirely consistent with the respondent's policy on internal applicants and had a fair non-discriminatory process been followed she ought to have been appointed.

Ms Pauline Railhac's introduction in November 2015

125. Ms Railhac started in post on 9 November 2015. The claimant's case is that either Mr Pensa or Ms Ait Maamar failed to introduce Ms Railhac to the claimant on her first day, but introduced her to all other members of the team. We find based on his evidence that Mr Pensa was not available to make the introductions on 9 November 2015 because he was in a training session all day. The introductions were carried out by Ms Ait Mamaar. The claimant's evidence (statement paragraph 28) was that it was Mr Pensa who introduced Ms Railhac. We find that the claimant's memory was not accurate on this.

126. Mr Pensa sent an email on Friday, 6 November 2015 informing the team

that Ms Railhac was joining at, so by email he introduced her to the entire team. The email included the claimant (bundle 1 page 322).

127. Ms Ait Maamar gave the personal introduction on 9 November 2015. She did not give evidence to the tribunal. Mr Pensa's evidence was that the practice when introducing a new member of staff, was that they would not do so if someone was on the phone or busy. The claimant also said that Ms Railhac subsequently refused to talk or respond to her. There were no specifics given as to what Ms Railhac had refused to respond on. The claimant accepted that she and Ms Railhac had a conversation over a Christmas meal about Ms Railhac's children. Ms Grzegorcyk-Rapacewicz, an Accounts Payable Assistant in the same office, did not notice Ms Railhac ignoring the claimant.

128. Our finding is that the claimant's memory was flawed about Mr Pensa carrying out the introduction. We accepted Mr Pensa's evidence about reasons that a person might not be introduced on the first day. The claimant gave us no specifics as to what Ms Railhac refused to respond to. There was evidence that they had a cordial conversation over a meal. Even if Ms Railhac did not speak much to the claimant, we find that this was not because of her race. We find that any refusal to introduce Ms Railhac was not because of the claimant's race or related to her race. We find that any lack of communication between the claimant and Ms Railhac subsequently was not because of race or related to race.

Contact list – December 2015

129. The claimant's case is that her contact details were removed from a contact list circulated to their customer boutiques sometime prior to December 2015 and the person responsible was Retail Director Ms Di Ivory.

130. When the respondent's finance team moved to Central London, the sales department was located on the fourth floor with finance on the second floor. In December 2015 Mr Boltman's PA on the fourth floor drew up a telephone list which did not include the respondent's employees on the second floor including the claimant. All four members of the Montblanc finance team were missed off, Page 129a in bundle 3, including Mr Foden.

131. The replacement list was at page 129c and all four were included. The respondent put to the claimant that this was a pure administrative error. The claimant did not deny this but considered that she was singled out because she was a key contact and should have been there.

132. We find that the reason the claimant's name did not appear on the list at page 129a was because it omitted all the Montblanc employees and was an administrative error which was rectified with the later list at page 129c. It had nothing to do with race. She was not treated less favourably than the other Montblanc employees. The claimant gave no evidence in chief regarding boutique staff being told that Ms Ricard was their main point of

contact and we find this allegation unproven.

Assigning parts of the claimant's role to Ms Rose

133. Mr Foden's evidence was that he wanted both Mr Burgess and the claimant to cover Ms Rose's maternity leave and he asked the claimant to do the aspects of Ms Rose's role that she would have done when Ms Rose was on annual leave. Mr Foden's evidence was that most of Ms Rose's role was covered by Mr Burgess but there were nevertheless aspects of Ms Rose's role that he wished covered by the claimant. Ms Rose went on maternity leave in December 2015 (agreed chronology).

134. This was three months after the move to the Central London office but before they created a third pillar in the finance business. The two existing pillars were accounting and controlling. Mr Catto agreed in evidence that he had input with Mr Foden into the redistribution of Ms Rose's role when she went on maternity leave.

135. The claimant's case is that she was told that Mr Catto wanted Mr Burgess to do the controlling aspects of the role and that she was given the clerical parts of the role.

136. We find that this was a reasonable request from the line manager because it was temporary in nature to cover the maternity leave. Mr Burgess was the Senior Credit Controller so we find it made sense for the controlling aspects to go to him and the clerical parts of the work needed to be covered as well.

137. We find that these were sensible and practical arrangements for maternity leave cover and was not because of the claimant's race and not related to her race.

Compassionate leave

138. In August 2015 the claimant's brother very sadly passed away and she sought compassionate leave. The funeral was not until 14 September 2015.

139. The respondent's Compassionate Leave Policy was in bundle 1 at page 177. It said:

> *Paid compassionate leave may be granted urgent personal reasons (including leave for childcare, leave to care for dependent relatives and bereavement leave).*
> *….*
> *There is no specific entitlement to compassionate leave as such and each case will be considered according to the relevant circumstances of the individual concerned. Factors to be taken into account when determining whether, and if so how much, compassionate leave will be granted, will include the urgency of the application and the personal circumstances of the individual (e.g. whether responsibility for the care of child(ren) and/or dependent relative(s) can be shared with a partner/relative).*
> *In case of bereavement leave, factors such as the extent of the individual's involvement in making funeral or other arrangements and the need to travel will be*

> *taken into account. Each case will be decided on individual circumstances. However, as a rule of thumb the duration of paid or unpaid leave will take account of the employee's relationship with the deceased, any domestic responsibilities the employee may have to undertake and any travel arrangements, but will not normally extend beyond 5 days. Paid leave, normally not exceeding 1 day, will be extended in respect of the death of other family relatives, for the purpose of allowing the employee to attend the funeral.*

140. The policy on Dependency leave was set out immediately following the section on Compassionate leave and provided for unpaid leave to deal with emergencies involving a dependent and to make long-term arrangements. It mirrored the statutory right.

141. Pages 154-156 of bundle 1 comprised a table of 92 employees within the Group of companies who were granted compassionate leave in the last 3 years. It included 15 employees of the respondent company. Ms Hennessy's evidence was that it averaged 2.2 days per employee. The claimant was given 3 days. The median was one day.

142. The claimant was informed by Mr Foden by email on 20 August 2015, page 320d, that she could have the day of the funeral plus one day to help with arrangements, as compassionate leave. Mr Foden said that if she wanted further time this would have to be booked and approved as annual leave. He had checked the position with Ms Hennessy in HR. The funeral was not until 14 September 2015, the same day as the move from the Richmond office to the London office.

143. The claimant replied that she understood that Ms Ivory had been given several weeks off when her sister passed away and that other colleagues Trevor and Amanda had been given more time. We were not told their racial groups. Trevor had 1.5 weeks because he had to clear his late father's house on his own. We were not told the reason why Amanda had more time. We were told that Ms Ivory lost three members of her family within a matter of weeks in tragic circumstances. Ms Hennessy's evidence was that if the claimant saw that someone else had been given something, she regarded it as an entitlement.

144. The claimant also wanted time off because her husband had been admitted to hospital with chest pains. Mr Foden was a little confused as to what time off was required, when and for what purpose.

145. When Mr Foden's father passed away, he was given two days off, one to make funeral arrangements and one to attend the funeral in Birmingham and he considered this sufficient.

146. Page 320a of bundle 1 the claimant accepted that Mr Foden was seeking to find a solution for her, a form of leave that might assist her in having time off for her husband as well as compassionate leave for the funeral. In response to HR, Mr Foden said: "*I am inclined to increase the offer to 3 days*" (page 320). We find that Mr Foden was supportive of the claimant's request for more leave. The claimant accepted in submissions that Mr

Foden was making a case for her for more than 2 days to be granted.

147. We were not told whether Ms Ivory's time off was with or without pay. In terms of the claimant's case that Mr Foden only permitted her three days off, we find that Mr Foden was doing his best for her. This was accepted in the claimant's submissions. The claimant was told she could have dependency leave or annual leave if she wanted more time off.

148. We find that the granting of only 3 days compassionate leave was not because of the claimant's race and neither was it related to her race. It was also not the action of Mr Foden. Mr Foden was doing his best for her in the circumstances.

The claimant's appraisal of 16 December 2015

149. The claimant's case is that in her appraisal of 16 December 2015 Mr Foden "refused to recognise and record her achievements" and told her that if she did not sign his version of the appraisal, she would not be considered for a bonus or a pay rise.

150. The HR process was that unless employees signed off their appraisals they would not be put forward for a pay rise or discretionary bonus. We find that this was the process and it was not personal to the claimant, it applied to all employees. She was not treated less favourably than anyone else in such circumstances.

151. What the claimant had done with her appraisal document, was to alter the manager's comments rather than confining her comments to the employee section. She had also changed the rating given to her by Mr Foden from Meets Expectations to Exceeds Expectations. The claimant's version of the document was at page 343 in bundle 1 and the respondent's version at page 345.

152. In an email dated 4 April 2016, Mr Foden told the claimant that she should only complete the employee comments and then sign and return it to him. He told her that she was not permitted to change the evaluation (bundle 2 page 37). He also told the claimant that he had been working on her salary increase, as with other team members, but he could not submit it until the appraisal had been uploaded on the HR system.

153. The claimant's case was that Mr Foden did not properly record the matters they had discussed at the 16 December 2015 appraisal meeting. The claimant's position was that her appraisal had been influenced by Mr Catto and that Mr Foden told her Mr Catto may not agree with what had been discussed.

154. Mr Catto's evidence was that Mr Foden had reservations about the claimant's capabilities but had been reluctant to raise them with her. We find that Mr Foden required Mr Catto's sign off before the pay rise and bonus could be approved. In cross-examination Mr Foden said that the

claimant suggested some things that he felt were unwise to include in the appraisal because he felt they were exaggerations that would not help her in achieving a better grade. One of these issues was her involvement in e-invoicing, which Mr Foden said had been the responsibility of Mr Burgess. Mr Burgess told Mr Foden that he had introduced it and the claimant implemented it going it forward.

155. As a majority (Employment Judge and Ms Cameron) we find that it was not open to the claimant to change Mr Foden's rating of her appraisal and the correct place for her to do this was within the employee comments box. The reason Mr Foden could not approve the pay rise or bonus was because of the system and not because of her race. It was also not related to her race. The claimant and Mr Foden did not agree the appraisal and there was a recognised process for dealing with this. We find as a majority that Mr Foden was following the due process on the appraisal.

156. The minority decision (Dr Weerasinghe) is also that Mr Foden was not acting as he did because of the claimant's race and it was not related to her race but for different reasons. The minority view was that Mr Foden was misled or misinformed by Mr Burgess on the e-invoicing issue and this was the nub of the problem. Mr Foden's view was that the claimant had taken ownership of this from Mr Burgess. Mr Burgess in evidence agreed that he introduced it and the claimant took it forward. The minority view is that Mr Foden misunderstood this issue and this is why he refused to record it in the appraisal. It was not because of her race or related to her race.

Listening to the claimant's telephone call on Christmas Eve 2015

157. On 24 December 2015, Christmas Eve, the claimant made an internal phone call to her colleague Ms Fattu Kallay at 1:14pm. In that call the claimant asked Ms Kallay when she thought Mr Catto would let them go home. Immediately after that call Mr Catto came out of the office to inform staff that they could leave at 2pm.

158. Mr Catto does not work in the open plan office. He denied listening in to the claimant's telephone call and did not know that it was technically possible within the phone system, to listen in without the other person consenting to join the call. He had no reason or interest in listening to the call.

159. He went out to inform all staff sitting across 20 desks. He did not inform people individually. We could find no good reason why Mr Catto would wish to spend his time eavesdropping on colleagues' telephone conversations, even if he had the technology to do so. We find that this allegation is not proven on its facts.

Ms Cecelia Boudet's arrival in January 2016

160. The claimant's case is that on Ms Boudet's first day in the office in January

2016 Mr Pensa introduced her to everyone in the office apart from herself. The claimant's case is also that Ms Boudet refused to talk or respond to her.

161. Mr Pensa's evidence was when Ms Boudet started, he took her round the office and introduced her to whoever was there. If anyone was busy or on the phone then he did not do so. We accepted his evidence and find on a balance of probabilities that he did not introduce Ms Boudet because the claimant was busy or on the phone and not because of her race. The lack of introduction was not related to race.

162. The claimant's case is that Ms Boudet subsequently refused to talk or respond to her. As with the same allegation against Ms Railhac, there were no specifics as to what Ms Boudet failed to respond to. Mr Pensa's evidence was that Ms Boudet was a friendly but quiet person. We did not hear from Ms Boudet. Ms Grzegorczyk-Rapacewicz found the claimant to be a solitary person and said she took her lunchbreak outside the normal time. Ms Grzegorczyk-Rapacewicz was not challenged on this evidence.

163. We find on a balance of probabilities that the allegation is not proven on its facts.

Ms Utteridge's complaint

164. On 6 January 2016 Mr Foden informed the claimant that Ms Utteridge had made a complaint about her. The claimant's case is that on that date, Mr Foden came over to an empty desk opposite hers and banged his hand on his desk a couple of times telling her that he wanted to see her in a meeting room because of a serious complaint.

165. The claimant said that Mr Foden put his face very close to hers and told her that he had been informed by Mr Catto that Ms Utteridge had complained that she was being treated unfairly. Ms Utteridge had also complained that the claimant's emails were aggressive.

166. The email complaint from Ms Utteridge to an HR officer was brief, at page 356 of bundle 1. It said: *"Here is the fact about the sick form, whenever I was sick, next day in the morning, she put a sick form on my desk. She point out and did only to me but not Nicola. I feel that it is the discrimination."*

167. In essence the complaint was that the claimant required Ms Rose to fill out sick certificates but not Ms Utteridge. We are not required to make a finding on that issue, but on whether Mr Foden dealt with the complaint in an intimidating manner and whether he did so as an act of discrimination.

168. The claimant's evidence on this point was difficult to follow. She suggested there was no issue between herself and Ms Utteridge. It was clear from the documents that Ms Utteridge had a problem with the claimant in relation to sick notes and her view that she was being treated

differently to Ms Rose. It said as much in the claimant's own notes of a meeting on 12 January 2016 (page 88 bundle 3).

169. By an email dated 12 January 2016 Mr Foden invited them both to a meeting for a brief discussion about working together as a team (bundle 2 page 3). We find that he was in the middle trying to mediate and sort out a problem between two employees.

170. The claimant's case was that the way in which Mr Foden dealt with this complaint was designed to intimidate her and leave her feeling unsupported and isolated and this included him banging his fists on a table and speaking to her with his face unduly close to hers in two meetings, one on 6th and one on 12th January 2016. This was denied by Mr Foden.

171. As a majority (Employment Judge and Ms Cameron) we find it inconsistent with having invited them both to a meeting in a spirit of mediation, to come and bang on the claimant's desk and intimidate her. We found Mr Foden a controlled and formal person in evidence. Mr Catto considered him a manager who wished to avoid conflict in managerial terms. As a majority we find the allegation was not proven.

172. The minority finding (Dr Weerasinghe) was that Mr Foden did bang on the desk and in support of this noted paragraph 3 of claimant's witness statement which said that in 2006 he slammed his hand his desk. The minority finding was that the facts were proven but it was not related to the claimant's race or because of her race but because he was angry.

<u>Comment by Mr Catto on 21 January 2016</u>

173. The claimant's case was that there were conversations between her colleagues including Mr Burgess and Ms Utteridge as to whether she would leave. The claimant also said that Mr Catto made a comment to her on 21 January 2016 saying that she was "*OK only for now*" implying that she should leave.

174. There was no evidence in chief from the claimant as to the overheard conversations about whether she would leave and therefore we find this part of the allegation unproven.

175. Both parties agree that the conversation with Mr Catto took place in the kitchen. Mr Catto said that the claimant asked him how he was and he said "*OK, only for now*" meaning that he could only speak for the present moment. His evidence was that he often replies: "*I am alright, for now*".

176. The claimant's evidence (paragraph 43 of her witness statement) was that Mr Catto came into the kitchen and asked how she was and when she replied "*OK*" he said: "*yeah, only for now*". The claimant interpreted this as a personal attack and an act of race discrimination.

177. We find on a balance of probabilities that Mr Catto said that he was "*alright*

for now". We find that the confusion arises from no more than a misunderstanding within a casual conversation in the kitchen. The misunderstanding was underlined for us with the slight difference in words relied upon by the claimant in paragraph 43 of her statement and in allegation (t) in the list of issues. The statement said: "*Yeah, only for now",* the list of issues said: "*ok only for now"* yet the claimant told us she remembered it very clearly and noted the time of the comment. We find that the claimant's memory on the issue is flawed and that the allegation is not proven on the facts.

Changing the settings on the work telephone

178. The complaint was that Mr Burgess, Ms Maestri and Ms Clark changed the settings on the claimant's phone without her consent on various occasions between February 2016 and January 2017 so that she was less able to perform her role. She said that the calls were forwarded to voicemail. The respondent accepts that this did happen on occasions.

179. When members of staff were out or absent, the procedure was that the volume on their phone should be turned down so as not to disturb anyone and if they did not do so, someone else would do it for them. It could be put to voicemail and it is accepted that this was done on the claimant's phone.

180. The claimant accepted that Mr Burgess "*could be right*" that this happened to his phone. His evidence was that the claimant's phone rang incessantly when she was not there. She agreed that she never adjusted her own phone, she did not touch it. Mr Burgess said that the reason it was adjusted so it did not disturb. In his oral evidence Mr Burgess said it was common for employees to put colleagues' phones on to voicemail if they were absent, if the colleague had not done so themselves.

181. The claimant emailed IT about this in May 2016 (volume 2 pages 56-57) saying she could not get the phone off the "do not disturb" setting. The claimant asked IT and they said there was nothing wrong with her phone. The claimant did not know who was said to have gone into her phone settings to cause this problem.

182. In November 2016 the claimant sent to her personal email address a chain of emails where she raised the issue with IT (bundle 2 page 87). IT found no problems with the phone. In relation to voicemails, IT said that an employee could not cause this problem and perhaps the phone had not been configured properly (bundle 2 page 239). The claimant was prepared to countenance the possibility that it was the equipment and not something that had been done by someone else.

183. Ms Decort (white British) was the named comparator. In her evidence, statement paragraph 13, she said her phone was adjusted by others when she was not in the office and she had no problem with it. She did not know who did it and did not ask. She was not challenged on this evidence.

184. We find that the practice in the finance office was that when an employee had not turned their phone down when absent, someone else would do it for them. It happened to Ms Decort, the comparator. We find that there was no less favourable treatment because of race. We also find that this was not conduct related to the claimant's race.

Ms Grzegorczyk-Rapacewicz and Ms Decort and staff lunches

185. On 17 February 2016 the claimant's colleague had a birthday lunch and invited colleagues by email of that date (page 231 of bundle 2). Ms Grzegorczyk-Rapacewicz invited about 14 colleagues. She did not invite Mr Foden, Ms Rose, Mr Catto and Ms Maestri amongst others. Ms Lee told us that she was invited but by a separate email.

186. The claimant accepted that she was not the only one who was not invited. The claimant accepted that all the Montblanc employees were not invited. Mr Foden was not invited. The claimant accepted that he was not on holiday and therefore in the same position as herself.

187. Ms Grzegorczyk-Rapacewicz said that the reason she did not invite the claimant was because she did not know her very well, they hardly spoke and did not have anything in common. It was not put to Ms Grzegorczyk-Rapacewicz that the reason she did not invite the claimant was because she is black. She denied this.

188. Mr Foden's oral evidence was as follows: "*We were supposed to integrate into the larger department and as the claimant has described, the whole office would empty out at lunchtime and the only people left there were the "Montblancers" as we called ourselves and Byron Burgess, for what reason I don't know and I was being tasked by Mr Catto to integrate the team but there was nothing at all coming the other way."* Mr Foden said that the integration did not go well.

189. We find that the reason Ms Grzegorczyk-Rapacewicz did not invite the claimant, was firstly because she was part of the Montblanc team who had not been in the office for very long and secondly because they were not particular friends. There was no less favourable treatment because of race because Mr Foden was treated in the same way. We find that it was not because of the claimant's race or related to her race.

190. We saw an email in bundle 2 page 232 dated 16 March 2016 sent by Ms Decort to a number of employees inviting them to a birthday lunch. Included in the invitation was Ms Fattu Kallay who were told is black. We find that the reason Ms Decort did not invite the claimant was not because she was black and the lack of an invitation was not related to her race. We find this because Ms Kallay, who is also black, was invited.

191. In her witness statement this allegation was also put against Mr Catto who had failed to invite her. In oral evidence the claimant withdrew the

allegation against Mr Catto.

The lift incident

192. On 24 May 2016 the claimant left the finance office at 5:30pm and went to the lifts on the second floor. She pressed the button for the ground floor. She was waiting for the lift when four others approached namely Mr Burgess, Ms Decort, Ms Divya Patel and Ms Grzegorczyk-Rapacewicz. The middle lift arrived and the claimant entered and her colleagues all walked past the lift, one by one in single file, led by Mr Burgess. Ms Patel was third to walk past the lift and as she did, she turned back towards Ms Grzegorczyk-Rapacewicz and pulled a face with a wide-open mouth. We had the benefit of viewing the CCTV footage of the incident.

193. The four colleagues admitted that they sometimes played a childish game with the lifts, racing to see who could get out of the building first. They all accepted that they were not playing that game on 24 May 2016. The four of them were good friends and used to walk to the station together. They often laughed together.

194. The claimant regarded the lift incident as bullying and ostracism. She raised it in her grievance of 9 January 2017 (page 105 point 15) saying that she was the only black member of staff at the lift and they decided not to get in the lift with her, and it was done with total disregard for her feelings. The four colleagues all admitted in evidence that the claimant was holding the lift door open for them. Ms Grzegorczyk-Rapacewicz, Ms Decort and Mr Burgess are white and Ms Patel described her racial group as Indian.

195. All four were interviewed by Ms Saint-Cast about what happened. This was on or about 26 and 27 January 2017, eight months after the event. We saw the interview notes, none of which were approved by the four individuals and which they had not seen until these proceedings.

196. According to Ms Saint-Cast's records, they were all asked the same open question about what happened in the incident and Ms Saint-Cast read to them the relevant extract from the grievance. First through the door on 24 May 2016 was Mr Burgess, he relied on the "racing the lifts" story. Ms Decort did not refer to racing the lifts. Ms Patel referred to a game within the team, saying that she did the same to Ms Grzegorczyk-Rapacewicz, leaving her alone in the lift. Ms Grzegorczyk-Rapacewicz referred to the game. Those who had relied on the racing game all agreed, once they had seen the footage, that this was not what they were doing.

197. They all said in front of the tribunal that they were laughing and joking as they left work. We find, having viewed the footage and on their admission, that they all saw the claimant holding the door for them. We find that they deliberately ignored the claimant.

198. On the issue of whether the case was properly put to witnesses, the

respondent accepted (submissions paragraph 26) that it was put to all four witnesses that they did so because of the claimant's race. They all denied it.

199. Ms Mei Lai Lee has worked for the respondent for about 20 years. She has therefore worked with Mr Burgess for 16 years as he joined in 1998. She described him in her witness statement (paragraph 21) as someone who did things as a prank and that he liked a joke. Ms Lee, who describes herself as Malaysian Chinese, also gave evidence that she considered that there was casual racism in the office and she just put up with it. She saw it as office banter that was "not worth fighting for".

200. We find that Mr Burgess was the ringleader. He led the single file procession past the lift and the others were following him. He was the most senior of the four employees. We find that the three women followed his lead. He made a strange bodily position standing on one leg for the amusement of the people behind him. There was some laughing and joking going on. Mr Burgess accepts that at no time has he apologised to the claimant even after seeing the footage.

201. The claimant alleged that Mr Burgess made a whipping noise. There was no audio with the CCTV footage to assist us with this. All four relevant employees including Mr Burgess denied that he ever made such a noise. Ms Lee on the other hand said she had heard him make that noise around the office but she was not sure in what connection. Ms Lee was not present at the lift on 24 May 2016.

202. We have no difficulty in finding that the claimant was upset by this incident as shown in her grievance. This was a detriment to the claimant.

203. The changing stories relating to racing the lift and in the grievance interviews and their defensiveness in evidence led us to find that this was not a prank. This on our finding would have been easy to admit in the first instance.

204. We find that the three women were led on by Mr Burgess and were doing no more than following his lead. We also find on a balance of probabilities that Mr Burgess made a whipping noise. Mr Burgess did not expressly deny it, he could not recall making it. We find that he made the noise based on the claimant's evidence, on Ms Lee's evidence that he made such a noise from time to time around the office and the fact that three of the witnesses, including Mr Burgess changed their stories about racing the lift.

205. Mr Burgess in his statement at paragraph 52 said "*I cannot say why I did not get into the same lift as [the claimant]".* He therefore did not offer any cogent explanation. He denied that he was avoiding her. Not one of the witnesses said that the lift was too full and we find that there was sufficient room for them. We have taken into account Ms Lee's evidence of casual racism in the office. She was a witness for the respondent and we found

her the most straightforward and credible of all the witnesses from whom we heard.

The counselling issue

206. The claimant's case is that Ms Saint-Cast and Mr Foden did not show interest or concern for her in relation to her referral for counselling for work-related stress in June 2016 and that they did not follow up on an offer to provide a company doctor, despite reminders from her.

207. On 24 May 2016 (bundle 2 page 51) there was an email from the respondent's private healthcare provider with regard to counselling. The claimant had authorisation for six sessions. There were weekly sessions from 31 May in work time, taking half a day off work. There was no objection to this from Mr Foden. On 25 May 2016 the claimant asked Ms Saint-Cast whether she (the claimant) should be referred to OH.

208. It was not until 12 July 2016 that Ms Saint-Cast responded to the request for further counselling sessions (page 49a bundle 2). She could give no good reason for the seven-week delay, other than saying that she received a lot of emails and probably missed it.

209. There was a question as to how many more sessions were needed. Mr Foden promptly found out from the claimant that she needed 12 sessions and Ms Saint-Cast suggested that they arrange OH after those 12 sessions (page 49c bundle 2). Mr Foden thought there should be an OH referral after 6 sessions (page 50). On 13 July 2016 Mr Foden told the claimant they would need to book an OH appointment. On 13 July the claimant received authorisation from the medical insurers. These emails were a matter of minutes apart.

210. The question of an OH appointment came up on 9 August 2016 (page 80) when Mr Foden asked Ms Saint-Cast whether the claimant had yet been to OH. The claimant raised it on 14 September 2016 (page 70) and Mr Foden put the query back to Ms Saint-Cast. Ms Saint-Cast did not progress the matter and expressed regret for this.

211. The claimant agrees that she had the counselling and that HR and Mr Foden raised no objection.

212. We find that Mr Foden did not show a lack of interest or concern. He pressed and reminded Ms Saint-Cast on the matter. The allegation against Mr Foden is not proven on the facts.

213. The claimant secured the additional six counselling sessions and insurance approval for this. Ms Saint-Cast dealt with the matter in her supplementary witness statement. In her original statement Ms Saint-Cast said she had been lacking information from the claimant's doctor but in the supplemental statement accepted that this was not correct and she did not ask for the information until 20 December 2016. She said that the reason

was her heavy workload causing her to act reactively rather than proactively.

214. Ms Saint-Cast had a heavy workload, she was looking after 400 employees at the time whereas earlier in her career in France, she had only looked after 150. Her position was better by the date of this hearing as she had responsibility for only 200 staff. We found as a majority (Ms Cameron and Employment Judge) on a balance of probabilities that her reasons for not acting more promptly on the claimant's OH issue was due to feeling overloaded at work and not because of the claimant's race and it was not related to her race.

215. The minority view from Dr Weerasinghe was that it was not enough for Ms Saint-Cast to say she had a heavy workload and she needed to show that there were similar omissions for white employees. Other actions and inactions on her part, as set out in our findings below were taken into account. The minority view is that an adverse inference is drawn that Ms Saint-Cast's failure to show interest or concern about the referral for counselling was because of the claimant's race.

<u>The chair incident on 30 November 2016</u>

216. On 30 November 2016 the claimant returned to work after a couple of days leave and went to sit on her chair. The relevant chair was shown to us in the tribunal. It was a relatively standard office chair on wheels, with a padded seat.

217. The claimant said it had been lowered to such an extent that it caused her to jar her back. The claimant agrees that she did not fall off her chair. In the list of issues this allegation was put against Mr Burgess, Ms Clark or another colleague. In her witness statement the claimant put this allegation against Mr Burgess alone (paragraph 62). She asked her colleague Ms Lee who sat alongside her whether anyone had adjusted her chair. Ms Lee told her that they had received a visit from their auditors PricewaterhouseCoopers and the auditor, a petite young woman, had sat on the claimant's chair to view the same screen. The claimant also asked Mr Burgess if anyone had adjusted her chair and he also explained that there had been an auditor in the office.

218. The claimant contacted the auditor, Ms Rai from PwC, asking if she had adjusted the chair (email 5 December 2016 bundle 2 page 90). Ms Rai replied that as far as she remembered she did not adjust the chair.

219. The claimant believes that this was a deliberate act, a prank and an act of race discrimination. The claimant believes that this was carried out by Mr Burgess because she said he was always at her desk adjusting her telephone with Ms Clark and she regards him as the instigator of the lift incident and of putting rubbish on her chair. She accepted that she did not know because she was not present. The claimant accepts that it is possible that someone else could have used her workstation but

considered it unlikely.

220. The claimant accepted in cross examination that she did not know whether it was Mr Burgess who adjusted her chair. She accepts she was not there and it was a guess. In oral evidence Mr Burgess denied it. The claimant said that Ms Lee had told her in a conversation in the kitchen that Mr Burgess had done something similar to her chair and that it was because she is Malaysian.

221. As we have said above, Ms Lee described her racial group as Malaysian Chinese. Ms Lee's evidence was that she had been off work for a day and came back to find that her chair had been altered. She asked Ms Kallay and Ms Decort if anyone had been sitting in her chair and Ms Kallay said Mr Burgess had used her chair. Ms Lee sat on the chair and in her words it "*collapsed*". She did not fall to the floor and she was not injured.

222. The claimant's case is that she suffered excruciating pain and a slipped disc as a result. As we confirmed with the parties on day one of the hearing, we make no finding in this liability hearing as to causation of any back injury on the part of the claimant.

223. Mr Catto's evidence (statement paragraph 68) was that he saw the claimant fall off her chair at the Finance Christmas dinner on 24 November 2016. He does not know whether she hurt her back. He witnessed her falling off the chair because he sat opposite her and people were concerned that she may have hurt herself although she said she was fine. Mr Pensa also witnessed it as he was sitting next to the claimant at the time. The claimant accepts that she "*rolled off*" her chair.

224. We find on a balance of probabilities that it was the auditor who adjusted the chair. She had used the chair the day before as the claimant was not there and she had used the chair to view the same screen when working with Ms Lee. Although the auditor could not recall adjusting the chair this was not the same as a denial.

225. This was not less favourable treatment of the claimant because of her race. A hypothetical comparator who had been absent from the office and whose chair was in a similar position to be used by an auditor when working with Ms Lee, would have been treated the same on our finding. We also find that this was not conduct related to the claimant's race.

<u>The meeting with Ms Saint-Cast on 9 December 2016</u>

226. On 6 December 2016 the claimant sent an email to Mr Foden as her line manager, to the general HR address and to Ms Saint-Cast saying that she had a doctor's appointment for her back pain and wanted to know arrangements for seeing the company doctor (page 96 bundle 2). Ms Saint-Cast offered the claimant a meeting which Ms Saint-Cast described as a grievance pre-meeting. That meeting took place on 9 December 2016.

227. In that meeting, based on the claimant's note at page 89 bundle 3, Ms Saint-Cast told the claimant in relation to the 30 November chair incident was that it was company furniture and can get adjusted "*Company furniture Therefore, can get adj".*

228. The claimant's case is that at that meeting Ms Saint-Cast failed to take seriously the claimant's indication that she wished to bring a grievance. The claimant also contends that Ms Saint-Cast told her that she could not include events that went back to far as it would take too long and she suggested that the claimant look for another job. We make findings on this below.

A further chair incident on 21 December 2016

229. The claimant's case is that on 21 December 2016 she found files and rubbish left on her chair. There is no allegation in this list of issues as to who was said to have done this. The claimant photographed the chair and the photo was at page 112b of bundle 3. It showed some clear empty plastic wallets and some tape that looked like the backing to sticky labels. The claimant thought, but was not certain, that there were some empty envelopes as well. We saw the claimant's WhatsApp messages with Ms Rose on 21 December 2016 at pages 168-169 of bundle 3 where she asked about this. Ms Rose assumed that the items had been left by the cleaners. There are no photographs of any files on the chair and no reference to files in the WhatsApp messages.

230. The claimant does not know who it was who did this and makes no allegation as to who it was. Nevertheless, she could not agree it was the cleaners. She could not accept that there could be an innocent explanation and was certain that it was an act of race discrimination and racial harassment.

231. In her statement paragraph 70, she said it was not appropriate for her to be lifting files and rubbish from her chair when she had a back condition that everyone knew about. The items we saw in the photo looked so light as to be negligible. We find on a balance of probabilities it was left by the cleaners as Ms Rose suggested.

232. We find no less favourable treatment because of race and no detriment. These items of office stationery of negligible weight could be easily lifted and removed. Cleaners could equally have left such items on the chair of a hypothetical comparator. We also find that this was not conduct related to the claimant's race.

Communication over the closure of the Bond Street boutique

233. The claimant's case is that Retail Director Ms Ivory failed to communicate with her about significant changes that the respondent including the closure of the Montblanc Bond Street store in about January 2017 and that

this affected her ability to perform her role.

234. This was dealt with in paragraph 71 of the claimant's witness statement. She said that on 4 January 2017 she sent an email to Ms Ivory about the closure of the Bond Street boutique as she had not "*been communicated to about this*". The claimant also said there were other changes of which Ms Ivory failed to advise her and which had an impact on her ability to perform her role. We were not told what other changes the claimant had not been told about and therefore we can make no finding on this.

235. Ms Saint-Cast dealt with this in evidence at paragraph 75 of her statement by cross-referencing to her grievance outcome letter of 6 February 2017 at page 211 in bundle 2. She acknowledged that the claimant sent an email to Ms Ivory about the Bond Street closure and Ms Ivory replied the same day apologising twice for failing to inform the claimant prior to that date. The reason given by Ms Ivory was that it was not deliberate but an oversight given how busy she was at the time. She was preparing to close Bond Street and open a new boutique in Selfridges, during one of the busiest retail periods of the year in December. Ms Saint-Cast concluded that it was human error and an oversight.

236. On a balance of probabilities we accept the respondent's explanation. We accept that December is the busiest retail period of the year and it was a large task for Ms Ivory in closing the Bond Street store and opening in Selfridges. We find that her failure to inform the claimant had nothing to do with the claimant's race, it was not related to her race.

Office seating

237. The claimant's case is that on 16 January 2017 she was required to move to a new desk and sit with the back-office section. Retail Back Office was a newly created third pillar of the finance department along with Controlling and Accounting. The claimant accepted that she and Ms Utteridge swapped desks (email page 142a of bundle 2 – relating to Desk Swap on 16.01.16). The claimant accepted that this was done equally to Ms Utteridge. The claimant was asked what this had to do with her race and said that she did not consider the move was necessary. Mr Pensa explained why it took place and he confirmed that it was not just the claimant who had been asked to move desks.

238. This took place as part of the integration with Ms Medeiros arriving as Head of Retail Back Office, being the team within which the claimant was placed. At the time, Mr Pensa asked the claimant and Ms Utteridge if they had any concerns about it and none were raised.

239. The claimant was treated in the same way as Ms Utteridge who is from a different racial group. We find that there was no less favourable treatment because of race and the desk swap was not related to the claimant's race.

The claimant's grievance of 8 January 2017

240. Prior to formally raising her grievance the claimant approached Ms Saint-Cast to mention her grievance issues. Ms Saint-Cast arranged a grievance pre-meeting on Friday 16 December 2016. Ms Saint-Cast was asked whether it was normal to arrange a grievance premeeting and she said that it was. This is because employees often do not give enough detail in their grievances so the purpose of the meeting was to discuss this. Despite the purpose of the meeting Ms Saint-Cast made no notes, which was a common theme with the HR witnesses. On Ms Saint-Cast's evidence we find that this was the respondent's first ever complaint of race discrimination.

241. The claimant relies on the "contents" of this meeting as a protected act. She was not specific as to what part of the meeting was said to be a protected act.

242. At the meeting Ms Saint-Cast told the claimant that the grievance would be a long process (statement paragraph 44). It was put to Ms Saint-Cast that she told the claimant that it might be better for her to look for another job and offered her paid time off to look for another job. Ms Saint-Cast said that she was "*pretty sure"* that she did not say that and then went on to deny it.

243. In email correspondence the following day (page 97-98 of bundle 2) the claimant said that she was not prepared to look for another job and in an email confirming the content of the meeting (page 97) Ms Saint-Cast made no comment on that matter. In that email Ms Saint-Cast did not deny telling the claimant that it might be better for her to look for another job.

244. Ms Saint-Cast tried to explain this in evidence by saying that she "*only focussed on the tricky points".* The claimant's own note of the meeting (bundle 3 page 89) also referred to being told that she could have time off to look for another job. We find on a balance of probabilities that Ms Saint-Cast told the claimant it might be better for her to look for another job and offered her time off for this purpose. The contemporaneous documentation supports this finding.

245. We also find on a balance of probabilities that Ms Saint-Cast told the claimant that she could not go back too far with her grievance as it would take too long. We find that this is consistent with telling the claimant that it might be better to look for another job and offering time off to do this. The claimant also mentioned this contemporaneously in her email (page 97 bundle 2) of 19 December 2016.

246. We find that Ms Saint-Cast did take the grievance seriously and followed the process in a mechanistic way but she was keen to find ways to dissuade the claimant from going ahead with it or to reduce the scope of it.

247. The claimant raised the formal grievance on 8 January 2017 – bundle 2

page 103-107 by letter addressed to Ms Saint-Cast. She complained of a systematic campaign of bullying and ostracism. It was a lengthy grievance with 27 numbered complaints. She sent an amended version on 9 January 2017 which is relied upon as a protected act for the victimisation claim. In submissions the respondent accepted that the grievance contained a protected act.

248. A grievance investigation meeting was arranged for 23 January 2017 and the claimant was given the right to be accompanied. The handwritten notes of the meeting, taken by notetaker Ms Shona Adams, were at pages 175 to 180 in bundle 2.

249. The claimant's case is that Ms Saint-Cast failed properly to investigate her grievance. It was the first time Ms Saint-Cast had conducted an investigation into an allegation of race discrimination, a matter on which we find she had no equality and diversity training. She said she interviewed 10 members of staff in connection with the grievance and met with the claimant on a number of different occasions.

250. Ms Saint-Cast interviewed Ms Grzegorczyk-Rapacewicz, Mr Pensa, Mr Burgess, Ms Clark, Ms Decort, Ms Ivory, Ms Patel, Ms Lee, Mr Foden and Ms Maestri. She also contacted the IT department regarding the complaints about the claimant's phone settings and reviewed CCTV footage in relation to the lift incident. The interview notes were in the bundle. Five out of ten of the interview notes were dated 26 January 2017. The remaining five were undated. Based on the email invitations to the meeting, (bundle 2 from page 151 onwards), we find that at least 6 such interviews took place on 26 January 2017 and the balance on 27 January 2017.

251. Given the length and complexity of the grievance, the notes were remarkably brief. Bundle showed photographs of Ms Saint-Cast's handwritten notes and then a typed-up version. By way of example the note of the interview with the claimant's line manager Mr Foden was shown on page 192. It showed no more than a couple of sentences photographed from different pieces of paper. We find that the notetaking was inadequate.

252. The typed version showed Ms Saint-Cast asking Mr Foden only four questions. One such was: "*Do you think Cheryl is treated differently?"* and Mr Foden replying: "*No. She doesn't try to discuss neither with the team".* The fourth question was: "*And what about her job description?*" with Mr Foden replying: "*You know when I hired her 10 years ago after few days I knew she was not good for the role. Technically I mean she was not at the level of the job*". Having heard from Mr Foden, the typed record, which was brief and yet substantially longer than the handwritten note, did not come across in the sort of language he used. His answers came across in the sort of language that Ms Saint-Cast used.

253. The suggestion that Mr Foden said that after a few days, he knew the

claimant was "*not good for the role*" did not concur with his evidence. Neither was it reflected in his appraisals of the claimant. By the time of the grievance investigation he had worked with her for 10 years and we find that he would not have let things lie if the claimant was not up to the job for that amount of time.

254. The notes made by Ms Saint-Cast were inadequate. She had six years experience in HR and was an HR Manager. The notes did not address the breadth of the claimant's complaints and the typed versions, which were not reflective of handwritten notes, were not put to the witnesses for approval. The notes had the feel of Ms Saint-Cast's interpretation and these brief summaries should have been put to the witnesses for approval if an adequate investigation was being undertaken.

255. Mr Burgess told the tribunal that his interview with Ms Saint-Cast lasted about an hour. The brief note of his meeting on one side of A4 suggested a much shorter meeting.

256. We find that Ms Saint-Cast followed the grievance process in a mechanistic way but did not take the in depth investigative approach that was necessary on a grievance of such substance. Her record keeping was far below what would be expected of an experienced HR professional.

257. The grievance outcome of 6 February 2017 ran to seven pages (206-211 bundle 2). Ms Saint-Cast was assisted by the respondent's solicitors in the drafting of the grievance outcome. There is far more content in the letter than in any interview notes or investigatory documents. The letter was defensive in tone. The grievance was not upheld. The outcome was that her allegations were completely unfounded, that there was categorically no evidence to support it and that she had caused her colleagues distress (page 212 bundle 2). There was a lack of sensitivity given that it was a discrimination complaint. Ms Saint-Cast said: "*I might remind you that you are not the only 'black member of staff' within your team and no allegations of racism have ever been raised by any member of staff in the past"* (page 209).

258. Given the inadequacy of the investigation we find that the grievance outcome letter could not and did not respond adequately to the grievance. The response was dismissive of the complaint of race discrimination.

<u>The grievance appeal</u>

259. The claimant exercised her right of appeal on 13 February 2017. She used the grievance outcome document and added her comments and responses and points of appeal. The document ran to 19 pages from page 241 to 259, bundle 2, inclusive. Within the appeal letter (page 249) the claimant said in relation to the lift incident on 24 May 2016 "*as I believe it shows the ostracism, bullying and racism that I have stated several times….".*

260. Global HR Director Ms Caroline Welch-Ballantine was the appeal officer. As the appeal included new points, Ms Welch-Ballantine conducted interviews with Ms Maestri, Ms Kallay and Mr Foden. The interview notes were in the bundle.

261. The appeal hearing took place on 13 March 2017. This was the date of the start of the claimant's phased return to work as recommended by Occupational Health (OH). The typed notes of the appeal hearing were at pages 287-298, bundle 2. The handwritten notes, made by Ms Adams, were from page 277 – 285. The notes show that towards the end of the hearing (handwritten notes page 281) Ms Welch-Ballentine told the claimant that she was "*minded to uphold findings".* We find that she was remarkably swift in reaching that provisional conclusions given the complexity of the grievance and issues involved.

262. The notes show at page 279 that Ms Welch-Ballentine expressed the view on the lift incident that the "*Images show what is already known. This had already been agreed. Team maintain it is a game. No new*". Our finding above is that the images did not show this and the team accepted that they were not playing a game on that day. We find that Ms Welch-Ballentine was not sufficiently open minded, she did not probe matters with the claimant and was content to accept the finding that had already been made, despite the footage showing differently.

263. Ms Welch-Ballentine then moved to a different topic, that of the claimant getting hold of the CCTV footage. Ms Welch-Ballentine was most unhappy that the claimant had been able to do this in conjunction with security. She considered it highly irregular for an employee to be given access to CCTV footage without authorisation from HR.

264. The claimant complains that in the meeting Ms Welch-Ballantine told her that she must take her mobile phone to IT to delete footage of the lift incident and stop contacting HR. The claimant also complains that Ms Welch-Ballantine behaved angrily towards her at that meeting. Ms Welch-Ballantine denied behaving angrily. Her evidence was that she was serious but not heavy handed.

265. Ms Welch-Ballentine admits that she requested that the claimant delete the CCTV footage from her phone. She did so on advice from the respondent's internal data protection lawyers. She considered that the claimant had acted in breach of the respondent's Standards of Business Conduct (bundle 2 page 325) on information security and data protection. Ms Welch-Ballentine required the claimant to sign a statement confirming that she had deleted the footage. On Ms Welch-Ballentine's admission, we find that she did ask the claimant to delete the footage. She told the claimant that if she needed help with deleting it, she should take it to IT.

266. We find on a balance of probabilities that Ms Welch-Ballentine told the claimant that she should stop contacting HR. We find that this is consistent with the HR approach shown by Ms Saint-Cast as we have

found above, that she told the claimant that she could not go back too far with her grievance as it would take too long and it would be better if she found another job for which time off to search would be given. We find that HR were keen to close the matter.

267. Ms Welch Ballantine produced her grievance outcome on 15 March 2017 and upheld Ms Saint-Cast's original decision. Somewhat unusually the notes of the grievance meeting formed part of the outcome letter and were titled "Appeal Meeting Briefing Note" (page 287 of bundle 2). We find that Ms Welch-Ballentine attended the grievance meeting with a prepared note, which she subsequently used to prepare the outcome. Notes in red were added after the meeting and on the majority of points were brief and comparatively few (save for on pages 296-297). Ms Welch-Ballentine was assisted by solicitors in the preparation of the outcome letter.

268. We find that Ms Welch-Ballentine failed to tackle the grievance appeal in an open-minded fashion, she went in with prepared views and was swift to express conclusions within the meeting itself, for example on the lift issue.

Return to work on 13 March 2017 and a further chair allegation

269. In addition to being the date of the appeal hearing, Monday 13 March 2017 was also start date for the claimant's phased return to work as recommended by OH. She had been absent for about 2 months. The claimant's case was that when she arrived at work and unknown colleague had piled up boxes and paperwork on her desk which needed moving even though she had back problems. She also complains that Mr Pensa and Ms Clark refused to say hello or acknowledge her when they encountered her in the kitchen. The claimant in oral evidence said that that the boxes and paperwork were by her desk and not on her desk. The factual issue we were asked to determine was whether these items were left on her desk and we find that they were not.

270. In bundle 3 at page 112a there was a photograph of a blue bag on the floor which the claimant photographed on 13 March 2017. Page 112 showed some boxes with a chair in the background. The box was marked "*FAO Cheryl Spragg*". The claimant agreed that the contents of the box related to herself. She said that the boxes had been taken out of the cupboard and placed by her desk as well as the blue bag.

271. The claimant accepts that these were not items gratuitously placed there that had nothing to do with her. It was a bag containing her items and they were her boxed contents. She did not know who put them there.

272. It was put to the claimant that she could have asked someone to move them. We find that nobody asked her to move the boxes and bag herself. There had been some moves around the office at the time and we find on a balance of probabilities that these were her work papers catching up with her. There was no detriment to the claimant because she was not asked

to move the items.

273. We find that this was not less favourable treatment of the claimant because of her race. Firstly, the allegation that these items were left on her desk, fails on its facts. Secondly, the only reason the claimant thought it was discrimination was because of her bad back and our finding is that she was not asked to move it. There could be all sorts of reasons why boxed items in a cupboard were moved following an office move. This was not conduct related to the claimant's race.

274. The claimant also said that on 13 March 2017, the day of her return to work, Mr Pensa and Ms Clark refused to say hello to her or acknowledge her in the kitchen. The claimant's evidence was in her statement at paragraph 83, she said that when she saw Mr Pensa and Ms Clark in the kitchen and said good morning, they put their heads down. Mr Pensa dealt with this in his statement at paragraph 37. He said it was just not the case and he continued to speak to the claimant. He said that Ms Clark did not ignore the claimant.

275. We had the benefit of seeing Mr Pensa in person in the tribunal. We were all of the view that he was polite and courteous and we accept his evidence including in relation to Ms Clark. On a balance of probabilities we find the allegation unproven on its facts.

<u>New job description 16 March 2017 and allegation of reduced responsibilities</u>

276. The claimant complains that on 16 March 2017 Ms Maria Mederios, Head of Retail Back Office (RBO), gave her a new job description which reduced the scope of her responsibilities and increase the volume of her administrative work. It is accepted that Ms Mederios and the claimant had a meeting on 16 March 2017 and Ms Mederios went through the new job description with the claimant line by line. Ms Mederios said that the meeting was 20 minutes long, maximum and the purpose of the meeting was to hand over the new job description.

277. Ms Medeiros joined the respondent on 9 January 2017. She had worked in their offices in Dubai and when she and her husband decided they wished to return to Europe, she told her manager in Dubai that she would be interested in any opportunities that were opening up in the Group either in the UK or Switzerland. Her manager put her in touch with Mr Catto because there were likely to be some vacancies opening in the UK that might be of interest to her. She was interviewed by Mr Catto and a recruiter in the UK and had interviews in Switzerland as well. On Ms Medeiros' evidence we find that the role of Head of Retail Back Office was not advertised. She confirmed and we find that she did not respond to an advertisement.

278. It is not in dispute that all four members of the Finance Team who moved over from Montblanc were given new job descriptions, the claimant, Mr Foden, Ms Rose and Ms Utteridge. The old and new job descriptions were

all shown in bundle 1. We find no difference in treatment between the claimant being given a new job description and her Montblanc colleagues being given new job descriptions. This had nothing to do with race and was not related to race. It was because of the integration of Montblanc with Richemont.

279. On 23 March 2017 the claimant sent an email to Ms Medeiros and Ms Saint-Cast relating to the Job Description (page 268 bundle 2). She complained about her reporting line that pre-integration she had reported to a financial controller and with the new job description she would be reporting to Ms Medeiros head of the newly created third pillar of Retail Back Office. We find that this change was due to the changes in the business and the creation of the third pillar and not because of or related to the claimant's race.

280. The claimant complained at the loss of her to direct reports Ms Utteridge and Ms Rose reporting line. Mr Foden also lost the claimant as one of his direct reports. It was put to the claimant that this had nothing to do with her race and she said that in the light of Ms Mederios explanation, "*Possibly not*". We agree with this and find that it was not because of or related to her race.

281. The claimant at no time worked to the new job description so she never experienced it in practice. She also highlighted the increase of administration work with the vendor creation duty. The claimant had already agreed to take this on when Mr Catto's PA Ms Tara Sankar went on maternity leave. Her original job description page 181 of bundle 1 included credit control responsibilities which in turn included vetting credit account application forms and obtaining credit references. On the evidence we heard this was consistent with the vendor creation duty.

282. The claimant also complained about a reduction in scope of her duties with what she said was the level of her overall communication with boutiques. The claimant does not know how this would have worked in practice as she has never worked to this job description.

283. Ms Saint-Cast sent an email to the claimant on 28 March 2017 regarding the job description and the integration. Dealing with the claimant's complaint that the role was in effect a demotion, Ms Saint-Cast said: "*having consulted in detail with your line manager, we do not agree with your analysis".* This implied that Ms Saint-Cast had discussed the matter with the claimant's line manager Mr Foden, who was not copied on the email, when in fact it had been a discussion with Ms Medeiros. This was misleading (page 267 of bundle 2).

284. We find that the changes were to do with the integration and not because of her race. Whilst we saw that there were differences within the old and new job descriptions and there were some losses along the way for the claimant, this was to do with the integration process.

Threat of disciplinary action re: CCTV footage and not to contact HR

285. The claimant complains about an email from Ms Welch-Ballantine on 30 March 2017, page 344 bundle 2. The claimant was required to sign a statement recognising that she used her mobile phone to film the CCTV footage of the lift incident, stating that she had deleted the footage and had not shared it with anyone else. This was to reflect the facts recounted to Ms Welsh Ballantine at the grievance appeal hearing.

286. Ms Welch-Ballantine considered this a reasonable management instruction. Ms Welch-Ballantine said that unless she heard from the claimant by 15:00 hours on 3 April 2017 with the signed statement, she would be invited to a disciplinary hearing for failure to follow a lawful order without reasonable justification.

287. The statement the claimant was required to sign was at page 328 of bundle 2.

288. We accept and find that it was unusual and irregular for an employee to obtain access to company CCTV footage without authorisation. The claimant obtained this with cooperation from one of the security guards. The claimant had acknowledged in her appeal letter that the respondent "might be unhappy" that she obtained the footage (page 249 bundle 2). She said she did this because of her lack of trust and confidence in the colleagues in question and was concerned not to have the evidence of the incident. It was not until an email from the respondent's solicitor of 4 April 2017 (page 357 of bundle 2) that the claimant was told that the company would retain a copy for 30 days only. Ms Welch-Ballentine admitted in cross-examination that she knew that the claimant wanted to rely on the footage in connection with her discrimination claim.

289. By 7 April 2017 Ms Welch-Ballentine was aware that the claimant had commenced Early Conciliation as a precursor to these proceedings. Early Conciliation ended on 21 May 2017 by which time Ms Welch-Ballentine knew that the matter was not going to be resolved via ACAS and was likely to result in tribunal proceedings. In addition we find that Ms Welch-Ballantine knew about the 9 January 2017 protected act, as it formed part of the grievance that she considered on appeal.

290. We find on the facts on this allegation that the claimant was required to sign a statement to delete the CCTV footage and she was told that she would face disciplinary action if she did not. It is also not in dispute that she was told that any such disciplinary action could result in dismissal. The respondent said that this was standard wording in their letters pertaining to disciplinary action. We agree and find that this is standard wording in such letters.

291. We find that given the respondent's data protection concerns on a balance of probabilities that they would have sent a similar letter to any other hypothetical employee of a different racial group who had obtained the

CCTV footage by an unauthorised manner.

292. Ms Welch-Ballentine admitted in evidence that she knew that the claimant wanted to use the footage within future proceedings. Both sides had solicitors involved. The claimant's case was that she was being bullied into signing a statement and deleting the footage. Whilst we have found that the respondent would have sought deletion and a signature had she been of a different racial group, we find that the stringent approach which they took was because of her intention to bring these proceedings and thus because they considered that she may do a protected act. They knew that she wanted to rely on the footage in a discrimination claim and they would not give her an assurance that the footage would be preserved for the purposes of such proceedings. They would only give limited assurances and they maintained the threat of disciplinary action. The strong stance that the respondent took on data protection on this issue was not mirrored in their position taken in relation to covert surveillance of the claimant upon which we make our findings below.

Surveillance of the claimant

293. On Sunday 28 May 2017 which was during the Bank Holiday weekend, Mr Boltman saw the claimant at a concert at Imber Court, East Molesey as part of the Happy Days Music Festival. He was surprised to see the claimant who is in the standing area as she was off sick with a bad back. He has been shown photographs of the claimant at the event sitting in a portable seat, page 392f of bundle 2. She was standing when he saw her. The event went on for several hours.

294. When Mr Boltman returned to work he mentioned it by email to Ms Hennessy in HR (email dated 2 June 2017 page 395 bundle 2). He also mentioned it to Ms Welch-Ballantine who decided to instruct a professional surveillance company. The instruction was carried out by Ms Hennessy. It was the first time in Ms Welch-Ballentine's and Ms Hennessy's professional career that they had ever instructed surveillance on an employee. Ms Welch-Ballentine has 20 years' experience in HR and Ms Hennessy 17 years. Neither of them kept a written record of the rationale behind decision.

295. On 1 June 2017 the claimant sent an email to Ms Saint-Cast saying that she could not sit for more than five minutes, could not walk for very long and could not go shopping or carry shopping bags. She said her whole lifestyle had changed. She said she was unable to play tennis, do regular walking, swimming or dancing and was unable to wear business clothes or shoes. She said she could not wear jeans as it made the pain excruciating, she could not go shopping or lift or carry bags (page 393 of bundle 2).

296. Ms Welch-Ballentine said in oral evidence that her reason for commissioning the surveillance was because she had a suspicion that the claimant was not being truthful about her incapacity. Ms Welch-Ballentine

agreed in cross-examination that she could have referred the claimant to a medical specialist.

297. Ms Hennessy gave instructions to Mr Damian Ozenbrook, the Managing Director of the surveillance company. Ms Hennessy said that the purpose of the surveillance was because the claimant was bringing a personal injury claim, which forms part of these proceedings. By the time Ms Hennessy issued the instructions on 7 August 2017 (agreed chronology) the ET1 had been issued and the ET3 filed. As would be expected for senior HR professionals, both Ms Welch-Ballentine and Ms Hennessy knew about the claim when the instructions were given.

298. Ms Hennessy was asked if she told Mr Ozenbrook that there was a claim for race discrimination. She said she did not believe so but thought not. We find that she did, because it is mentioned in the surveillance report (bundle 3 pages 4 and 6) including within the scope of job. Ms Hennessy was also aware of the claimant's grievance raising race discrimination.

299. There was no written record available of the instructions given to the surveillance company. Ms Hennessy's evidence was that her document was lost from her lap top and could not be restored by IT. No evidence was produced from IT as to any requests or efforts they made to recover the document.

300. There was no disclosure of any email correspondence between Ms Welch-Ballentine and Ms Hennessy in relation to the surveillance. They both explained it by saying that they were in the same office and spoke face to face. Ms Welch-Ballentine said that she "*could not remember*" if anyone had asked her to look for the instruction document which was the only contemporaneous record of the instructions given to the surveillance company. It was a common theme within Ms Welch-Ballentine's evidence that she could not remember. We find that this is one of the weaknesses in failing to keep written records.

301. Mr Ozenbrook was asked if the respondent asked him for a copy of the instructions. His answer was "*I don't believe I was asked to provide that*". The instructions were uploaded by Ms Hennessy on to his company's portal. On his evidence we find that this is kept indefinitely unless clients ask for the information to be returned to them. Mr Ozenbrook was asked about this in re-examination and taken to a document in bundle 4 at page 50-51. Mr Ozenbrook was not absolutely clear as to whether the document came from his own IT system. He said it looked like it, but he was unsure. It indicated that the instructions and the report were deleted on 7 October 2017. Because Mr Ozenbrook said that documents are normally kept indefinitely on the portal, we find that the instructions would not have been deleted unless his company had been instructed to do so by the respondent.

302. We find the absence of the instructions implausible and not "unfortunate" as stated in the respondent's submissions. There is every likelihood that

Ms Hennessy shared an electronic copy of the instructions with Ms Welch-Ballentine who initiated the instructions on such an important matter. The respondent did not seek a copy from Mr Ozenbrook's company and it appears that his copy has also been deleted.

303. We find on a balance of probabilities that at least three people had access to the written instructions: Ms Hennessy, Ms Welch-Ballentine and Mr Ozenbrook. Ms Hennessy had a lap top, a desk top and access to the link on the portal. It is too coincidental that no copy was retained by anyone and we find that there has been a failure by the respondent to preserve and produce this evidence. We draw an adverse inference from the failure to disclose the instructions.

304. There was a detailed 76-page surveillance report starting at page 2 in bundle 3. The claimant was placed under close surveillance for a number of days including when she attended a wedding in Bristol on 2 September 2017 as well as out shopping in Kingston, travelling on the bus and observations of her home and garden. The report provided a huge amount of personal data including on the claimant's health and details of all her immediate family members and their phone numbers. It covered personal information such as her membership of a tennis club and her churchgoing. She was under surveillance on a Saturday and Sunday at the wedding event, including observing the claimant having breakfast with her husband at the hotel on the Sunday morning, as well as on weekdays. Ms Hennessy agreed that it was intrusive but said she was trying to protect the company in respect of this claim. The surveillance showed that the claimant was more active than she had told OH.

305. We also heard evidence from Mr Ozenbrook. We find there was an initial period of surveillance from 23 to 26 August 2017. They had no firm sightings of the claimant during that period so Mr Ozenbrook offered a further five days. Ms Hennessy made it clear it was to include a Saturday. The second period took place over five days on 1, 2, 3, 25 and 26 September 2017.

306. There was an issue as to whether surveillance continued to at least 9 December 2017. Mr Ozenbrook's evidence was that it did not. There was a photograph taken by the claimant of someone said to be Mr Ozenbrook or one of his operatives. Mr Ozenbrook was adamant that it was not him and it was not one of his operatives.

307. There was an issue regarding the payment of Mr Ozenbrook's company's invoice for the surveillance work. The invoice was at page 48a of bundle 4, dated 7 October 2017. It invoiced for 5 days of screening and surveillance. Ms Hennessy had to deal with the vendor creation part of the process, which was necessary for a supplier to be paid. It took her a long time to do this. Ms Hennessy's view was that there was no way Mr Ozenbrook was going to carry out more work when he remained unpaid for the first piece of work.

308. We find that Mr Ozenbrook did not carry out more surveillance after 26 September 2016. We agree and find that for commercial reasons it is highly unlikely that he would have wished to carry out more work when he was not paid in a timely manner for the September surveillance. Relations between the respondent and his company became strained over the payment issue. We also find that the photograph purporting to be him, was not him or one of his operatives.

309. Mr Ozenbrook said that it was not unusual for subjects who become aware of surveillance to become unnerved and believe that surveillance is continuing. We accept his evidence which was based on his experience and find that this was the case for the claimant. We find that the surveillance ended on 26 September 2017.

310. In the light of the surveillance there was an OH report dated 23 January 2018 from Dr N Khan who is a GP practitioner (page 243 bundle 3). He is not an orthopaedic or other specialist. Dr Khan had a telephone consultation with the claimant on 18 January 2018; it was not an in-person examination. He noted the discrepancy between the surveillance report and the claimant's reported symptoms.

311. The first OH report of March 2017 (page 216) was based on a clinical examination. The second took place by telephone on 2 August 2017 with a report dated 3 August (page 235). The third consultation was on the phone on 25 September 2017 and the date of the report was 27 September 2017 (page 237). The telephone consultation coincided with one of the surveillance dates. The third report said that the claimant was not fit to return to work, she should decide on whether to have an operation or be referred for pain management.

312. We find that instructing covert surveillance as a first response to having seen the claimant at the festival was disproportionate. It was acknowledged by Ms Hennessy that this was very intrusive into the claimant's personal life. We are not surprised that it was at the very least it was unnerving for the claimant and we accept her evidence that it was extremely upsetting and intimidating. She was understandably concerned that it was ongoing beyond September 2017, even though we have found it was not.

313. We consider that there should have been some investigation with the claimant in relation to what Mr Boltman had observed at the festival. In addition it would have been reasonable and proportionate to have commissioned a further medical investigation to include a clinical examination by a suitably qualified medical expert. The respondent's OH professional is a GP. An expert could be asked appropriate questions including as to what had been observed by Mr Boltman at the festival and whether this was consistent with the injury and symptoms described, in conjunction with a clinical examination.

314. The respondent accepted that surveillance was potentially a detriment. We find that it was very much a detriment because of the disproportionate

level of intrusion into the claimant's personal and family life. We find that the strict approach that they took to data protection principles on the CCTV footage, was not extended to the claimant's personal privacy on the issue of surveillance.

Time point

315. There was no evidence in chief from the claimant as to why it would be just and equitable for the tribunal to extend time.

316. We saw a note of the claimant's meeting with Ms Welch-Ballentine on 13 March 2017 at page 286 of bundle 2. The claimant agreed that the note was accurate save for the words "*No back up and no copies*" concerning the CCTV. As a result of the claimant agreeing the remainder of the note we find that the claimant told Ms Welch-Ballentine that she had been working with a solicitor: "*since 2013, when all these issues started".* We find on this evidence that the claimant had advice from solicitors since 2013. Because of this, we find on the balance of probabilities that she was aware of the time limit.

Did the claimant do a protected act?

317. Four protected acts are relied upon for the victimisation claim. The respondent accepted that the fourth, the bringing of these proceedings, is a protected act. In submissions the respondent accepted that the third, the claimant's email to Ms Saint-Cast of 9 January 2017 was also a protected act.

318. This left two upon which we were required to make a finding. These were her email of 1 July 2016 to Mr Foden commenting on comments made by Mr Foden in his email of 8 June 2016 and the "contents" of the meeting with Ms Saint-Cast on or about 16 December 2016, the grievance pre-meeting,

319. The claimant did not make clear exactly what "contents" of the 16 December 2016 she relied upon as a protected act. The claimant's evidence in chief on this meeting was at paragraph 67 of her witness statement: "*During my grievance meeting on 16 December I explained to the HR Department that there were lots of issues involving several members of staff. I was advised that I should not go back too far as it would take too long due to the number of people involved. I was also told that I had the option of taking three to four months off on paid leave whilst I look for another job. I was shocked at this suggestion as I did not believe this would resolve the problem but it only emphasised in my head that this was the company's intention all along to get me to leave. I therefore, refused to accept the offer and thought it was very unprofessional of the respondent to have suggested something like this"*.

320. No protected act was revealed from this evidence. The claimant has not shown us facts from which we can conclude that she did a protected act at the grievance pre-meeting on 16 December 2016. She did not tell us

exactly what she relied upon as being the protected act within the "contents" of that meeting. We find that there was no protected act.

321. The claimant's email of 1 July 2016 to Mr Foden which was at pages 64-68 of bundle 2. We were not told exactly which words were relied upon. We considered the email and we took the view that the reference in the middle of page 66 to the underlying race related reason for unfair treatment is sufficient to amount to a protected act.

322. We therefore find that there were three protected acts namely (i) the claimant's email of 1 July 2016, (ii) the grievance email of 9 January 2017 and (iii) these proceedings.

The law

323. The agreed list of issues confines the scope of the tribunal's enquiry. As the CA has recently confirmed in ***Scicluna –v- Zippy Stitch Ltd & Ors 2018 EWCA Civ 1320*** the claimant is limited to the issues identified in that list:

> *14 … Ever since the Woolf reforms, parties in the High Court have been required to agree lists of issues formulating the points which need to be determined by the judge. That list of issues then constitutes the road map by which the judge is to navigate his or her way to a just determination of the case. Employment tribunals encourage parties to agree a list of issues for just that reason and, if advocates are retained on both sides, it is right and proper for a list of issues to be prepared.*
>
> *15 In paragraphs 32-33 of Land Rover v Short (2011) UKEAT/0496/10/RN Langstaff J approved the submission of counsel that:-*
>
> *"it was trite law that it was the function of an Employment Tribunal to determine the claims which the claimant had actually brought, rather than the claims which he might have brought and that accordingly the claimant was limited to the complaints set out in the agreed list of issues."*
>
> *So likewise must the respondent be limited to the defences set out in the agreed list of issues.*

324. Similarly the CA in ***Parekh v London Borough of Brent 2012 EWCA Civ 1630*** said:

> *"A list of issues is a useful case management tool developed by the tribunal to bring some semblance of order, structure and clarity to proceedings in which the requirements of formal pleadings are minimised. The list is usually the agreed outcome of discussions between the parties or their representatives and the employment judge. If the list of issues is agreed, then that will, as a general rule, limit the issues at the substantive hearing to those in the list: see Land Rover v Short at [30] to [33]."* (paragraph 31)

325. Direct discrimination is defined in section 13 of the Equality Act 2010 which provides that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

326. Very little direct discrimination today is overt or even deliberate. The guidance from the case law tells tribunals to look for indicators from a time before or after the particular decision which may demonstrate that an ostensibly fair-minded decision was, or equally was not, affected by racial bias – ***Anya v University of Oxford 2001 IRLR 377 CA.***

327. Section 23 of the Act provides that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

328. Section 26 of the Equality Act 2010 defines harassment under the Act as follows:

> *(1) A person (A) harasses another (B) if—*
>
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
>
> *(b) the conduct has the purpose or effect of—*
>
> *(i) violating B's dignity, or*
>
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*
>
> *(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*
>
> *(a) the perception of B;*
>
> *(b) the other circumstances of the case;*
>
> *(c) whether it is reasonable for the conduct to have that effect.*

329. Harassment and direct discrimination are mutually exclusive – section 212(5) Equality Act 2010.

330. In ***Richmond Pharmacology v Dhaliwal 2009 IRLR 336*** the EAT set out a three step test for establishing whether harassment has occurred: (i) was there unwanted conduct; (ii) did it have the purpose or effect of violating a person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person and (iii) was it related to a protected characteristic? The EAT also said (Underhill P) that a respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. The EAT also said that it is important to have regard to all the relevant circumstances, including the context of the conduct in question.

331. In ***Grant v HM Land Registry 2011 IRLR 748*** the CA (Elias LJ) said:

> *Furthermore, even if in fact the disclosure was unwanted, and the claimant was upset by it, the effect cannot amount to a violation of dignity, nor can it properly be described*

as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. (para 47)

and

I do not think that a tribunal is entitled to equate an uncomfortable reaction to humiliation. (para 51).

332. In ***Bakkali v Greater Manchester Buses (South) Ltd EAT/0176/17*** the EAT (Slade J) said that where the same facts were relied upon for a claim of direct discrimination on grounds of race and a claim of harassment for conduct related to the same protected characteristic, an Employment Tribunal does not err in determining the harassment claim if they rely on their findings of fact on the direct discrimination claim provided they apply the correct "related to" test required by section 26 Equality Act 2010.

333. Conduct can be related to a relevant characteristic even if it is not because of that characteristic. It requires a broader enquiry. If it relates, as was the claimant's case in ***Bakkali***, to words spoken, it requires a more intense focus on the context of the words spoken. The mental processes of the alleged harasser will be relevant as to whether the conduct was related to the protected characteristic. See also ***Henderson v GMB 2017 IRLR 340 CA.***

334. Section 27 provides that a person victimises another person if they subject that person to a detriment because the person has done a protected act. A protected act is defined in section 27(2) and includes the making of an allegation (whether or not express) that there has been a contravention of the Equality Act.

335. In ***Chief Constable of the West Yorkshire Police v Khan*** **2001 IRLR 830** the House of Lords held that provided that an employer honestly and reasonably believed that he needed to protect his position in pending proceedings, he would not be guilty of victimisation by failing to provide a reference for the person who had brought the proceedings. Lord Nicholls said "*Employers, acting honestly and reasonably, ought to be able to take steps to preserve their position in pending discrimination proceedings without laying themselves open to a charge of victimisation*".

336. The protection given to respondents is not absolute. The employer's response must be honest and reasonable. In ***Derbyshire and others v St Helens Metropolitan Borough Council 2007 ICR 841*** the House of Lords considered ***Khan*** and took a different approach. Lord Bingham stressed that the contrast between the Chief Constable's purpose and acts in ***Khan*** was "*striking and obvious, for the object of sending the letters [in Derbyshire] was to put pressure on the applicants to drop their claims…. the letters were sent because the applicants had persisted in their claims and the Council wished to put pressure on them to settle*" (judgment paragraph 9).

337. Section 136 provides that 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.

338. One of the leading authorities on the burden of proof in discrimination cases is ***Igen v Wong 2005 IRLR 258***. That case makes clear that at the first stage the Tribunal is to assume that there is no explanation for the facts proved by the claimant. Where such facts are proved, the burden passes to the respondent to prove that it did not discriminate.

339. Bad treatment per se is not discriminatory; what needs to be shown is worse treatment than that given to a comparator - ***Bahl v Law Society 2004 IRLR 799 (CA)***.

340. Lord Nicholls in ***Shamoon v Chief Constable of the RUC 2003 IRLR 285*** said that sometimes the less favourable treatment issues cannot be resolved without at the same time deciding the reason-why issue. He suggested that Tribunals might avoid arid and confusing disputes about identification of the appropriate comparator by concentrating on why the claimant was treated as he was, and postponing the less favourable treatment question until after they have decided why the treatment was afforded.

341. In ***Madarassy v Nomura International plc 2007 IRLR 246*** it was held that the burden does not shift to the respondent simply on the claimant establishing a different in status or a difference in treatment. Such acts only indicate the possibility of discrimination. The phrase "could conclude" means that "a reasonable tribunal could properly conclude from all the evidence before it that there may have been discrimination".

342. In ***Hewage v Grampian Health Board 2012 IRLR 870*** the Supreme Court endorsed the approach of the Court of Appeal in ***Igen Ltd v Wong*** and ***Madarassy v Nomura International plc***. The judgment of Lord Hope in ***Hewage*** shows that it is important not to make too much of the role of the burden of proof provisions. They require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other

343. The courts have given guidance on the drawing of inferences in discrimination cases. The Court of Appeal in ***Igen v Wong*** approved the principles set out by the EAT in ***Barton v Investec Securities Ltd 2003 IRLR 332*** and that approach was further endorsed by the Supreme Court in ***Hewage*****.** The guidance includes the principle that it is important to bear in mind in deciding whether the claimant has proved facts necessary to establish a prima facie case of discrimination, that it is unusual to find direct evidence of discrimination.

344. The Court of Appeal in ***Ayodele v Citylink Ltd 2017 EWCA Civ 1913***

recently confirmed that the line of authorities including ***Igen*** and ***Hewage*** remain good law and that the interpretation of the burden of proof by the EAT in ***Efobi v Royal Mail Group Ltd EAT/0203/16*** was wrong and should not be followed.

345. Section 123 of the Equality Act 2010 provides that:

> *(1) ……..proceedings on a complaint within section 120 may not be brought after the end of—*
>
> *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
>
> *(b) such other period as the employment tribunal thinks just and equitable.*

346. This is a broader test than the reasonably practicable test found in the Employment Rights Act 1996. It is for the claimant to satisfy the tribunal that it is just and equitable to extend the time limit and the tribunal has a wide discretion. There is no presumption that the Tribunal should exercise that discretion in favour of the claimant.

347. The leading case on whether an act of discrimination it to be treated as extending over a period is the decision of the Court of Appeal in ***Hendricks v Metropolitan Police Commissioner 2003 IRLR 96***. This makes it clear that the focus of inquiry must be not on whether there is something which can be characterised as a policy, rule, scheme, regime or practice, but rather on whether there was an ongoing situation or continuing state of affairs in which the group discriminated against (including the claimant) was treated less favourably.

348. The burden is on the claimant to prove, either by direct evidence or inference, that the 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.

349. In ***British Coal Corporation v Keeble 1997 IRLR 336*** the EAT said that in considering the discretion to extend time:

> *It requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular, inter alia, to –*
>
> *(a) the length of and reasons for the delay;*
>
> *(b) the extent to which the cogency of the evidence is likely to be affected by the delay;*
>
> *(c) the extent to which the party sued had cooperated with any requests for information;*
>
> *(d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;*
>
> *(e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.*

350. There is no presumption that a tribunal will exercise its discretion to extend time. It is the exception rather than the rule - see ***Robertson v Bexley Community Centre 2003 IRLR 434.***

351. The decision of the Court of Appeal in ***Apelogun-Gabriels v London Borough of Lambeth 2001 IRLR 116*** makes clear that there is no general principle that an extension will be granted where the delay is caused by the claimant invoking an internal grievance or appeal hearing.

352. Counsel for the claimant cited, but did not provide a copy of, ***Bahous v Pizza Express Restaurant Ltd EAT/0029/11*** in which the EAT stressed the importance of giving due consideration to the balance of prejudice when deciding whether a claim was out of time. The EAT found in that case that the tribunal had not taken the balance of prejudice into account.

353. Counsel for the claimant said at the end of oral submissions that the tribunal would be familiar with the recent authorities on subconscious bias of ***Geller v Yeshurun Hebrew Congregation 2016 ICR 1028*** and ***Edwards v Home Lettings Ltd and others EAT/0147/17.*** These authorities were not mentioned in the claimant's written submissions and copies were not provided despite our request for such. The tribunal considered these authorities but no specific submissions were made on how these cases were said to apply to the case under our consideration.

354. In ***Geller*** the EAT considered that there had been an inadequate application of the burden of proof and overturned the decision because despite facts from which discrimination could be inferred, the tribunal failed to consider subconscious or unconscious discrimination. Only if discrimination is inherent in the act complained of is the tribunal released from the obligation to enquire into the mental processes of the alleged discriminator.

<u>Putting the case</u>

355. An individual who is accused of discrimination is entitled to have her or his evidence as to why she or he acted as they did heard and to have that evidence tested in cross examination so that the tribunal can hear what she or he says in response to the direct allegation that he/she discriminated against and consider the response – the principle deriving from ***Browne v Dunn* (1893) 6 R 67** and considered by the EAT in ***NHS Trust Development Authority v Saiger 2018 ICR 297*** and ***Commissioner of Police for the Metropolis v Denby EAT/0314/16.***

356. Hand J in ***Saiger*** said (extracts from paragraphs 99-102):

> *It will not usually be a fair procedure for a tribunal to reach conclusions about a factual scenario if that factual scenario has not been put. If conclusions of dishonesty are to be reached, it will usually be unfair to reach them unless the person likely to be condemned has had an opportunity to deal with them. If a tribunal is minded to reach a conclusion that is purely inferential and such a conclusion is neither obvious nor has*

it been advertised in that form at any point in the proceedings, then the tribunal must give the parties an opportunity to address the matter.

……..

The fact that evidence has not been challenged specifically will not always preclude a tribunal from reaching a particular conclusion.

……..

The extent to which there has been procedural unfairness is not necessarily a matter of simply scrutinising what actually was put. It will involve a consideration of all of the evidence, how the matter stood at the end of all of the evidence and what the parties and the tribunal should have recognised from that material was still in issue in the case. I do not accept that every failure to put every particular aspect of a case amounts to a serious procedural failure. The context may suggest that looked at overall it was perfectly fair, everybody knew where they were heading, what was at issue, what the case being put forward was and what the answer to it should be.

Conclusions

The Controller role

357. Issues (a), (d) and (h) relate to the Controller role. We have found that there was a preference for white continental Europeans. There was a lack of transparency and a lack of a properly structured process with scoring, marking and record keeping. There was a complete absence of any interview records. The HR team had received no equality and diversity training. This was not a priority for this respondent. There were no black staff at senior level and none in the HR team. Although Ms Maranon had produced a supplemental witness statement showing ethnicity statistics, it covered Montblanc and Finance it did not show us the position in the finance department alone.

358. There were three Controller vacancies. The claimant was not shortlisted for any of them. The respondent appointed to the second vacancy, the maternity leave cover, without alerting the claimant to the vacancy. We have found that her line manager and HR knew or ought reasonably to have known, based on her application 16 months earlier, that she was interested in the role. The appointment to the second vacancy was to someone who was from a Spanish Group company, who despite being made redundant and who had an offer of alternative employment in Spain, preferred to come to the UK. This was a candidate whom even the respondent admits did not have a good level of English.

359. We find that the burden of proof passed to the respondent to explain the reasons for the failure to shortlist and appoint the claimant. For the reasons we have set out above, the respondent has failed to provide us with a satisfactory and cogent non-discriminatory explanation on the shortlisting and on these three issues the claim succeeds. On the issue of failure to appoint, the claim fails by a majority.

360. The claimant was less favourably treated than her white comparators Ms Ait-Mamaar, Ms Roman and Ms Railhac. In the absence of any satisfactory explanation, the burden of proof having passed, and for the reasons we set out on the procedural shortcomings we draw an adverse

inference that this was because of her race.

361. It was suggested by the respondent that the case was not properly put to Mr Catto who was involved in all three relevant recruitment processes and was the final decision maker. It was clearly put to him that there was a barrier to progression for black people and we find that the case was properly put to him.

362. In relation to the time point, we find that the three recruitment processes form a continuing act. The same individuals were involved in terms of the HR department and Mr Catto at the head who, on our finding, had a final say on all three appointments. There was a policy of seeking internal candidates from the wider Group across Europe and including speculative applicants such as Ms Railhac. This was illustrated by Ms Maranon's proactive request to her HR Director colleagues in the case of the appointment of Ms Roman and the failure to make sure that the vacancy had come to the claimant's attention, when her interest in the vacancy should not have been in doubt.

363. We find that Mr Catto had the controlling hand on all three appointments plus the appointment of Ms Medeiros whom he interviewed and appointed to the role of Head of Retail Back Office, without the role being advertised. Mr Catto was not the only person who interviewed Ms Medeiros but again we find that he had the controlling hand. It was submitted by the respondent that it was not put to Mr Catto that he acted as he did because of race. We find that this was clearly put to Mr Catto by Mr Khan, through a number of questions in the context of the recruitment exercises, that there was a barrier to progression for black people.

364. We find unanimously that there was direct discrimination in the failure to shortlist the claimant for the Controller role. We are guided by the decision in ***Anya*** above that very little direct discrimination today is overt or even deliberate. We have found by a majority that there was no direct discrimination in the failure to appoint the claimant to the role. The minority view is that there was direct discrimination in the failure to appoint on the first vacancy and had that taken place there would have been no need for the second or third processes.

365. We find unanimously that the failures on issues (a), (d) and (h) do not amount to harassment related to race. We find that the purpose or effect of the recruitment processes was not to violate the claimant's dignity, nor to create an intimidating, hostile, degrading, humiliating or offensive environment for her. The claimant succeeds on direct discrimination.

366. Our finding above is that the date of appointment on the third appointment was 7 July 2015 and we deal further with the time point below.

<u>Mr Boltman's comment and harassment</u>

367. We found on issue (b) that the comment was made by Mr Boltman in July

2013. We found that in making the comment he was not admitting to being a racist and he was not saying that Mr Catto was more racist than himself.

368. We find unanimously that this was not an act of racial harassment. We find under section 26(4) that if the claimant considered it had the purpose or effect referred to in section 26(1) then it was not reasonable for it to have had that effect. We considered it a step too far to regard a comment about the national heritage of Mr Boltman and Mr Catto to be consistent with saying that they were both racists and would not treat her fairly. Whilst it was reasonable to take the view that it contained a racial element in the reference to being South African, we found that the definition and the threshold of harassment was not met.

369. We also found unanimously that the comment was not made because of race and was not direct discrimination.

370. We find in any event that the claim in respect of Mr Boltman's comment was almost four years out of time. We find that it is not connected to other matters which we have found were within time. We make further findings on the time point as set out below.

"Pranks"

371. We take issues (u), (w), (y), (aa) and (gg) together as they fall under the heading, to use a word used by the parties during the hearing, of "pranks" (for example from claimant's submissions paragraph 10).

372. On issues (u), (y), (aa) and (gg) we have found no less favourable treatment or harassment. These allegations fail on their facts.

The lift incident

373. On issue (w) the lift incident, based on our findings above, there are facts from which we concluded in the absence of any other explanation that the actions of Mr Burgess on 24 May 2016 were because of the claimant's race. We have found that the three more junior women were just following his lead. Having seen the footage and heard the evidence, the burden of proof passed and Mr Burgess did not give us a cogent or satisfactory explanation as to why he acted as he did. He could not say why he acted as he did. We have drawn an adverse inference that this was because of the claimant's race.

374. The claimant was the only black employee present on that occasion. We find that she was snubbed by the other four when she held the lift door open for them and they walked past her in single file, in Mr Burgess's case making a strange movement and in Ms Patel's case pulling a face. We find that this was conduct which was violating to her dignity, it was offensive and humiliating and met the definition of harassment in section 26 of the Equality Act. We find that issue (w) was an act of racial harassment. It does not succeed on direct discrimination.

The issues that fail on the facts

375. The following remaining allegations fail on their facts. The brief comment against each issue is not intended to be fully encompassing but as a pointer to the full issue: Issues (c) the Global Blue invitation; (e) reduction of responsibility over Ms Utteridge and "bypassing"; (f) the 6 August 2014 email of complaint; (g) the transfer of the sales flash report to Ms Ricard on 5 March 2015; (i) reduction of scope of role in September 2015 upon the move to London; (j) and (k) the introduction of Ms Railhac; (l) the contact list; (m) assignment of Ms Rose's role on her maternity leave; (n) the appraisal issue of 16 December 2015; (o) compassionate leave; (p) listening in to the telephone call on Christmas Eve 2015; (q) and (r) the introduction of Ms Boudet; (s) Mr Foden's handling of Ms Utteridge's complaint (t) "*OK, only for now"*; (u) phone settings; (v) invitations to lunch; (x) concern over counselling; (y) the chair; (aa) files and papers on the chair; (bb) failure to communicate on store closure; (cc) desk move on 16 January 2017; (gg) boxes and bag on 13 March 2017; (hh) Mr Pensa and Ms Clark acknowledging the claimant; (ii) Ms Medeiros changing job responsibilities.

The further issues that succeed

376. We have found above on issue (jj) of being required to sign a statement to delete the CCTV footage and being threatened with disciplinary action by Ms Welch-Ballentine, that this was not because of the claimant's race or related to her race but it was an act of victimisation. The claim on this issue fails for direct discrimination and harassment. This claim is within time.

377. On issue (z) which concerned Ms Saint-Cast's handling of the grievance, we found that Ms Saint-Cast told the claimant that she could not go back too far with her grievance and it would be better if she looked for another job. We have made findings as to the flaws on her handling of the grievance process. In the outcome letter the claimant was criticised for causing her colleagues distress.

378. We found a lack of sensitivity on this discrimination complaint. We find that there was incredulity on the part of the respondent, shown by Ms Saint-Cast in the outcome letter when she said: "*I might remind you that you are not the only 'black member of staff' within your team and no allegations of racism have ever been raised by any member of staff in the past".* We find that the respondent was incredulous that anyone could complain about race discrimination. It had never happened before. Yet this came from an HR professional, in a team of HR professionals, including at the very top, who had never received any training on equality and diversity and it was not a racially diverse HR team.

379. We draw an adverse inference from the comments made and the procedural and record keeping failures, that this was direct discrimination

because of the claimant's race. Issue (z) succeeds as direct discrimination and not as harassment and for the same reasons, issue (dd).

380. Issue (ee) relates to the grievance appeal handled by Ms Welch-Ballentine. We found that Ms Welch-Ballentine failed to tackle the grievance appeal in an open-minded fashion, she went in with prepared views and was swift to express conclusions within the meeting itself, for example on the lift incident. We find that the same level of incredulity applied to the appeal as to the original grievance and for the same reasons as we set out for the Ms Saint-Cast's handling of the grievance we find that the handling of the grievance appeal was also an act of direct race discrimination. It was not racial harassment.

381. Our findings above on issue (ff) relating to being required to delete the CCTV footage and the threat of disciplinary action was because the respondent knew that the claimant wished to use the footage in a discrimination claim and they would not give a plain and unconditional assurance that they would preserve the footage for that purpose. We find that this was an act of victimisation. Based on our findings of fact above, it was not direct discrimination or harassment.

<u>The victimisation claim</u>

382. The only matter relied upon that was not a protected act was the third act, on 16 December 2016. The earliest protected act was on 1 July 2016 and any facts or matters predating this email cannot amount to victimisation. This means that issues (a) to (w) inclusive are not acts of victimisation because they precede the first protected act relied upon.

383. Issue (x) is put as a failure to show interest or concern over the claimant's referral for counselling and covers a period both before and after 1 July 2016. This issue failed on its facts unanimously in relation to Mr Foden. We found that Mr Foden did show interest and concern as he followed this up with HR. It failed on its facts by a majority in relation to Ms Saint-Cast as the majority finding was that she did not follow up sufficiently due to pressure of work.

384. On issue (y) our finding was that the auditor adjusted the chair and she did so to view a screen together with Ms Lee. It was not because of any protected act. This was therefore not an act of victimisation.

385. It was submitted by the respondent that it was never put to Ms Saint-Cast that she acted as she did because of the claimant's race. We find that it was put by Mr Khan to Ms Saint-Cast that in the 16 December 2016 meeting the claimant was saying that this was about her race (cross-examination on the morning of day 9). Ms Saint-Cast did not agree with the question, but we find it was put.

386. Issues (aa), (bb), (cc), (gg) and (hh) also failed on their facts.

387. As set out above under "The Issues", leave was not given for issue (ii) to be relied upon as an act of victimisation or harassment.

388. We have found above that issue (jj) was an act of victimisation. Issue (jj) is within time, the date of the act relied upon, in the agreed chronology is 30 March 2017. On Early Conciliation Day A is 7 April 2017 and Day B is 21 May 2017, the issue date for the ET1 was 14 June 2017. Based on the limitation date plus stopped clock, which the respondent accepts is 44 days, this claim is within time.

Covert surveillance

389. We have found that when the instructions were given to Blue Square Global Ltd on 7 August 2017, the ET1 had been issued and the ET3 filed. Mr Ozenbrook's company was instructed as to the race discrimination claim as reference to this appears twice within his report, including within the part of the report dealing with its scope. Our finding is that both Ms Hennessy and Ms Welch-Ballentine knew about the claim when the instructions were given. Ms Hennessy's evidence was that the reason for the surveillance was to "protect" the company in respect of claim.

390. In ***Khan*** Lord Nicholls said at paragraph 16, that the primary object of the victimisation provisions in what was then section 2 of the Race Relations Act 1976, was to ensure that persons are not penalised or prejudiced because they have taken steps to exercise their statutory rights or are intending to do so.

391. The respondent submitted that all that they were seeking to do by instructing the surveillance was to protect the company's position within the litigation and thus brought the case squarely under ***Khan*** so that we should find there was no victimisation.

392. We considered the decision of the House of Lords in ***Derbyshire v St Helens*** (above) and the decision of Lord Neuberger in which it was said that an alleged victim cannot establish detriment merely by showing that there had been mental distress. It has to be objectively reasonable in all the circumstances (judgment paragraph 68). The HL restored the decision of the ET in ***Derbyshire*** in finding that the Council had gone further than was reasonable in protecting its interests in sending the letters to the employees and the letters would not have been sent by a reasonable employer in the circumstances.

393. Our finding above is that this respondent's actions were disproportionate in instructing and undertaking and the manner of the covert surveillance. We found that covert surveillance should not have been the first response. There were other more proportionate avenues available that did not involve such a manifest intrusion into the claimant's personal life. The level of distress suffered by the claimant was objectively reasonable. Our conclusion is that this was not honest and reasonable conduct on the part of the respondent and we are supported in this by our findings of fact together with the adverse inference drawn from the absence of the

instructions to the surveillance company.

394. The respondent accepted that the claim in relation to the surveillance issue was within time.

395. We find that the respondent victimised the claimant in instructing and undertaking and the manner of the covert surveillance.

The time point

396. There was no evidence in chief from the claimant as to the timing of the presentation of her claim. We have found above that the claimant has had advice from solicitors since 2013 and that on a balance of probabilities she was aware of the time limit.

397. There was no evidence in chief from the claimant as to why she did not present her claim any earlier. On the just and equitable argument the claimant reminded the tribunal that we should weigh the balance of prejudice which naturally the claimant said fell in her favour.

398. The claimant's submission was that was just and equitable to extend time in relation to the lift incident of 24 May 2016 because the CCTV evidence has been made available and all five people concerned (the claimant and the four respondent witnesses) had given evidence. We accept the submission that it is relatively rare for a tribunal to have access to have such video evidence. It was submitted that the claimant's delay in bringing the claim could in part be explained by the fact that the incident affected her profoundly: she was having counselling following it and was taking anti-depressants. The claimant did not make this link in her evidence. As we have already said that she gave no explanation as to the timing of her claim. In relation to this incident, the claim was not presented until about a year later in June 2017.

399. The respondent's submission was that the claim form was presented on 14 June 2017 and accordingly anything occurring more than 3 months and 44 days before that date was not on the face of it within the tribunal's jurisdiction. The respondent submitted that the basis of any continuing act argument had not been articulated. It was submitted that the specific allegations in the list of issues were in relation to specific events and not things done over time or of a continuous nature.

400. It is accepted by the respondent that the claim in relation to the covert surveillance is within time. The covert surveillance took place on the instruction of the most senior person in HR, Ms Welch-Ballentine. We find that this is in turn linked to and connected with Ms Welch Ballentine's instructions to the claimant, given at the grievance appeal hearing and afterwards, to delete the CCTV footage together with the threat of disciplinary action. That is issue (jj) which we have also found is within time. That issue formed part and parcel of the grievance appeal hearing for issue (ee). The grievance appeal process and outcome is also within

time, bearing in mind the Early Conciliation dates and the date of the grievance outcome letter of 15 March 2017. We therefore find that the entirety of the grievance process forms a continuing act and is within time from the grievance pre-meeting with the claimant on 16 December 2016.

401. The claimant submitted and we accept the submission that the respondent has a "*blind spot on race*". The HR department had received and provided no equality and diversity training, it was not a priority for them. We found it revealing that Ms Lee, the claimant's colleague, said that she put up with casual racism and banter in the office. She was a witness for the respondent. The incredulity at the claimant's complaint of race discrimination, the first they had ever encountered, also led us to this view.

402. There was a distinct lack of record-keeping and a complete absence of interview notes or shortlist scoring. HR dealt with things on a case-by-case basis and this opens up the risk of subconscious discrimination, due to the lack of objective structure and process. There is no transparency as to the interviews that took place with the successful candidates for the three separate Controller roles. We can only find such record-keeping was not important to this respondent as they were content with the way in which they made their decisions which they considered had no need for scrutiny

403. The recruitment processes, although prima facie out of time, come under the HR umbrella. They made important decisions including Ms Saint-Cast making the decision not to shortlist the claimant on the third vacancy. HR were responsible for failing to bring the second vacancy to the claimant's attention when on our finding they knew or ought reasonably to have known that she was interested having made such an application 16 months earlier. We also had Mr Catto who had a controlling hand on all the applications. We therefore find that the state of affairs and approach in relation to these processes stemmed from the top of the organisation.

404. On issue (w) on which we have found for the claimant in terms of racial harassment, this is connected to the grievance issues and issue (jj) concerning the request to delete the footage of that incident which are within time.

405. The claimant submitted that in relation to the recruitment exercises this was a continuing act insofar as it was a state of affairs that existed within the finance department with Mr Catto at the head and so long as he retained ultimate veto over the candidates and a negative view of the claimant and so long as HR did not follow any objective process to counteract personal bias and given the lack of insight into equal opportunities there was a continuing state of affairs. We agree with this submission.

406. For these reasons those matters upon which we have found for the claimant are within time.

_____

Employment Judge Elliott
Date: 26 October 2018

Judgment sent to the parties and entered in the Register on: 29:10 :18 .
_____ for the Tribunals