EMPLOYMENT TRIBUNALS

Claimant: **Miss S Cole**

Respondent: **Derbyshire County Council**

Heard at: **Nottingham** **On:** **9-13 October 2017 and deliberations in chambers on 12 January 2018.**

Before: **Employment Judge R Clark**
Mrs J Rawlinson
Mr Z Sher

Representation

Claimant: **Mr McCracken of Counsel**
Respondent: **Mr Breen of Counsel**

JUDGMENT

1. The unanimous judgment of the Employment Tribunal is that the claim of race discrimination by way of victimisation under s.27 of the Equality Act 2010 **fails and is dismissed**.

2. The majority judgment of the Employment Tribunal is that the claim of race discrimination by being subjected to less favourable treatment because of race under s.13 Equality Act 2010 **succeeds in part**.

3. Remedy to be determined at a future hearing if not agreed.

REASONS

1. INTRODUCTION

1.1. This claim concerns events in the parties' relationship from around 2010. The claimant says she has been repeatedly overlooked for recruitment into managerial posts. She has raised concerns about the recruitment process alleging racial bias. She says her complaints have been brushed over. The claims before us are of direct race discrimination and victimisation

under sections 13 and 27 of the Equality Act 2010 respectively. She continues in employment with the respondent.

2. **EVIDENCE AND PRELIMINRY MATTERS**

2.1. For the claimant, we heard from Miss Cole herself. For the respondent, we heard from Mrs Kathryn Goodwin, the claimant's Locality Manager; Mrs Chris Lavelle, head of service; Ms Nusrat Sohail, the investiting officer appointed to investigate the claimant's grievance; Mrs Jo Allen, the senior practitioner in the claimant's team and Miss Sam Bradwell, an HR officer involved in the claimant's case. All witnesses adopted written statements on oath and were questioned.

2.2. We were taken to a substantial bundle running to around 900 pages and considered those documents we were taken to.

2.3. Both Counsel made oral closing submissions.

3. **ISSUES**

3.1. The claimant's ET1 set out her claim in narrative form. A Preliminary Hearing sought to identify the issues in the case and the fundamental questions for us are set out at para 9 (i)-(vii) of that record of hearing. Orders for further and better particulars were made requiring the individual allegations to be identified. They were subsequently provided listing 54 matters. Although the claimant was initially unrepresented, she has had help at various stages firstly from a body called Legal Advice Services which drafted the list of allegations and, more recently, solicitors.

3.2. Despite the professional input, the further and better particulars provided included a large number of matters that appeared to be either evidential assertions, duplication or potential consequences of the alleged discrimination. Mr McCracken undertook to revise and reduce the list. The 54 matters were reduced to 15 allegations of less favourable treatment, 12 of which are also advanced in the alternative as allegations of victimisation. Each of the allegations that remain is set out and addressed within the discussion and conclusions section below.

3.3. It is common ground that the claimant's grievance raised in February 2016 is a protected act for the purpose of s.27 Equality Act 2010.

4. **FACTS**

4.1. It is not the tribunal's purpose to resolve each and every last dispute of fact between the parties but to focus on those matters necessary to determine the issues before us and to set them in their proper context. On that basis, and on the balance of probabilities, we make the following findings of fact.

4.2. The respondent is the county council and social services authority for Derbyshire. It is, as one would expect, a large employer with professional support services available to its managers, collective bargaining and consultation systems in place and a developed employment policy framework. It has an equalities and diversity policy [131] and long

established systematic recruitment and selection procedures [73]. Those undertaking recruitment decisions undergo internal training in the application of the policy.

4.3. The claimant has been employed by the respondent since 1988. She has held various positions mainly within social services. The directorate in which the claimant has worked most recently has been split across “localities”. At the material time, the claimant worked in the South Derbyshire locality. The head of service for that locality was Chris Lavelle, a white female. Within each locality are various children’s services, including three Multi-Agency Teams (“MAT”), one of which is the Ashbourne and Etwall MAT Team, in which the claimant worked. The Manager of that team was Kathryn Goodwin, a white female. She and the claimant had worked together for some time and she was well regarded by the claimant who described her as a good manager, that she had been supportive towards her and, during the initial grievance, that she did not see her as racist. The MAT teams, as the name suggests, include a number of individuals from various professional backgrounds including social work, health, education, youth and criminal justice. They are employed as “Family Support Workers”. This is a grade 8 post within the employer’s pay grading scheme. The claimant was one such family support worker.

4.4. We find all of the managers involved in this case come from social work or related professional backgrounds. We accept that awareness of issues such as diversity and cultural difference are present in their professional work.

4.5. As to the ethnic diversity of the workforce, we have not been taken to any statistics in any detail. However, it is common ground that there are no managers of a BME background in grade 11 jobs within the 3 MAT teams in the locality in which the claimant works. The claimant estimates the BME proportion of the workforce in that locality to be around 1%. Mrs Lavelle identified the claimant in one team and 2 other BME employees in another team. The third team had no BME employees making 3 out of a total of around 45 staff. We accept that there are BME employees in the more senior positions and across the service as a whole. Two individuals were identified occupying positions at Assistant Director level. We also accept that over time there have been more BME staff employed across other teams in the Council as a whole. The area in which the claimant worked, however, was particularly under represented although it also seems the general population served by this area is not a diverse one. All that is not enough for us to conclude, as the claimant seeks, that there exists some secret policy of not appointing black British applicants to managerial grade 11 posts in the South Derbyshire area. The mere fact that there are not any, does not mean there is an overt policy or practice of securing that state of affairs.

4.6. The claimant identifies as Black British. We found her to be studious and committed to improving herself. She had started her career as an administrative assistant and had experience across a number of areas of the organisation including Personnel, Youth Work, Education and Social Services. She had managed to balance work and family life with part time

study to obtain a law degree. She was prepared to work outside office hours although on one occasion that we return to later, this would be seen as a concern. During recent years, she had applied for around 10 promotion positions, all of which were unsuccessful. It stands to reason that amongst those posts, each will have been more or, as the case may have been, less suited to her particular skills and experience. Nevertheless, we did not find the claimant to be someone likely to waste the time and effort in applying for posts completely beyond her reach and, in fact, we find she has been shortlisted for all but one of the promotion posts she has applied for. We accept the claimant's evidence that the feedback she has received from these interviews has been generally positive. We also accept the claimant's evidence that during her 6 years or so in the MAT, she has seen a number of white individuals join the team after her who have then moved on to promotion posts. We acknowledge her perception that those white colleagues have not been as well qualified for promotion as she was although we clearly cannot make a finding to that effect through want of evidence. She is now one of, if not the, longest serving members of the team.

4.7. Aside from the formal recruitment exercises that were undertaken to fill vacancies, we find the respondent would also make use of less formal processes such as temporary acting up arrangements which would not only deal with short term needs in a flexible way but would provide development opportunities for employees. We accept the claimant's evidence that she has never been asked to fulfil such short term roles.

4.8. The claimant's growing sense of injustice first found voice, in a formal sense at least, on 28 June 2011 when she made a written complaint to David Wallace, the then Principal Education Welfare Officer [420]. She complained she was being discriminated against by a manager in another team called Angela Perry. Within the grievance, she expressed her frustration at being overlooked for promotion [420]. Mr Wallace acknowledged the grievance on 7 July promising to carefully consider the issues but we find there was no investigation undertaken and no response provided to her complaint. It was simply left unanswered.

4.9. In 2013 she raised similar concerns, albeit in more passive terms, with Ian Thomas, the strategic director [433]. The purpose of this correspondence was simply to feedback concerns from a number of BME employees after an internal conference which may explain the apparent absence of any response.

4.10. The evidence before us touched on the fact that in 2011, Mrs Goodwin and Mrs Evans had been the subject of a previous grievance complaint by a British black employee. We have little detail about the circumstances. We understand this was not upheld.

4.11. We turn to consider the creation and recruitment into to the new Senior Practitioner Supporting Families posts ("SPSF"). In 2015 the respondent reorganised its structure and combined the locality structure. There had previously been separate discrete areas of responsibility each with its own locality manager. In this case the relevant individuals were Christine Lavelle and Maureen Evens. Those roles were merged into one locality

manager. Mrs Lavelle was appointed to that post and Mrs Evans displaced within the reorganisation to another position. To balance the increased managerial workload this change created in the structure, the SPSF post was created as a new, first line manager position at grade 11. Each MAT would then have one SPSF. A major recruitment exercise was launched to coordinate the appointment of applicants to those new posts across the entire service. Consequently, there were a large number of applicants, a large number of vacancies and the managers set up a system for shortlisting and interviewing. That process involved locality managers across the service including Mrs Goodwin although individual managers stepped back from short listing applications from members of their own team. We have some concerns about the consistency of that process as we find that when the process was repeated for a second time locally, the claimant not only met the same criteria for short listing but was in fact appointable to the role. On this first occasion, she was not shortlisted. Whilst the process of stepping back from short listing applicants from one's own area appears to give a feel of independence to the process, we are not satisfied it did take place in a vacuum. The process involved the locality managers coming together, firstly for a planning meeting and then the short listing meeting itself. We do not accept there was a complete firewall between applicants and their current locality manager and that no discussion could ever take place. There remained scope for views being influenced, even if not deliberately or maliciously. That in itself may not be a problem, but we express that finding principally in rejecting the contention that this process, and all the recruitment processes, were as clinical as it seemed at times to be suggested. That is not to say Mrs Goodwin was influential in the claimant not being shortlisted when she should have been, or the successful candidate being shortlisted when she shouldn't have.

4.12. The successful candidate appointed to the role of SPSF in the claimant's MAT team was a Racheal Searcey, a white female with a youth work background. She was regarded by the claimant as being a close friend of Mrs Goodwin. Mrs Goodwin denied this to be the case which we accept and we are also satisfied she did not have any formal role in her appointment. In the event, Ms Searcey decided not to take up the post. The vacancy therefore remained unfilled by which time the service wide exercise that had introduced and then appointed to this newly created post had come to an end and any recruitment would then be organised in accordance with usual process for any vacancy arising and would be managed within the team.

4.13. This second recruitment process started in July 2015. It used the same job description and person specification. The claimant applied again. She was one of a small number of 14 candidates for two similar positions within the locality. This time she was shortlisted. We accept Mrs Goodwin's evidence that the claimant not only met the criteria for being shortlisted but was appointable to the post. However, she would be unsuccessful after interview. Although she met the absolute threshold for appointment, Mrs Goodwin was of the opinion that she was not in the top 3 of candidates and was not even considered a reserve candidate should either of the successful candidates drop out. We return to Mrs Goodwin's evidence on this in our discussion on the recruitment decision below.

4.14. The interview process was undertaken in early August 2015 by Mrs Goodwin and Maureen Evans who was at that time still Mrs Goodwin's line manager. She is white. Mrs Evans was not called and we have therefore not had the benefit of hearing from her. There are few documents before us concerning Mrs Evans' views of the claimant's abilities. We have seen her interview in the course of the grievance investigation that would follow in due course and in which she expressed a negative view of the claimant's abilities and suitability for this post. We have seen written interview feedback given after she was interviewed for different post of Community Development Officer. We found that feedback [776] to be generally positive, particularly in terms of the claimant herself and how she presented as a candidate and such gaps or deficiencies which apparently led to her not being selected appeared to be focused on her fit for the particular role itself.

4.15. Mrs Goodwin has been trained in the respondent's recruitment and selection procedures which include elements on equality and diversity. She was not aware of the concept of positive action or how that might unfold in respect of the respondent's equality duties.

4.16. The claimant was interviewed. She was not successful. In the feedback that followed, the claimant was told she had done a good job, given good responses but on this occasion, could not be offered the job.

4.17. We do not have a complete picture of what happened during this interview process. In fact, we have very little in the way of contemporaneous documentation despite the written recruitment process being structured and formal with various items of standard documentation expected to be used. We accept that the interview panel used the standard record sheets to note the questions and answers and score the candidates against the essential criteria. The scores for each of 8 questions would be between 1 and 5. We do not have any of the score sheets for the claimant or the other unsuccessful candidates. We only have one of the two score sheets for the successful candidate, as completed by Mrs Goodwin. We do not have any form that might have been completed by Mrs Evans. We have the application form for both the claimant and the successful candidate. The reason is that they were lost or destroyed or in any event not located. In her evidence, the claimant did not go as far as alleging they were destroyed as a cover up. It is correct that the respondent's policy states that records will be destroyed 6 months after the end of the recruitment process [101] and there may be nothing objectionable about that in theory but we are left without a clear explanation of what actually happened in this case. We know the claimant was interviewed in the first week of August 2015. The 6 months destruction date would therefore have expired in early February 2016. However, what would become the claimant's grievance concerning this recruitment exercise was initially lodged with a senior manager, Mr Ian Johnson, on 23 November 2015 who in turn referred it to Mrs Lavelle. She was dealing with it directly with the claimant in early December 2015 when, we find, the issue of the interview records was raised as relevant to the complaint and the clamant led to believe they would be obtained. Mrs Lavelle made some initial enquiries about the process but, it seems, despite that no effort was made to obtain, or at least locate and secure, the interview records. Mrs Lavelle's evidence of this

period between December 2015 and January 2016 was focused on the crystallisation of the initial complaint by the claimant into a formal grievance. During that time it was not clear to either Mrs Lavelle or the claimant whether that initial complaint would include an allegation of racial bias or not. There seemed to be a sense in the respondent's approach that there was no grievance until the claimant formalised the terms of it. Whilst we accept there needs to be some definition of the boundaries of the complaint in any grievance, we did not find the distinction between the lodging of the initial complaint and its final particularisation of great assistance to what happened to the recruitment records. The fact remains that the claimant was challenging the recruitment process about 3½ months after the interview, well within the 6 months period. Even if the final particularisation of the grievance did make a difference, that seems to have occurred in early January, also within the 6 months period.

4.18. The respondent's witnesses made some attempt at an explanation as to what may have happened to the recruitment records. We know that the document we have before us is only there because Mrs Goodwin happened to put a copy of the Mrs Allen's, the successful candidate's, score sheet on her personal file. At one level, Mrs Goodwin's evidence that the documentation has in fact been destroyed is closer to speculation, there being no direct evidence that that was the case. In fact when, in due course, Ms Sohail dealt with the issue it seems she did not actually ask the question whether the records existed, but instead simply presumed that as she was by then 6 months beyond the interview, they would have been destroyed. In any event, that is how it was explained in the grievance appeal. Miss Bramwell was of the belief that, in the confusion of the organisational change taking place at the time affecting Mrs Evans' own redeployment, that she may have sent the records to the HR shared services centre where they may have been destroyed but that did not answer the question if they were or when they were. All that simply demonstrated to us that the written policies and procedures are not always followed.

4.19. Our findings on the conclusions reached by the panel therefore has to be drawn from the surrounding circumstances. The contemporaneous evidence of the interviews is limited to the fact that Mrs Goodwin scored the successful candidate 28 out of an available 40. We do not know what score she received from Mrs Evans, nor do we know the score the claimant received from either interviewer. The same applies to the other unsuccessful candidates. We have already referred to Mrs Goodwin's evidence that she recalls the claimant scored less than Mrs Allen and was not in the top 3. We do not know to what extent the individual scores as between Mrs Goodwin and Mrs Evans were consistent. We did not accept that there was a complete independence in the interview process as between the two interviewers and find it more likely that there would have been some discussion about the candidates in the context of the scoring being applied. We also note Mrs Evans was not only Mrs Goodwin's manager at the time but was also the "Recruiting Officer" so far as the internal policy was concerned. She therefore had a lead role in the exercise. We find it more likely than not that there would have been some influence or deference respectively, either conscious or subconscious, in the decision making process. Equally, we were cautious about Mrs

Goodwin's evidence that the selection process was based purely and exclusively on the interview performance. We found the process was, as all such selection processes tend to be, a means of putting a subjective process into something of a more objective basis. That good practice does not mean that interviewers can necessarily separate the interview answer from their existing knowledge of the candidate on the point being assessed when deciding whether the response warrants, say, a score of 2 or 3 or 4.

4.20. We find the respondent's recruitment policy includes the desire to appoint from under represented groups and seeks to further this aim by the process of preferring candidates from those groups as a means of choosing between two or more candidates otherwise equally appointable after the selection process.

4.21. It was put to us that 28 out of 40 was not a particularly high score for a successful candidate and that the one score sheet showed one question in which she scored only 1 out of 5, having failed to meaningfully engage with the question at all. Against that, the claimant's case was put on the basis that we could extrapolate from her application, her experience, her interview feedback and her past supervision notes, the likelihood that the claimant would have scored no less than that which Mrs Allen scored. We declined to embark on that analysis. However, based on Mrs Goodwin's evidence, we were able to make two clear findings of fact. They were that the claimant's application and her performance at interview were such that she was appointable (which is at odds with the evidence Mrs Evans gave to the internal investigation). Secondly, that such criticisms as there may be about her interpersonal skills were not such as to preclude her from being appointed.

4.22. The reference to interpersonal skills arises from a criticism of the claimant that she could be combative in response to challenge in the workplace, and was regarded by some as difficult to manage. We were taken to some contemporary documentation in support of this and there were elements of the total evidential picture before that led us to accept that this view was genuinely held by Mrs Goodwin and would, in due course, come to be held by Mrs Allen. It was a state of affairs and confirmed within Ms Sohail's grievance investigation report.

4.23. These events sit against a background of a long working relationship between the claimant and Mrs Goodwin over many years. We found that to be a positive one. The claimant accepted that Mrs Goodwin had been supportive to her personally and professionally and that she was a very good manager. She would go as far as saying she did not view her as a racist.

4.24. Mrs Allen, the successful candidate, is a white female. She had not previously worked in the MAT teams. Her background was in the nature of a field Social Worker. She took up post in October 2015. She had not previously worked in a managerial role. This was her first post managing staff.

4.25. We find that during the initial months working together, Mrs Allen and the claimant worked amicably together although the claimant was of the view

that she should have been appointed and shared with Mrs Allen how disheartened she was by the repeated rejection. She was dismissive of why Mrs Allen's experience of child protection should be any more relevant to her own experience. For her part, Mrs Allen was new to management of any kind. She found it a difficult transition. We have seen contemporary evidence of Mrs Allen trying to support the claimant in the way work was allocated. This continued into the supervision sessions between them and we are satisfied Mrs Allen continued with her support for the claimant, giving advice and making proposals to improve her prospects of appointment in other recruitment exercises. Matters became strained however, through the progress of the grievance process when the allegations of discriminatory treatment by both Mrs Allen and Mrs Goodwin were explored.

4.26. The claimant continued to be subject to supervision with Mrs Allen as her new line manager. We accept how a formalised system of periodic supervision sessions between social worker and line manager are a standard aspect of social work practice. They tend to cover standard topic areas including current caseloads and professional practice issues and broader topics such as pastoral matters, training and professional development. That is the case in this employer. At the claimant's level, the parties come together usually once a month. They review previous notes, discuss the matters of the moment and set any plans for the next month. We find that discussion is always noted, by both parties. The typing up of the official record of the meeting may not happen immediately, still less the formal approval and joint signing off of the notes. It is common for this to be delayed and, as long as the parties are maintaining the supervision appropriately, the fact that a number of sessions may get signed off at one time is not critical. The reasons for this can be down to either party. From time to time this happened with the claimant's supervision. It happened in late 2016 when an issue arose with the claimant being presented with a number of sets of notes that Mrs Allen asked her to review and sign. We did not find anything deliberate or premeditated in this state of affairs arising. We did not find there was anything aggressive in the way Mrs Allen raised it. Unfortunately, it occurred at a time of high tension in the workplace when there was a risk that anything could be interpreted negatively. Equally, we find that would lead any person to be frustrated about the need to review a number of sessions and that the claimant expressed dissatisfaction about that state of affairs to Mrs Goodwin who advised her to check what she could and sign them. In the event, the claimant did not sign any as she was not happy with the delay.

4.27. We find there was a strain on the working relationship when the claimant raised her grievance. We do not accept Mrs Allen changed her approach to the claimant but we do find she found it increasingly difficult, simply because she knew that the central issue was her own appointment over that of the claimant. We find that the claimant herself was initially sensitive to this and in her formal grievance made clear that Mrs Allen should be kept out of it was not her fault. Likewise, she expressed as much in supervision on 27 January. Nevertheless, that position did not remain and, as before us, allegations were made about Mrs Allen's conduct to the claimant. We find the whole situation became increasingly difficult for both parties and we remind ourselves that this occurs at a time when Mrs Allen

is, for the first time in her career, trying to get to grips with the added responsibility of supervising a team. Having seen her in evidence, we found her genuine and professional and her entire demeanour demonstrated how the matter had clearly taken its toll. We were not surprised to learn that Mrs Allen has since moved on to other work.

4.28. In the course of this working relationship, we have seen one exchange by email in which progress on certain case files was being chased, the response from the claimant included a request that the two of them have a three-way meeting with Mrs Goodwin, a matter which is directly relevant to what would later become a criticism of a similar format for supervision.

4.29. We turn to the presentation of what would become the claimant's grievance. We find, perhaps obviously, that this was being formed from the moment she learned she had been unsuccessful for the SPSF post. She was wrestling with what to do about her sense of injustice for many weeks. We find this dilemma of challenging a decision on grounds which at least imply discrimination, to be perfectly normal as was the initial reluctance to identify certain individuals as being bias, even subconsciously. The claimant shared her frustration with Mrs Allen in supervision sessions in October and November 2015. The grievance complaint itself was sent to Mr Johnson on 23 November 2015. The following day, the claimant met with Mrs Allen in supervision again. That meeting was documented more fully [736] in that Mrs Allen recorded the complaint as it was now explicitly put to her in terms of a racial bias including that Mrs Goodwin was racist as being the only explanation for the absence of secondments and not being appointed. This discussion in supervision was understood by the claimant to be confidential. Nevertheless, Mrs Allen took the view that the serious nature of the allegation meant she had to share it with higher management.

4.30. Mr Johnson referred the complaint to Mrs Lavelle. She met with the claimant on 10 December 2015 and they discussed the parameters and extent of the grievance. We find Mrs Lavelle held that meeting after taking HR advice. As we have said, the focus at this stage seemed to be a continuation of the claimant's dilemma how firmly to frame the allegation of racial bias and how to do it without alienating people around her. We accept the claimant was tentative about raising a formal grievance.

4.31. After the initial discussions with Mrs Lavelle and being given time to think about it further, the claimant initially sought an informal grievance with the support of her trade union. She made clear that she did not want Mrs Allen implicated on the basis it did not "concern her". She emailed Mrs Lavelle to that effect [449g].

4.32. This dilemma was taken out of her hands on the basis that her initial desire to have an informal investigation was effectively refused. Mrs Lavelle view was that there was a serious allegation of racial bias hindering the claimant's progress and as such it should not be left hanging in the air. It needed formal investigation. The choice effectively became one of either having a formal investigation or an investigation without an allegation of racial discrimination.

4.33. A formal investigation process was launched. On 21 January 2016 the two met again to agree the parameters of the investigation which were noted [449l – 449n]. There was agreement that an independent investigator would be appointed. The claimant wanted an investigator who was preferably black but, her second choice would be an investigator from a BME background. We find that the respondent accepted this request and set out to identify one of its internal investigators who met the claimant's criteria. The need for the investigator to satisfy any pre-condition or to hold any particular characteristic would inevitably have the effect of reducing the pool of available internal investigators.

4.34. In February 2016, Nusrat Sohail was appointed to undertake the investigation. She is Asian and therefore met the alternative characteristic required by the claimant. We are satisfied that the employer appointed her because she was one of their trained internal investigators who met that criteria and was in a position to take on the investigation. We do not accept there was any other factor influencing her being chosen. We found nothing about her qualities or attitude that could describe her as pro employer, such that this could be a detriment to the claimant. She is employed by the respondent as a manager in another MAT area. Ms Sohail was only very recently trained as an internal investigator. This was her first formal investigation. We found her to be honest and enthusiastic in the way in which she went about her responsibilities. However, we also find the investigation was undermined by that same enthusiasm and her desire to turn this situation into a positive to help the claimant. That led her to start from the premise that there must be a deficiency somewhere in the claimant's skill set, including her ability to reflect on her own abilities, and that the investigation process could be framed in such a way to help the claimant make progress in her career in future. Such was an honest and laudable objective but, we find, meant the investigative mind-set was closed off to the possibility that there was some unconscious racial bias influencing the decision making, a position reinforced by her own positive experiences working within the respondent.

4.35. The fact that Ms Sohail had no previous knowledge of the claimant or involvement in the process meant she needed support from HR. Sam Bradwell provided that support. We found nothing objectionable about that. Similarly, the fact that this was Ms Sohail's first investigation meant that level of support was likely to be greater than would be the case for a more experienced internal investigator. Miss Bradwell's involvement within the individual investigation meetings and in supporting her in constructing the final reports did not seem to us to step outside what might reasonably be expected to take place in any organisation such as this. This is criticised by the claimant as her being the de facto investigator and that Ms Sohail was used to simply put her name to the report. We do not find that to be the case. Miss Bradwell's increased involvement was for the reason of Ms Sohail's inexperience. Similarly, whilst we are critical of the self-limiting scope Ms Sohail inadvertently applied to her investigation, we remain satisfied it was her investigation and the results were her own conclusions. In evidence before us she stated that had she found discrimination she would not have shied away from stating as much. We are satisfied that was genuine albeit her approach subconsciously limited that enquiry. Having said that, her position that there were non discriminatory reasons in play in

respect of the claimant's interpersonal relations was reinforced by the fact that she found supporting evidence for it in what others were telling her.

4.36. The claimant's grievance was encapsulated in two questions Ms Sohail posed to herself. The first was whether there had been racial bias in the recruitment process for the second senior practitioner post advertised in South Derbyshire for the Ashborne and Etwall MAT and Newhall MAT. The second was whether the claimant's progression within the authority has been hindered by her Manager Kathryn Goodwin.

4.37. The claimant met Ms Sohail on 23 March 2016 [754]. By now, the 6 month destruction date for interview records had passed. She did not have before her the interview notes which she described as being "no longer available". (at this time, it did not even include the single set before us which were subsequently located). She met with both Mrs Goodwin and Mrs Evans during which both set out their recollection of the interview process and in particular their recollection of how the claimant had performed. Both were of the view that she was not the best candidate and Mrs Evans going as far as to say that she was not appointable, in contrast to Mrs Goodwin's evidence before us. They explained their recollection contrasting the answers given during interview between the claimant and Mrs Allen. Ms Sohail also had a copy of written feedback provided by Mrs Evans to the claimant following another unsuccessful interview [776]. She met with Mrs Lavelle and other MAT managers and considered notes of supervision between Mrs Goodwin and the claimant.

4.38. On 13 June 2016, the outcome of Ms Sohail's grievance investigation was published [649]. It rejected all aspects of the grievance. Ms Sohail and Miss Bradwell met with the claimant to discuss the outcome further on 8 July 2016. This type of face to face meeting is not required by the internal procedure but we accept Ms Sohail felt it would be helpful to personalise the decision. In short, she answered both of the questions it posed in the negative. She went on to make various recommendations.

4.39. Ms Sohail found support for her initial view that the reason for the claimant not being promoted was likely to be within her own skill set. She found a number of references to the claimant's lack of ability to reflect on her own behaviours and how that might impact on her work. She identified this as a common theme emerging from her enquiries. The recommendations made relate to providing further opportunity for the claimant to reflect on her own behaviours and to receive support with counselling. It encouraged managers to develop a culture based on the employers code of conduct, for the claimant to reflect on her current role, to be supported by mediation with Mrs Allen and Mrs Goodwin and to encourage clear and honest interview feedback with areas for development.

4.40. The claimant lodged an appeal against that decision. Under the internal procedure, that appeal would be considered by the respondent's appeal committee of elected members. The claimant's grievance appeal is detailed and alleges both that the evidence did not support the investigators conclusions and that the investigation was insufficient to satisfactorily resolve the complaint. She raised a number of criticisms about the process and underlying treatment. In particular she cited the fact that she

understood all the recruitment documentation had been shredded, even though she had raised her concerns in time. She raised the absence of an interview with Dave Wallace, to whom she had complained previously. Within the grievance she again restated her view that the MAT Manager, Mrs Goodwin, is not racist but that racial bias is affecting recruitment decisions.

4.41. In meantime, the respondent set out to deal with the recommendations coming out of the investigation, in particular, that of mediation. A round table meeting was held on 20 July 2016 for that purpose. Chris Lavelle Chaired the meeting with the claimant, Mrs Allen and Mrs Goodwin present [655]. This meeting appeared to us to open up many of the issues all had with each other. Whilst getting that out may be a necessary part of understanding each other's perspectives so as to bring the individuals back together, it is understandable why this meeting ended with as much tension as there was before.

4.42. Mrs Allen continued to supervise the claimant although during the course of the grievance, which is essentially the first half of 2017, the supervision sessions had effectively been reduced to essential matters of caseload progression. Anything that was potentially controversial was parked.

4.43. On 12 October 2016, Mrs Allen sent an email to everyone in the team giving notice of the arrangements for the office Christmas meal [515]. The claimant was included. The email gave details of what was planned and what people needed to do to book onto it and chose their food from the menu. The claimant had not paid her deposit by the deadline for it to be paid to the restaurant. Mrs Allen contacted her again to say if she did want to go, she could but to pay her deposit directly to the restaurant. The claimant respondent thanking her and appeared to be content with that arrangement. In the end, she decided to make alternative arrangements with another colleague but did not tell anyone. It was therefore assumed that she was not going to the Christmas lunch and, as she was otherwise to be at work that day, there was a later email exchange in which she was asked if she could cover the office phones. She replied that she had replied already and had another appointment that day. In response to which Mrs Allen stated she had not received any response from the claimant but, if her appointment was a work appointment, she was asked to change it to another time.

4.44. On 14 November 2016 the claimant returned from annual leave and complained to Mrs Lavelle that she was being victimised in respect of the arrangements for the Christmas meal [550/551]. Mrs Lavelle responded that she could not follow the allegation of victimisation. Further emails were exchanged in which the claimant raised a request to be supervised by a different manager. Ultimately this exchange led to arrangements being made for a meeting between Mrs Lavelle and Mrs Godwin and the claimant and her trade union representative, Ms Bola. This meeting took place on Tuesday 22 November 2016. The practical limitation on being supervised by a manager outside the team were explored as was the option of moving to the Swadlincote MAT team. It was left for the claimant to consider whether she wanted to move teams which she did. The respondent began to explore the possibility of accommodating this.

4.45. In due course the Christmas meal went ahead as planned. A colleague of the claimant called Becky attended that meal. We have not heard from her but have seen text messages she sent to the claimant. In those messages she accused Mrs Allen of getting pissed and of laughing about the claimants complaint with another colleague. It contains multiple hearsay. We have heard Mrs Allen who had the allegation put to her. Not only did she firmly deny it but gave an account of the circumstances of that meal which was credible and detailed. We accepted her account that the question of why the claimant was not attending was raised by another and in an appropriately quite moment, Mrs Allen had asked her not to talk about the claimant. We accepted her account and do not find at any point she was sharing or laughing about the claimant's complaint. For completeness, we do not accept Mrs Allen was intoxicated, in fact we accept her evidence she was not drinking.

4.46. Returning to the chronology, the grievance appeal meeting took place before elected members on 10 November 2016. The claimant was represented again by her Union representative, Ms Bola. We do not have particularly helpful notes of that meeting. We have seen manuscript notes which are often illegible and usually paraphrasing the proceedings. We accept that during the course of the proceedings, the panel made various requirements for further information to be provided including contacting Mr Leckie, one of the MAT managers interviewed by the investigation and requiring Mr Wallace to attend.

4.47. Mr Wallace's comments at this appeal hearing is the only insight we have into his handling of the claimant's original complaints back in 2011. His position was that he could not be sure if anything was done. He thought it would have been investigated. In respect of Mr Wallace, we have been asked to find he was pulling the strings behind the scenes and orchestrating a conspiracy to negatively influence the claimant's progress in her career. He has featured in this case at three points in time. The first was the claimant's complaint in 2011 which he failed to respond to. The second was that he had some involvement in the arrangements for the service wide restructure and appointments to the SPSF, that is the first round of SPSF selection. The third is him being required to appear at the appeal hearing. On all that we have seen we are unable to reach the findings of fact that the claimant urges on us. We do not find he was behind a conspiracy to influence other managers negatively against the claimant.

4.48. Ms Sohail presented her grievance investigation and its findings. She presented it as she had found it which necessarily meant advancing those same conclusions. To the extent that it is suggested she was encouraged to present false information we reject that. When asked who was doing the encouragement, the claimant said she could not name names.

4.49. The appeal was dismissed [520d]. The outcome was confirmed by letter sated 17 November 2017.

4.50. A supervision meeting was due to take place on Friday 25 November. That would ordinarily have been between Mrs Allen and the claimant alone.

Whereas the claimant had previously sought to distance Mrs Allen from her complaints, by now the relationship had soured to the extent that the claimant was seeking a different line manager. Mrs Allen had been in post for a little over a year but we find was still a very inexperienced manager by any standard, let alone dealing with the sort of tension that was now present in the workplace and some of the potentially more difficult issues. She was struggling to manage the claimant in the face of the outcome of the grievance investigation and the views that had been expressed in it. The day after the meeting with Mrs Lavelle, Mrs Goodwin sent an email to the claimant stating that the scheduled supervision session would be with her as well. The claimant agreed although asked the reason why she was seeing them both. There was no response from Mrs Goodwin who could not recall why other than she believed the timing of the email and the meeting were close. We find the background to this meeting having two managers arose principally from Mrs Allen's own sense of needing support, particularly as the claimant had asked for supervision from a different manager. Mrs Allen was clearly herself concerned about supervising the claimant and Mrs Goodwin had taken the view that she needed that support.

4.51. The Claimant's trade union representative took up the question of why there were to be two managers with Mrs Lavelle by email late in the day on 24 November 2017 [528]. Mrs Lavelle explained this was a temporary measure to avoid any difficult one to one scenarios. It was against a background of the claimant asking for a change of manager. We accept these reasons were genuine. We note that Mrs Lavelle's response was not actually sent until 27 November, the Sunday after the supervision session on the Friday. We do not find this to have been deliberate decision to ignore or delay the issue until after the meeting has taken place. We accept Mrs Lavelle's explanation that she was unable to deal with it immediately but did respond as soon as she was able.

4.52. Whilst the grievance and the subsequent appeal had been under consideration, Mrs Goodwin and Mrs Allen took the decision not to engage with the claimant during supervision more than was necessary. This meant parking any potentially controversial issues. During this time, certain matters had arisen and were put to one side. These matters, principally about organising work and time management, were on the agenda to be dealt with on 25 November when the normal supervision sessions resumed. They included, the fact that the claimant appeared to be working in the small hours which raised a genuine concern about late night working, whether this was a workload issue or other factors were causing it. It was known the claimant was a mother of children at home and we are satisfied this concern was genuine attempt to support the claimant manage her workload within the working week. They discussed record keeping of start and finish times, keeping her electronic diary up to date and accurate records of flexi time. We do not find there was a threat to remove the claimant's laptop as alleged. Various planned training activities were discussed. We find the notes of the meeting were drawn up and forwarded to the claimant within a short period. They were available to her through her email but, due to the sickness absence that followed, she did not access them. They were accessed when the claimant returned to work in February 2017.

4.53. We find those matters discussed to have been genuine matters arising and in the nature of things that could legitimately form topics of discussion at any supervision sessions. We understand that there may have been some suspicion in the claimant's mind why things were being raised. However, we accept that this was wholly because of the decision not to engage in any potentially controversial areas whilst the grievance process was underway. We also accept Mrs Goodwin and Mrs Allen's evidence of the tone of the meeting which they anticipated as potentially being difficult but which in the event, they characterised as being less of the difficult meeting stressful than they had anticipated. In fact, they described a positive and relaxed meeting with laughing at times.

4.54. We accept Mrs Goodwin's evidence that it was her normal practice to have the employee's file with her at supervisions sessions, that she kept them in her office and that was where her supervision record was held. Consequently, there was nothing unusual or different when she did this on 25 November 2016.

4.55. On Monday 28 November 2016, the claimant commenced a period of sick leave and would remain absent until February 2017. The medical fit notes describe the reason for absence as stress at work. During this time, her previous request to relocate to a different team was considered further and the respondent proposed a transfer to the Newhall MAT team. The claimant rejected this offer on the basis that it would involve further travelling time and cost. Instead she sought a transfer to a completely different part of the county and also financial support with any additional travel costs.

4.56. Mrs Lavelle met with Miss Bradwell and the claimant's trade union representative, Ms Bola, on 5 December 2016 to review the claimant's request. Financial support for relocation would not normally be available where the move was at the employee's request. The claimant's sickness absence was also discussed and what support she may need, particularly in respect of counselling and CBT support that might be available. The respondent took the decision to refer the claimant to occupational health. We find there was a shared understanding, at least, with the claimant's trade union representative of the underlying rationale for this referral and, in any event, there was no dissent from the claimant's representative. Miss Bradwell therefore made the referral [545] and whilst seeking an urgent referral, recognised the usual timescales meant it may not be until after Christmas which proved to be the case. As with any referral, it was necessary to set out the background to the employee's current period of absence. We found the referral itself to be a balanced and measured synopsis of the background. It identified that there had been an internal grievance which had been rejected and that the dispute was continuing. It did not identify the nature of the grievance. We found the referral was accurate and served the purpose of informing the occupational health consultant of sufficient background to undertake a meaningful consultation with the claimant, at which she would have her own input into the relevant background circumstances, and ultimately to provide a meaningful report. The claimant objected to the fact that the referral contained an error in respect of her start date (stating 2008 instead of 1988), did not refer to the

grievance being about race and that it referred to previous sickness absences. We do not accept that the referral gives the implication that the managers were not at fault or that the claimant failed to accept the outcome without good reason. Overall, we found the referral to have appropriately sought advice on prognosis, timescales, additional support and adjustments.

4.57. The claimant continued to submit fit notes stating she was unfit for work due to stress at work. The claimant's absence record had reached the point of triggering stage 1 of the Attendance Management Policy. In her evidence, the claimant accepted that she was dealt with in line with the policy but asserted that two white male colleagues who she had previously not named had been left longer. They were both identified in the course of evidence and the respondent made further disclosure which, in the event, did not support the claimant's contention of a difference of treatment. The stage 1 meeting was arranged for 1 February 2017. At that time, the current fit note expired on 6 February after which the claimant stated she intended to return to work. In the meantime, the claimant engaged with the occupational health referral and met with the consultant on 26 January 2017. Dr Sherwood-Jones reported the same day recommending ultimately that if there were no changes to the work related factors that there was a risk of future absence. However, the release of his report to the respondent was delayed due to the claimant raising points she was not happy with in the report. Dr Sherwood-Jones considered the points raised and declined to alter his report. The release of the report to the respondent was not until early March 2017.

4.58. On 1 February 2017 the stage 1 return to work meeting took place. The notes stress how the purpose of the meeting at stage 1 was to be supportive and to look at ways to facilitate a return. At the meeting, an agreement was reached for the claimant to temporarily transfer to another team from 7 February 2017. The claimant returned to work as planned with a phased return being agreed. Further reviews took place but the claimant was never progressed to stage 2 of the attendance management procedure.

4.59. Whilst there was then some delay in resolving the issue of additional travel payments, the permanent transfer was put in place with the claimant's agreement by June 2017.

5. **Law**

5.1. In their closing submissions, neither party advanced any novel submissions on the law, each accepting the well settled propositions and that the determination of the claim depended largely on our findings of fact. Nevertheless, reference was made to those legal principals and in any event we directed ourselves on the following propositions of law.

5.2. In respect of the claim of direct discrimination, s.13 of the Equality Act 2010 provides:-

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

5.3. By that provision, we are required to identify the reason why the treatment complained of occurred. That is the crucial question in cases of direct discrimination (*Nagarajan v London Regional Transport [1999] IRLR 572 HL*) and if we are able to, we will seek to make an explicit finding of the reason why it occurred. (*Amnesty International v Ahmed [2009] IRLR 884 EAT*). In this regard, the "because of" and "less favourable" questions are not always apt for separate consideration, particularly where the comparator is hypothetical.

5.4. Where we are unable to make an explicit finding one way or the other, we will apply s.136 of the Equality Act 2010 which provides:-

> ***if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.***
> ***But subsection (2) does not apply if A shows that A did not contravene the provision.***

5.5. We have sought to apply the *Barton/Igen* guidance as set out by the EAT and Court of appeal respectively. In doing so, the test is to be considered having regard to all the evidence before us and the mere difference in treatment and difference in characteristic is not enough (*Maderassy v Nomura International plc [2007] IRLR 246 CA*). We remind ourselves that the degree of influence the protected characteristic must have on the impugned act need only be more than trivial. To put it another way, that it was "in no sense whatsoever" because of the claimant's race.

5.6. IN some cases there are actual comparators identified. In most, her case is premised on a hypothetical comparator. In considering comparators, actual or hypothetical, we have regard to s.23(1) of the Equality Act 2010. The role of any comparator is as a tool of evidential analysis to identify the reason why something happens. The hypothetical comparator is a person in materially like circumstances to the claimant but who does not share the relevant protected characteristic.

5.7. In respect of the claim of victimisation, s.27 of the 2010 Act provides, so far as is relevant: –

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

5.8. Whether any detriment is because of the protected act is similarly a "reason why", and not a "but for", question (*Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830*).

6. Analysis of the Issues in the Claim

6.1. We have structured our analysis to reflect the remaining 15 individual allegations as set out in the claimant's schedule of further and better particulars [65-72]. These are the allegations remaining after Mr McCraken's editing at the start of the hearing. In each case, for ease of

cross reference we have included in brackets the number as it appeared in the original schedule. All allegations are advanced as less favourable treatment because of the protected characteristic of race. Allegations 4-15 are also alternatively advanced as victimisation for doing the protected act.

Allegation 1 (originally 1) – "During a restructure in 2010-2011 the Head of Service Dave Wallace, White Caucasian, failed to act on the Claimant's complaint of race discrimination.

6.2. There is no actual comparator relied on.

6.3. This evidence of this allegation is limited. There is no doubt that the complaint was raised and that Mr Wallace indicated an intention to look into it. There was no feedback thereafter and if Mr Wallace did in fact look into it further, he did not communicate that to the claimant. His recollection of this matter stated at the grievance appeal hearing was similarly limited. His only addition to the basics that were before us anyway was his statement that he believed he would have investigated it. There is clearly a detriment to the claimant in not having her concerns looked into. We have no other evidence to consider how Mr Wallace responded to other complaints. It might be that a hypothetical comparator may or may not have had the same response. Whether that hypothetical comparator is constructed as the same complaint by a white employee or a complainant not raising a racial complaint, the analysis does not assist us to conclude that there was any less favourable treatment still less the reason for it. The evidence suggests Mr Wallace's response could as likely be borne out of pressure of work or ineffectiveness as it was likely to be a decision not to progress the complaint influenced by race. We are not satisfied that the fact the complaints arise in the context of a race discrimination complaint is enough to raise an inference that the reason why nothing seems to have happened was because of the claimant's race specifically, or the protected characteristic of race generally. We are not satisfied that a prima facie case has been established and we dismiss this claim.

Allegation 2 (originally 3) – "During January 2013 – 23rd November 2015 the respondent rejected the Claimant's recruitment applications in team and local area, while less qualified and knowledgeable white caucasian colleagues were appointed

6.4. The focus of the case before us, as it was during the internal proceedings, was the claimant's rejection for the SPSF grade 11 post and, even then, the focus is on the second round of interviews. This allegation is put on a much wider basis embracing all of the 10 or so posts that the claimant had made during the relevant timeframe. It is the case, however, that the nature and extent of the evidence presented of the recruitment process for the SPSF post is in stark contrast to the other posts applied for which went little further than advancing the mere fact of an unsuccessful application. We have therefore been unable to make meaningful findings as to the suitability of the claimant for the other posts, the circumstances of each selection exercise, the identity of the decision makers, the quality of the competition she faced from other candidates or anything else relevant to and from which we may have been able to find or infer a prima facie case. In that evidential void, we are not prepared to overlay the circumstances of

what we have been able to find in respect of the second round of interviews for the SPSF post to those other applications. To the extent that the claimant seeks a declaration of direct discrimination because of her race in respect of those other posts, the claims fail.

6.5. The SPSF post has an actual comparator in the successful candidate being white. Of course, there are other white candidates who were also unsuccessful which illustrates why the mere difference of treatment and difference of characteristic is not enough to establish a prima facie case. This is not a case where we are able to reach explicit findings of discrimination, nor are we in agreement as to the explicit finding of the reason why the claimant was unsuccessful. There are a number of factors in this case that are all relevant to whether or not adverse inferences can be drawn such that, if they are, the evidential picture before the tribunal is one from which it could conclude that the claimant's race did materially influence the decision not to appoint her.

6.6. All members of the tribunal have given consideration to all the relevant factors emerging from the evidence and as summarised here and below. In the judgment of the majority (Mrs Rawlinson and Mr Sher) the factors in the evidence set out here raise sufficient concern over the other factors for them to draw an adverse inference. The evidential factors given significance by the minority judgment are relevant but do not displace that conclusion. Individually, some of the factors carry more weight than others but, collectively, they are sufficient to give rise to the inference being drawn that the claimant's race was a material influence on the decision, even on a subconscious level. The relevant evidential factors are :-

a That the claimant was said to be appointable to the post. This is not, therefore, a case where the application clearly fails on its merits, the claimant was simply not preferred against other candidates.

b That there are aspects of the evidence which do not establish objective grounds for there being a significant difference between the claimant and the successful candidate and which makes being able to understand the detailed basis of the recruitment decision all the more important.

c That the racial make up of the local population is dominated by residents of a white ethnic background. This is not an area where the racial diversity of service users in the area might encourage racial diversity of the workforce. The claimant is the only BME employee in her team.

d That there is concern arising from the way complaints of racial discrimination have been handled in the past by the respondent, in particular Mr Wallace failing to respond in 2011.

e The apparent destruction of the interview records despite them being asked for at a time when they should have been capable of preservation and, moreover, the explanation of what happened to them is vague. The respondent's own policy requires them to be kept and explains the reason why it is vital to keep records so as to

justify the decision not to appoint. If, as the respondent maintained, the sole factor determining who gets the job is the scores, all the more reason to be able to see who scored what.

f The claimant's character traits that were identified during the grievance investigation and which some found made her difficult to deal with were not challenged or addressed at the time. In any event, according to Mrs Goodwin they were not such as to preclude her from appointment to the post.

g The oral feedback to the claimant at the time was that she had given a good interview.

h The score for the successful candidate is not particularly high, her experience was outside the MAT area and this was her first appointment to a first line manager role. The cumulative scores of both interviewers is not known which leaves open the concern that the claimant scored as well or better overall. The majority do not accept the difference in scoring as asserted by the witness's recollection, particularly as Mrs Goodwin could not recall whether she scored the candidates higher or lower than Mrs Evans.

i That the Recruiting Officer Mrs Evans did not give evidence.

j That the respondent does not apply any weighting to the areas it scores at interview and, in one area, the successful candidate scored the lowest available score of 1.

6.7. The majority conclude that the effect of those factors permits the drawing of an adverse inference such that they could conclude that the claimant's race was influential in the decision not to select her for the post, albeit at the level of subconscious bias. They are therefore satisfied that the claimant has established a prima facie case under s.136(2) of the 2010 Act and turn to reconsider the evidence from the perspective of the respondent's burden to show it did not contravene the act.

6.8. The majority having rejected the evidence that the claimant scored less than the successful candidate, the obvious manner in which the respondent would discharge the burden would be in the evidence of the scores actually attributed to the candidates. Whilst the scoring could itself be subject to further scrutiny, the scores could at least provide a starting point for showing that there was a reasonably objective basis for not selecting the claimant which was not tainted by race. The absence of those records of the recruitment exercise together with the broader findings of fact mean the majority reach the conclusion that the respondent has not shown that it did not contravene the act. Consequently, this claim succeeds so far as it relates to the decision not to recruit the claimant to the SPSF post on the second occasion.

6.9. In arriving at a dissenting position, the minority (EJ Clark) nonetheless recognises the force of the factors identified by the majority in establishing its concerns about the claimant's rejection for this post. The basis of the minority judgment is that the decision whether adverse inferences can be

drawn from those factors has to be considered in the wider evidential context as, in itself, no single factor clearly points towards racial bias. Those evidential factors of significance to the minority are:-

a The fact that the claimant was appointable does not alter the fact that there remained a choice to be made between all the candidates who were equally appointable. The fact that Mrs Goodwin was of the view that the claimant's occasional difficult behavioural characteristics did not preclude her from appointment did not also mean that it was not relevant to, and could not be reflected in, the relative criteria being scored.

b For my part I do not dismiss the evidence given of the witness's recollection of the different scores. I found Mrs Goodwin to be a professional, honest and credible witness. She is described by the claimant and others as having been supportive to Ms Cole, a good manager and not racist. Whilst anyone could fall foul of subconscious bias, that does not affect the quality of the evidence of her recollection of the relative position of the claimant. For my part, therefore, I do accept the recollection that the claimant scored lower and was not in the top 3 of candidates after all the interviews.

c That the respondent seeks to apply a structured procedure in its recruitment decisions. It puts the decision making within a structure which forces consideration of the objective criteria identified for the vacant post and seeks to measure candidates against it. It is not for me to say someone working outside the MAT area could not therefore demonstrate the skills and qualities of the SPSF post better than someone working within it.

d That Mr Wallace did not respond to the claimant's grievance 5 years earlier raises a concern potentially about his attitude or the culture at the time but there is no basis for the conspiracy advanced and any negative culture or attitude is at odds with my view of the evidence relating to Mrs Goodwin's approach as a manager.

e The respondent provides in-house training to its managers who undertake recruitment and selection decisions. The training includes implications of the Equality Act.

f The extent to which the lack of diversity in the local population or that of those employed locally has to be seen against two balancing factors. The first is that the decisions being impugned were taken by professional social workers. That is not enough in itself to say discrimination cannot occur but the ethos and training of their profession is reflective practice. Considering the different perspectives of a service user or colleague as the case may be is a core of the profession. The second factor is that the diversity of the local population is not likely to be reflected in the more senior posts which are drawn from wider geographic areas, from individuals with wider experience and who are likely to have wider exposure to diversity issues arising both in practice and in their role as an employer.

g The absence of the interview records is an obvious concern and I would agree that the respondent's explanation demands close scrutiny. However, there is no credible basis for concluding that there has been a deliberate decision on the part of Mr Johnson or Mrs Lavelle to ensure that the interview records were destroyed before the 6 month destruction date, rather than be disclosed to the claimant. There may be a failure to appreciate the significance of locating and securing the records, but no positive decision not to do so. Nor would not disclosing necessarily serve any purpose. If the interview scores did in fact score the claimant higher than the successful candidate I have no doubt she would have been selected. Conversely, if there was any manipulation of the interview process, it is unlikely the score sheets would not have been written in such a way as to support that outcome. The absence of the records is clearly significant to the respondent discharging any burden that has shifted and the failure to disclose in circumstances when the employer's policy says they should be available brings me close to drawing an adverse inference but, in my judgment, the mere absence without some conscious or deliberate intervention or existing practice is not enough for it to shift. To put it in *Igen* terms, those primary facts are not without adequate explanation.

6.10. The minority therefore concludes that the weight of all the factors does not allow it to draw the adverse inference necessary to conclude that there has been a contravention of the Act. Whilst I may hold a nagging concern that the claimant *could have* been treated less favourably on grounds of race, my conclusion not to draw an adverse inference means it falls short of satisfying s.136(2).

Allegation 3 (originally 4) – "The respondent did not appoint black British managers grade 11 or above to the South Derbyshire MAT teams"

6.11. This allegation is put on the footing that there is a policy or practice in place or some other form of common understanding amongst recruiting managers to these posts. We have rejected that as a fact. The allegation flows from the fact that the South Derbyshire MAT Teams did not and have never had a black British manager at grade 11 but that mere state of affairs is not, in itself, proof of the allegation. We do not know the numbers of black applicants for those posts and their respective suitability for the post. We have no real sense of how qualified the managers that are in post are. We do note that there are employees from BME backgrounds in other grade 11 positions in other areas which raises the question why would such a practice exist only in this area and/or why for black British but not, say, Asian. In short, this allegation is not made out.

6.12. In any event, it is difficult to see how this stands as a separate allegation of less favourable treatment over and above the fact that the claimant was herself not appointed. It seems to us, had we found there to have been such as practice in place as alleged, it would have added forcefully, if not conclusively, to the evidential basis for the central allegation that the claimant was not appointed to the SPSF role due to her race, but it does not give rise to a separate claim in itself.

Allegation 4 (originally 10) – "During grievance proceedings in November 2016 regarding discriminatory treatment of her applications, Sam Bradwell, white Caucasian, was in fact lead of the grievance investigation"

6.13. We first considered whether this allegation contains what can properly be described as a detriment. It would be open to any employer to structure its grievance investigation procedures to include its HR professionals. We are not satisfied that a detriment would exist simply by virtue of the fact an HR professional was involved in the investigation stage. However, it is for the claimant in any particular case to circumscribe the extent of the alleged detriment and as long as that establishes a reasonable sense of disadvantage which is more than trivial, a detriment can be established and the tribunal should go on to address it. This case is slightly more nuanced than the mere fact that HR were involved. In this case there was an explicit request for an investigator from a BME background and the respondent acceded to that request. To the extent that the claimant believes that request has not been followed, it is enough to amount to a detriment.

6.14. However, we do not accept the underlying factual premise of this allegation that Miss Bradwell was in fact the lead investigator. To that extent the allegation fails. In any event, we are satisfied that Miss Bradwell had a perfectly legitimate role in the grievance procedure and did not on our findings exceed that role. In this case it is true that the investigator's inexperience seems to have led to her seeking greater support than might have been the case with a more experienced investigator but the support she received was legitimate and arose entirely because of that state of affairs. In other words, we see no evidential basis for concluding that the level of involvement was in any way because of the claimant's protected characteristic or protected act. There was no actual comparator relied on in this allegation. A hypothetical comparator, being either a white employee alleging racial bias or a black British employee raising a grievance about matters other than racial bias, would in either case would have to be constructed to include the inexperienced investigator as a materially similar circumstance. We are satisfied that such an inexperienced investigator would have required and received the same level of support from HR which would have manifested in the same way as this case. We dismiss this allegation. Any detriment that there is does not arise either because of the claimant's race or because of her protected act.

Allegation 5 (originally 11) – "The investigator Nusrat Sohail was openly pro-respondent and appointed to be named lead of the investigation"

6.15. The second limb of this allegation was added to the further particulars during Mr McCraken's process of distilling the allegations to their core. This allegation could be read in two ways. As an allegation that Ms Sohail was merely a figure head to the investigation, it is the corollary of allegation 4 and we would dismiss it for the same reasons. As an allegation that Ms Sohail was known to someone in the respondent to be someone with such a level of pro-respondent views that she would inevitably dismiss the claimant's grievance, this is simply not made out on the facts. We understand that the claimant takes issue with the grievance investigation process and that Ms Sohail maintained her findings at the appeal.

However, we have found her to have approached her task with a genuine intention and to have reached honest conclusions, even if there are also aspects of it which may have arisen out of her inexperience. We have no doubt that the manner in which she would have gone about any investigation would have been in the same vein. It is not easy to interpret this allegation in terms of either less favourable treatment or victimisation. But we are not satisfied there is anything about her work which was in anyway influenced by the fact of the claimant's protected characteristic or protected act.

Allegation 6 (originally 12) – "The claimant was targeted with a hostile work atmosphere"

6.16. To the extent that this unparticularised allegation advances something different to the other specific allegation of relationships and events in the workplace, in particular allegation 9, we are not satisfied a prima facie case has been established by the claimant. It was not addressed separately in submissions.

6.17. There will undoubtedly be pressure put on the working relationships in the course of, and following, any grievance process and we see nothing different in this case. In fact, we are of the view that the respondent's officers that worked the closest with the claimant were very much alert to the claimant's position and sensitive of the situation in their dealings with her. We do not accept and have not found as a fact that the claimant was targeted with a hostile work atmosphere. The allegation fails to establish the alleged detriment.

Allegation 7 (originally 13) – "At the grievance appeal hearing on 10th November 2016 the investigating officer Nusrat Sohail was encouraged to present a long statement falsely asserting no discrimination within the council"

6.18. We reject this allegation. As a fact, the claimant has not proved there was any encouragement for the investigator to present a case which falsely asserted no discrimination. We do not regard it to be enough merely that the claimant is herself of the view that Ms Sohail was wrong in her conclusions, or even that we might find them discriminatory. In this context, the falsity of the assertion has to be in circumstances where Ms Sohail in fact new there was discrimination but nevertheless presented a false case to the appeal panel. The facts as we found them are that Ms Sohail presented her findings. They were her genuine and honest conclusions. In any other situation, we are satisfied Ms Sohail would have conducted herself in the same manner. Nothing about what she said or did arose because of the claimant's protected characteristics nor her protected act, still less was Ms Sohail diverted to present a false position by encouragement from others.

Allegation 8 (originally 14) – "Following the grievance appeal hearing the claimant was treated less favourably than a hypothetical non-black Caribean British Children's Services MAT officer and/or victimised by immediate line managers Kathryn Goodwin and Jo Allen, with complaint by C to Head of Service Chris Lavell"

6.19. We reach the same conclusion as we did for the sixth allegation. This generalised allegation is not made out on our findings of fact. It is not particularised nor was it advanced in submissions as any separate matter over and above that which appears in the ninth allegation below. We dismiss the claimant's claim.

Allegation 9 (originally 15) – "Both managers arranged to hold supervision with C on 25.11.16 although usually one manager holds it. Further, the managers ignored claimant's email query regarding the arrangement"

6.20. We have found as a fact that there was a supervision session on that date at which both managers were present. We have also found that the claimant queried the reason for two managers in general terms with Mrs Goodwin and, more specifically through her trade union representative with Mrs Lavelle. Surrounding those facts, is the context of Mrs Allen's inexperience as a manager and the sense of supporting the working relationship between her and the claimant. Mrs Allen had previously parked some of the issues that had arisen during the recent months that she felt may have been controversial matters and the need now to address them only added to the difficulty. We are satisfied that the reason why the approach was taken was as part of supporting the ongoing working relationship for both employees. We are not satisfied that the claimant has established that the reason why this occurred was because of her protected characteristic or because of doing a protected act.

6.21. In terms of the response to the claimant's queries, we are not satisfied that the claimant has established the managers ignored it. In respect of Mrs Lavelle, it is accepted that there was in fact a response on 27 November and we have found that that was sent at the first reasonable opportunity. Mrs Goodwin did not respond and could not recall why other than that the date of the email and the meeting were close in time. There is a failure to respond which may or may not have been inadvertent. We do not consider the surrounding evidence entitles any adverse inference to be drawn such as to conclude that the reason for Mrs Goodwin's failure to respond was deliberate and influenced by either the claimant's protected characteristic or doing the protected act. Consequently, this allegation is dismissed.

Allegation 10 (originally 16) – "the 25/11/16 supervision was held by Goodwin and Allen without the option for union representation, and without taking notes against normal practice"

6.22. We dismiss this allegation. In the first instance, we do not see that the claimant was subject to a detriment. A supervision meeting would not ordinarily involve trade union representation and there is no evidence of a request for representation, either by the claimant or the trade union, even though the trade union was involved in supporting the claimant at the time. Secondly, there are notes of that meeting. They appear in the bundle and have been relied on by both parties as reflecting the content of the meeting. In other contexts, the claimant has alleged them to be oppressively full notes during the examination of some witnesses. We conclude that the claimant has failed to establish this allegation in fact.

Allegation 11 (originally 17) – "During supervision managers bullied and intimidated the Claimant."

6.23. This allegation was originally set out in the original allegations 17-24. They were then reduced to a general allegation of bullying and intimidation during the supervision meeting, the original allegations being advanced as evidence of that allegation.

6.24. We dismiss this allegation. In making our findings we preferred the respondent's evidence of the meeting and how it unfolded. We accepted that the issues raised were legitimate topics for supervision that would have happened in any supervision of any other employee. The manner in which they were discussed was not bullying or intimidatory. Of the specific matters raised by the claimant, we found the presence of her personal file at the meeting was as explained by Mrs Goodwin in circumstances that we are satisfied would apply to any employee during supervision with her training was discussed and recorded. We are not convinced that such could realistically be treated as a detriment where its purpose was in part to hold copies of previous supervision notes. We see no detriment in the employer exploring any of the matters that were raised and, so far as it appeared the claimant was working at extreme times, her own wellbeing was itself a legitimate concern. Finally, we found the claimant to be simply wrong about the allegation of delay in taking and sending out notes of the meeting.

Allegation 12 (originally 25) – "Timeous request for her interview records for specific posts, promised to be made available, refused on ground records destroyed."

6.25. We found as a fact that there was a request for the records by no later than 10 December 2015 and to the extent that that was within the period of 6 months of the end of the interviews, it was timeous. In fact, the issue that should have put the employer on notice that obtaining the records might be beneficial was raised about two weeks before that. We rejected Ms Sohail's chronology so far as it related to the destruction date for the records as it was given at the appeal hearing on 10 November 2016. This related to the timing of when the grievance was "formally" raised and when she was appointed as the investigator. Everything she said in that report was factually correct, but missed the point. Overall, we have found a lack of certainty in the respondent's evidence as to where the records had been kept, when they were actually asked for and what actually happened to the records. That is characterised by a general state of affairs by the time Ms Sohail came to investigate the grievance that they were simply no longer available. By the time of the appeal, when the issue of the missing records was a specific issue, Ms Sohail put it more passively stating that any documentation "would have been" destroyed. The absence of the records is a detriment.

6.26. The tribunal is not agreed on the implications of these findings on this allegation. It is an allegation that infers the reason for the destruction was either the claimant's race or because the complaint was of racial bias. They are the material factors that need to be removed to construct an

appropriate hypothetical comparator, there being no actual comparator relied on.

6.27. The majority (Mrs Rawlinson and Mr Sher) conclude that an adverse inference can be drawn the nature of the complaint being the claimant's race, was a factor. Their conclusions are reached, in particular, by the vagueness of the respondent's evidence of what actually happened to their own records; the claimant's understanding that she had asked for them in December and the passive nature of the enquiry by Ms Sohail. It could be anticipated that the interview records would be the respondent's obvious defence to the claimant's concerns. That they were not secured suggests that there was, somewhere in the background, a desire not to have the records examined. The chronology relied on at the appeal to say, effectively, that it was too late by the time Ms Sohail came to investigate has the feel of being disingenuous. The majority have concluded that the findings and the adverse inference drawn establishes a prima facie case that the reason the records were not disclosed was impermissibly tainted by the protected characteristic sufficient to place the burden of showing otherwise on the respondent.

6.28. The majority then turn to reconsider the evidence from the perspective of the respondent's burden to prove there was no contravention. The respondent cannot say how or why the records were lost or destroyed or why there was no attempt to secure them when they should have been still available. Its evidence leads to one of two possibilities. Either the records were destroyed before the period of 6 months that they should have been retained for, which is not the respondent's position, or no request to secure them was made in time which begs the question why. Either way, the respondent cannot explain what happened to the records. There is some suggestion, within the possibilities of what happened to the records, that they may have been retained or handled in a way slightly out of the ordinary by Mrs Evans due to the reorganisation she was caught up in. Ultimately, that is speculation. The Tribunal has not heard from Mrs Evans and the majority conclude that the respondent has failed to show that the reason the records were destroyed when they were was not influenced by the claimant's protected characteristic. The majority conclude that the claimant was treated less favourably because of her protected characteristic.

6.29. The minority (EJ Clark) does not draw that adverse inference. The reason for not doing so is the same as set out at paragraph 6.9.g above. Consequently, in the minority judgment the claimant has not established a prima facie case under s.136(2).

6.30. We are, however, unanimous in rejecting the allegation so far as it is said to be because of the protected act. The claim is put on the basis that the protected act is the written grievance of the claimant in January 2016. The failures in respect of securing the records begin before that date. Consequently, the later protected act is not causative of a state of affairs that was already occurring.

Allegation 13 (originally 27) – "Following the Christmas dinner Ms Allen was seen laughing about the way she was treating the claimant with white MAT colleagues; the report further stressed the Claimant."

6.31. We have dismissed this allegation on the facts. The alleged treatment did not occur.

Allegation 14 (originally 28) – "On or about 9.12.16 Sam Bradwell in HR submitted a management referral containing inaccurate information about the Claimant, including that her managers were not at fault, that the claimant had failed to accept the grievance appeal outcome without good reason, and omitted the fact the grievance concerned discriminatory treatment."

6.32. This allegation relates to the referral to occupational health. It is not put on the basis of the mere fact of being referred to occupational health, but on the content of the information provided in that referral. Most of the factual assertions made in this allegation were rejected in our findings of fact. We do not accept it is right to describe the referral as inaccurate and the outcome of the grievance and appeal was in fact to reject her complaint. Although the claimant's position is that the employer was wrong to do so, for the purpose of informing an occupational health consultant about the background to a period of sickness absence, the fact of that difference of position is itself a potentially relevant factor for the occupational health consultant to know. Equally, we did not accept that the referral infers that the claimant has failed to accept the outcome without good reason. In this context, any further information that the claimant felt should have been included, such as the nature of the grievance dispute, is in our judgment minor in the context of an occupational health referral and, in any event, no occupational health report would be prepared without the claimant first having a consultation with the consultant and the opportunity to expand on the situation as she saw fit. We are not satisfied the allegation is made out in fact nor, in any event does the omission of the nature of the grievance properly amount to a detriment. It is a minor issue in the context of the referral and the overall referral process. If the content of the referral could be a detriment, we are satisfied that a hypothetical comparator in materially like circumstances would have been subject to the same narrative referral. We dismiss this allegation both as a claim of less favourable treatment and victimisation.

Allegation 15 (originally 29) – "Following the Claimant's request for support from Head of Service Chris Lavelle, while off sick 28.11.16-6.2.17, she was placed in stage 1 of the ill health capability procedure. By Contrast white MAT colleagues have on longer sick leave and not place in the ill heatlh capability procedure."

6.33. We found as a fact that the claimant's sickness record engaged the employer's attendance management policy. Indeed, the claimant agreed as much but sought to suggest white colleagues had been treated more favourably by delaying the stage 1 procedure. The subsequent disclosure from the respondent once the identity of those comparators was provided showed that difference in treatment not in fact to be the case. The claimant

has therefore failed to show she has been treated less favourably and we dismiss this allegation.

7. **Jurisdiction**

7.1. Of the 15 discrimination claims brought, 13 have failed. The majority have found that 2 succeed by the operation of s.136(2) and (3). They are allegations 2 and 12 (the non-selection of the claimant for the SPSF post and the circumstances of the destruction of the interview records). Those claims arise at earlier times in the chronology and the respondent relies on them having been brought substantially out of time so that the Employment Tribunal's statutory jurisdiction to determine them is not engaged and power to extend ought not be exercised.

7.2. The claimant maintains the claims remain in time as they form part of conduct extending over a period, the end of which is in time and, in any event, it is just and equitable to extend time. The state of affairs that enshrouds the claim and which is relied on as the conduct extending over a period of time is the continuation of the internal grievance procedures up to and including the appeal before elected members. That appeal did not conclude until 10 November 2016 when the appeal was heard and, arguably, 17 November when the decision was promulgated. Either way, the end date of the internal grievance procedure is in time for the purpose of s.123(2) and (3)(a) of the Equality Act 2010 due to both the time the claim was presented on 7 March 2017 and allowing for the effect of the extension of time for early conciliation.

7.3. Alternatively, the claimant argues that she has not sat on her complaint, but sought to advance her challenge promptly albeit internally, exhausting the respondent's internal grievance procedure. Only when that has failed has she turned to law. The evidence in the case has not changed and in all the circumstances, it is just and equitable to extend time.

7.4. By section 123(1) of the 2010 Act, claims must be brought within 3 months of the date of the act to which the complaint relates. So far as is relevant, section 123(3) further provides:-

> ***(3), For the purpose of this section-***
> ***a conduct extending over a period is to be treated as done at the end of the period;***
> ***b ...***

7.5. We direct ourselves on the concept of conduct extending over a period of time as follows. It requires there to be some discriminatory policy, regime, rule, practice or principle in operation and relevant to the conduct in question (**Barclays Bank plc v Kapur and others 1991 ICR 208 HL**). The notion of a policy, regime, rule, practice or principal is not to be taken too literally in a way that limits the concept. They are to be treated as examples of one or other state of affairs which exist over a period of time and which is connected and relevant to the discriminatory matters in issue. (**Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530**)

7.6. It is common ground that the grievance procedure ending on 10 November would be in time. However, we have not found the procedure or any part of it to be discriminatory. There has to be something discriminatory about the operation of that procedure for it to constitute a discriminatory act continuing over a period of time. Without the notion of the discriminatory element, any continuing state of affairs loosely linked to an earlier allegation of discrimination would be enough to keep out of time claims alive. For that reason, we are not able to conclude the claims are in time due to them forming part of an act extending over a period.

7.7. However, whether it is just and equitable to extend time engages difference considerations. It is for the claimant to show it is just and equitable and there is no presumption in favour of an extension. (*Robertson v Bexley community centre 2003 IRLR 434*). The relevant principles engaged in the power to extend time were summarised in *Miller v Ministry of Justice UKEAT/003/15* as:-

a The discretion to extend time is a wide one.

b Time limits are to be observed strictly in employment tribunal. There is no presumption that time will be extended unless it cannot be justified; quite the reverse. The exercise of that discretion is the exception rather than the rule.

c What factors are relevant to the exercise of discretion, and how they should be balanced, are for the employment tribunal. The prejudice which a respondent will suffer from facing a claim which would otherwise be time-barred is customarily relevant in such cases.

d The Employment Tribunal may find the checklist of factors in section 33 Limitation Act 1980 helpful. This is not a requirement, however, and any employment tribunal will only err in law if it omits something significant

7.8. Those s.33 factors import considerations of the prejudice to both parties, the length of the delay, the reason for the delay, the effect on the cogency of evidence, whether the respondent had cooperated with requests for information, and the promptness of the claim.

7.9. Considering all the factors, we are of the view that the respondent has not only known of the claimant's complaints throughout but has been actively engaged with the issues through the internal grievance procedure. In that sense, the claimant has not sat on her complaint only to raise it some time later. There is, on balance, broadly, as much before the tribunal now as there would have been had the claimant presented an ET1 soon after the recruitment decision or the destruction of the records. In respect of the latter point, we have considered whether the fact the respondent does not have the records should itself weigh against the exercise of discretion to extend time and we have concluded it should not for two reasons. Firstly, the nature of the explanation of what happened to the records is such that we cannot be satisfied on the balance of probabilities that they would have been preserved had a claim been presented in time. Secondly, there is an element to which the respondent's destruction of the records after the claimant sought to secure them is the respondent's own failure such that it should not be able to rely on it to deny the justice and equity of the claim proceeding. The relative injustice of allowing, or refusing, the claim to

proceed out of time weighs in favour of the claimant. The respondent is prejudiced only so far as it has lost the windfall benefit of a limitation defence. There is no substantial prejudice put before us to it defending the claim on its merits. We therefore come to the conclusion that the claimant has established that it is just and equitable to extend time to 7 March 2017 for the presentation of the claims.

7.10. Of the 13 allegations that have failed, we have dismissed them on their merits. All but allegation 1 (Dave Wallace's handling of the claimants 2011 complaint) would be caught by our conclusions on the just and equitable extension of time should there be any issue arising in future about jurisdiction to determine those matters. We would not, however, similarly extend time for allegation 1 for these reasons.

7.11. First, this allegation is extremely old and it had not been in anyway under continued consideration by the respondent as can be said for the complaint about the SPSF recruitment decision. It was not raised by the claimant again until her grievance was lodged some 5 years later. In fairness, the claimant does not advance any just and equitable extension to this particular claim but seeks to rely on the continued conspiratorial involvement and influence of Mr Wallace in her treatment throughout. We have rejected that contention and reject the contention that there was, therefore, a continuing act of discrimination by his behind the scenes involvement. In our judgment, Mr Wallace's occasional involvement in the chronology relevant to the claimant's case is not sufficient to establish a continuing discriminatory state of affairs. Consequently and, irrespective of our conclusion on the merits, we do not have jurisdiction and nor do we regard it just and equitable to extend time in these circumstances so as to engage jurisdiction.

8. Conclusions

8.1. In summary, the effect of our conclusions is that the claim succeeds in respect of the revised allegations 2 and 12. A remedy hearing will be convened unless the parties are able to agree remedy.

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Employment Judge Clark

Date 28 February 2018

REASONS SENT TO THE PARTIES ON

10 March 2018

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FOR THE TRIBUNAL OFFICE