



# EMPLOYMENT TRIBUNALS

**Claimant** Miss P Sullivan

**Respondent** Isle of Wight Council

**Heard at:** Exeter

**On:** 29 & 30 November 2021  
(remotely by video hearing)

**Before:**  
**Employment Judge** Goraj

## **Representation**

**The claimant:** in person

**The respondent:** Mr F Mc Combie, Counsel

## **RESERVED JUDGMENT**

### **THE JUDGMENT OF THE TRIBUNAL IS that: -**

1. The Tribunal does not have jurisdiction to entertain the claimant's complaints of protected public interest disclosure detriment pursuant to sections 47B, 48 and /or 49B of the Employment Rights Act 1996, which complaints are therefore dismissed.
2. The Tribunal has jurisdiction to entertain the claimant's complaint of victimisation pursuant to sections 27 and 39 of the Equality Act 2010 (in respect of Issue 7.3.2 – the refusal to allow the claimant to pursue an appeal under the respondent's complaints procedure).
3. The respondent's applications for the striking out of the claimant's claims and/or the award of a deposit order pursuant to Regulations 37

and /or 39 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 are dismissed.

4. The claimant's extant claims of direct sex discrimination/ victimisation pursuant to sections 13, 27 and 39 of the Equality Act 2010 (Issues 5.3.1, 5.3.2, 7.3.1 and 7.3.2) are listed for hearing as separately recorded.

## **REASONS**

### **Conduct of the hearing**

1. The hearing was conducted as a remote hearing (by CVP) to which the parties consented. It was held in this manner in the light of the claimant's asthma, and as it was, in all the circumstances, in the interests of justice/ in accordance with the overriding objective to do so.

### **Introduction**

2. By a claim form presented on 14 November 2020, the claimant, who was an unsuccessful job applicant for financial positions in the respondent, brought claims of sex discrimination and detriment for making protected public interest disclosures. The claimant stated in the attachment to her claim form that it was a claim for "discrimination, victimisation and whistleblowing" in relation to the respondent's refusal to allow the claimant a right to a grievance appeal (email from Ms C Shand of the respondent to the claimant dated 18 September 2020) due to:- (a) the claimant raising a grievance in respect of the involvement by a manager of the respondent in alleged accounting and taxation irregularities and /or (b) that the claimant had raised past legal proceedings under the Sex Discrimination Act 1975/ the Equality Act 2010 ("the 2010 Act"). The claimant's "grievance" related to alleged discriminatory/ detrimental conduct by the respondent in respect of the two interviews referred to in paragraph 3 below.
3. The claimant also referred in the attachment to her claim form to previous alleged discrimination and/or detrimental treatment in respect of two unsuccessful applications for posts with the respondent namely:  
- (a) the post of DPSS Account Officer – interview on 31 October 2019 and rejection on 4 November 2019 and (b) the post of Direct Payment Finance Officer – interview on 5 December 2019 and rejection on 10 December 2019).
4. The claimant further stated in the attachment to her claim form that she appreciated that there were time issues in respect of matters arising prior to 18 September 2020 and that she was therefore relying upon them for reference only. The claimant however, also referred in her claim form to the allegation relating to the refusal of her grievance appeal as part of a continuing course of conduct.

5. The claimant's ACAS Early Conciliation Certificate records that the claimant's EC notification was received by ACAS on 18 September 2020 and that the EC Certificate was issued on 18 October 2020.
6. The respondent disputed the allegations in its response form including on the grounds that the Tribunal did not have jurisdiction to entertain the claimant's claims in respect of the interviews in October and December 2019 because they were presented outside the statutory time limits and /or that the claimant did not have the necessary status (as a job applicant) to pursue a complaint of detriment for making protected public interest disclosures. Further/ in the alternative, the respondent contended that the claims should be struck out on the grounds that they were scandalous or vexatious or had no reasonable prospects of success.

#### **The case management hearing/order**

7. The matter was the subject of a case management hearing on 14 July 2021 and subsequent case management order dated 16 July 2021 ("the CMO") during/ in which the Tribunal sought to clarify the nature of the claimant's claims and gave further directions for the future conduct of the case. The CMO is at pages 74- 86 of the bundle. In brief summary the Tribunal :- (a) sought to clarify the issues as recorded in the CMO including in the provisional List of Issues (paragraphs 29 onwards of the CMO) (b) decided to list the matter for this Preliminary Hearing to determine the Preliminary Issues and other matters identified at paragraph 1 of the CMO (including in particular the issues of status and time limits as stated at paragraphs 1.1 – 1.4 of the CMO) and (c) gave directions for the further clarification of the claims / preparation for the Preliminary Hearing (paragraphs 9-12 of the CMO).
8. The claimant subsequently provided further clarification of her claims in her letters dated 3, 13 and 17 August 2021 (pages 87 - 95 of the bundle) including that she did not wish to pursue any application to amend her claim form to bring any complaint of disability discrimination and/or harassment related to sex.
9. It was however apparent from the above correspondence and from the helpful written submissions which were submitted by the parties for the purposes of this Preliminary Hearing, that there were still a number of issues which required further clarification as recorded below.

#### **Witnesses**

10. The Tribunal received a witness statement and heard oral evidence from the claimant. The Tribunal did not receive any evidence from the respondent.

## Documents

11. The Tribunal was provided with an agreed bundle of documents (which was divided into three sections (Section A – C) (“the bundle”). The Tribunal was also provided, as requested, with a copy of the respondent’s complaints policy.

## The issues

12. The Tribunal clarified with the parties the issues for determination at this Preliminary Hearing (by reference in particular to the pleadings, the CMO and the respective written submissions of the parties) as recorded below.

**Paragraph 1.1 of the CMO – namely, does the claimant have the necessary status as a job applicant to bring a complaint that she has been subjected to detriments on the grounds that she has made protected public interest disclosures.**

13. The claimant accepted that, as a job applicant (and not a worker), she was not, without the assistance of wider statutory interpretation (as referred to further below), entitled to pursue a claim for protected public interest disclosure detriment pursuant to sections 47 B(1)/ 48 of the Employment Rights Act 1996 (“the Act”).
14. The claimant further confirmed that she accepted that for the purposes of section 49B of the Act (which section affords protection to applicants for employment in the health service from detriment for making protected public interest disclosures), that the respondent is not included in the list of NHS Employers/ Public Bodies for the purposes of section 49 B (6)/ (7) (a) – (p) of the Act.

15. The claimant’s position in summary, is however that: -

- (1) The provisions of section 47 B (1) / 48 of the Act, should be extended / interpreted to include job applicants by reason of: - (a) the application of the EU Directive 2019/1937 and/or (b) Articles 10 and 14 of the European Convention of Human Rights and /or the Human Rights Act 1998 and/or the Enterprise and Regulatory Reform Act 2013/ the Judgment of the Supreme Court in Gilham v Ministry of Justice.
- (2) The respondent was (notwithstanding that it was not designated as such by section 49 B (7) (a) –(p) of the Act), in reality an NHS employer as it advertised for NHS staff. Further, the provisions of section 49 B (7) should in any event be extended / interpreted to include the respondent in the light of the wider provisions referred to in paragraph (1) above.

16. The respondent's position continues to be however that: -

- (1) The provisions of section 47 B (1) / 48 and /or 49 B of the Act are clear and unequivocal. They do not provide any protection to the claimant who was a job applicant (not a worker) for employment (in financial roles) with the respondent. Moreover, the respondent was/is not a designated NHS Employer/ NHS Public body for the purposes of section 49 B of the Act and the claimant cannot therefore rely upon such provisions.
- (2) Further, the relevant statutory provisions are not capable of being extended/ interpreted pursuant to any EU Directive (insofar as it is in any event of any relevance/ ongoing application) and/or Human Rights provisions and/or any other authorities such as to bring the claimant within such protections.

17. The Tribunal clarified with the parties their respective positions with regard to any protected public interest disclosures (in the event that the Tribunal held that the claimant had the necessary status to pursue such a claim).

18. The Tribunal clarified with the claimant her position in the light, in particular, of paragraphs 10 – 12 of her written submissions. After further discussion during the Preliminary hearing (including an explanation from the Tribunal that any disclosure would for the purposes of causation have to predate any alleged detrimental (bad) treatment, the claimant clarified her position with regard to her protected public interest disclosure claim as follows: -

- (1) The claimant confirmed (having acknowledged that any remaining alleged disclosures identified at paragraph 10 of her written closing submissions were made after the alleged detrimental treatment relied upon ( i.e. the refusal of Ms Shand on 18 September 2020 to permit the claimant to pursue an appeal against the rejection of her complaint regarding the conduct of the interviews in November and December 2019 pursuant to the respondent's complaint's policy) that the only alleged disclosure upon which she relied was contained in the letter to Mr Justin Tomlinson MP dated 17 March 2020 (section C – pages 19 and 22-23 of the bundle). The claimant also contends however, that this disclosure was copied to the respondent- the Chief Executive of the respondent- Mr J Metcalfe and/or Ms Shand on 17 March 2020 (section C – page 19 of the bundle). The claimant therefore relies on sections 43 C and /or 43 F of the Act in respect of such alleged disclosure.
- (2) Whilst the main focus of the claimant's letter to the MP dated 17 March 2020 (C19 of the bundle) related to the alleged conduct of

the respondent during the interviews (including that the claimant had allegedly been described during the interview(s) as “mentally insane”), the letter also referred to alleged financial irregularities. The claimant’s alleged disclosure relates to the alleged activities of a manager in the respondent, Mr M Porter, (who was also a member of the interview panels) regarding the operation of a charitable trust and the alleged failure to submit to companies house truthful accounts of trading revenue received.

- (3) The claimant confirmed that it is her case that the references to such matters in the letter dated 17 March 2020 constituted a qualifying disclosure for the purposes of Section 43 (B) (1) (a) and/or (b) of the Act. In summary, the claimant says that she made a disclosure which in her reasonable belief was in the public interest and tended to show that a manager of the respondent ( Mr Porter) had committed a criminal offence (fraud) and /or had breached his legal obligations relating to the financial operation of a charitable trust (the Shanklin Chine Trust) in respect of alleged financial irregularities / the failure to submit truthful accounts of trading revenues to companies House.
- (4) The claimant identified three detriments upon which she relied at paragraph 11 of her written submissions (the rejection on 4 November 2019 and 10 December 2019 of applications for employment and the refusal on 18 September 2020 of a right of appeal against the rejection of her subsequent complaint regarding the conduct of the interviews for such positions).
- (5) Following the clarification of the claimant’s alleged protected public interest disclosure (and the explanation by the Tribunal that the disclosure had to predate the alleged detrimental treatment) the claimant confirmed that the only alleged detriment upon which she relied was accordingly, the refusal by Ms Shand on 18 September 2020 to allow the claimant a right of appeal against the rejection of her complaint pursuant to the respondent’s complaints procedure.

19. The respondent accepted for the purposes of this Preliminary Hearing only that (if the Tribunal had jurisdiction to consider the claimant’s claims) it was possible that the above could constitute protected interest disclosures / detriments but did not make any concessions pending further consideration of the position.

**Paragraph 1.2 of the CMO-namely in respect of the claimant’s complaint of sex discrimination (victimisation pursuant to section 27 of the Equality Act 2010 (“the 2010 Act”) relating to the respondent’s refusal to allow the claimant to pursue an appeal against the outcome of a complaint under the respondent’s complaints procedure, whether the claimant was an applicant for the purposes of section 39 of the 2010 Act.**

20. This issue is in dispute between the parties. The claimant contended that she was “an applicant” in respect of this allegation for the purposes of section 39 of the 2010 Act as the outcome of her complaint pursuant to the respondent’s complaints procedure was part of the arrangements which the respondent made for deciding to whom to offer employment. This is disputed by the respondent who says that it does not form part of such arrangements and the claimant does not therefore fall within the provisions of section 39 of the 2010 Act.
21. The Tribunal clarified with the parties their respective positions with regard to any protected acts in case the Tribunal decided that the claimant was “an applicant” for the purposes of section 39 of the 2010 Act.
22. The claimant confirmed that for the purposes of her complaint of victimisation the Issues identified at paragraphs 7 of the CMO (page 85-89 of the bundle) :- (a) the protected acts are the alleged references at the interview on 31 October 2019 to previous Tribunal claims for sex discrimination (alleged proceedings against the Post Office Limited in or around 2010/ Solent Composite Systems in or around 2019 identified in paragraph 15 of the claimant’s written submissions) / the claimant being perceived as being likely to bring a Tribunal claim (paragraph 7.6 of the CMO and paragraph 15 of the claimant’s written submissions) (b) she further contends that the alleged protected acts are referred to in the documents ( sections A and C of the bundle) the page numbers for which are identified at paragraph 14 of the claimant’s written submissions) (c) the claimant however confirmed during this Preliminary hearing that it is not her case that she made any reference to any proceedings against the Post Office/ Solent during the interviews and/or that there was anything further said by her regarding such matters which is not recorded in her subsequent reports of the interviews (d) the claimant further confirmed that it is her case that it was Ms Martin who made a comment about the Post Office and (e) the alleged detriments are as identified at paragraphs 7.3.1 and 7.3.2 of the CMO (page 86 of the bundle) as confirmed at paragraph 16 of the claimant’s written submissions and referred to below (f) that the alleged discriminators in respect of the rejection of the claimant for the post of DPSS Account officer (4 November 2019, paragraph 7.31 of the CMO and pages 3-4 of Section C of the bundle) are Esther Martin, Matthew Porter and Daniel Philbrick (g) the alleged discriminators in respect of the rejection of the claimant for the post of Direct Payment Officer) (10 December 2019, paragraph 7.3.2 of the CMO and page 9 of Section C of the bundle) are Esther Martin, Matthew Porter and Mr Higginson and (h) the alleged discriminator in respect of the refusal to allow the claimant to pursue a grievance appeal under the respondent’s complaints procedure (18 September 2020, paragraph 7.3.2 of the CMO and pages 32- 34 of Section C of the bundle) is Ms C Shand.

23. The respondent did not make any formal concessions as to whether the claimant had done any protected acts. The respondent also contended that it had had difficulty discerning any references to any protected acts in the claimant's reports of the interviews on 31 October 2019 and 5 December 2019. The respondent however accepted, for the purposes of this Preliminary hearing only, that :- (a) the document at C10 of the bundle (the crime report to the police dated 7 January 2020) (b) the document at C19 of the bundle (the letter to the MP dated 17 March 2020 ) (c) the documents at C26 – 28 of the bundle ( the emails from the claimant to Ms Shand dated 13 and 14 July 2020 enclosing the claimant's initial and more detailed reports of the interviews on 31 October 2019 and 5 December 2019) ( the reports are at pages 2-22 of Section B of the bundle) may possibly constitute protected acts for the purposes of the 2010 Act and (d) that the claimant was also, in any event, contending for the purposes of her complaint of victimisation that she was subjected to the alleged detrimental treatment because the respondent believed that the claimant might do a protected act.

**Whether, in the event that the claimant has the necessary status to pursue her claims (or any of them) any such permitted claims were, in any event, presented within the relevant statutory time limit and if not whether time should be extended on the basis set out in paragraph 1.3 of the CMO.**

24. In the light of the clarification of the issues above, the respondent accepted that:- (a) if the claimant is able to satisfy the Tribunal that it has jurisdiction to entertain her complaint of protected public interest detriment that claim ( as now clarified) would be in time and (b) if the claimant is able to satisfy the Tribunal that it has jurisdiction to entertain the claimant's complaint of victimisation in respect of Ms C Shand's refusal on 18 September 2020 to allow the claimant to pursue an appeal against the outcome of her grievance under the respondent's complaints policy, this would also be in time. The respondent continued to maintain however that the earlier allegations relating to the interviews/ outcome of the interviews in October-December 2019 (Issues 5.3.1, 5.3.2 and 7.3.1 are out of time ( including that that they do not form part of a course of conduct / that it would not be just and equitable to extend time to allow them to proceed).

25. There was a lack of certainty on the part of the claimant as to whether she wished to proceed with the allegations of direct sex discrimination relating to the alleged comments of the respondent at the interviews on 31 October 2019 and 5 December 2019 (paragraphs 5.3.1 and 5.3.2 of the CMO) as discrete allegations of alleged direct sex discrimination (including as part of a continuing course of conduct) or as matters of background only. In the light of the fact that the claimant was unable to give an unequivocal answer on this point the Tribunal indicated that it would proceed on the basis that claimant was still



pursuing such claims of direct sex discrimination as discrete allegations of sex discrimination and further as part of continuing course of conduct culminating in the refusal of Ms Shand on 18 September 2020 to allow the claimant to pursue an appeal against the outcome of her grievance under the respondent's complaints procedure.

**Whether the claimant should be permitted to amend her claim form to add a complaint of disability discrimination (perceived disability of mental insanity) in respect of the alleged comments at the interview on 31 October 2019 identified in paragraph 1.4 of the Order and/or the claimant's subsequent rejection for the post.**

26. The claimant confirmed at the hearing that she did not wish to pursue any application to amend her claim form to add any complaint of disability discrimination.
27. The claimant further confirmed, for the avoidance of doubt, that she did not wish to pursue any complaint of harassment in respect of the allegations of sex discrimination.
28. The issues with regard to Issue 1.5 (the applications for strike out / deposit orders) are discussed further below.

## **THE FACTS**

29. The Tribunal has found the following facts, on the balance of probabilities, for the purposes of the determination of the Preliminary Issues identified above.

### **The position of DPSS Account Officer**

30. On 31 October 2019, the claimant attended an interview with the respondent for the position of DPSS Account Officer. The interview was conducted by Ms Martin, Mr Porter and Mr Philbrick.
31. On 4 November 2019 the respondent emailed the claimant advising her that she had been unsuccessful at interview. The respondent complimented the claimant on her academic achievements and gave advice for future interviews. This email is at pages 3-4 of Section C of the bundle. The claimant replied the same day thanking the respondent for the email. The claimant stated that it had been nice to meet everyone and informed the respondent of her intention to look for employment with other companies (page 3 of Section C of the bundle).

### **The position of Direct Payment Finance Officer**

32. On 5 December 2019 the claimant attended an interview with the respondent for the post of Direct Payment Finance Officer. The interview was conducted by Ms Martin, Mr Porter and Mr Higginson.
33. On 7 December 2019 the claimant emailed the respondent with information regarding previous employment and associated matters (page 8 of Section C of the bundle).
34. On 10 December 2019 the respondent advised the claimant that she had been unsuccessful at interview. The respondent further stated that although the claimant had not been successful, she had done well at her interview and thanked her for attending (page 9 of Section C of the bundle). The claimant replied thanking the respondent for the email. The claimant advised the respondent that she had received news of her exams that day and that she had now completed her postgraduate Diploma in Environment Management (the email dated 10 December 2019 at page 9 of Section C of the bundle).

### **The crime report**

35. On 7 January 2020, the claimant filed an online crime report with the Hampshire Police concerning an alleged verbal assault during an interview (this email is at page 10 Section C of the bundle) which she stated she had not reported at the time. The claimant also stated that she had not raised a complaint with the respondent but intended to email their Safeguarding Team relating to the alleged statements made by the respondent during the interview that the claimant was mentally insane. The claimant also made reference to the Shanklin Chine which she stated was dormant but had been taking revenues for many years.
36. The claimant also filed a report on the respondent's confidential safeguarding helpline (page 11 Section C of the bundle) in which she alleged that it had been repeatedly stated during the interviews on 31 October 2019 and 5 December 2019, that the claimant was apparently "mentally insane" and requested confirmation of whether anyone had raised any safeguarding reports concerning such false statements.
37. The above prompted further exchanges of correspondence (including a freedom of information request) between the parties which are not relevant to the issues to be determined at this preliminary hearing.

### **Email dated 12 February 2020 and associated correspondence**

38. On 12 February 2020 the claimant emailed the Chief Executive of the respondent, Mr J Metcalfe, in which she stated that she was attaching

a copy of the report which she had sent to the Hampshire police together with other documents relating to the Shanklin Chine Trust. This email is at page 12 Section C of the bundle. The claimant advised the Chief Executive that she would allow 28 days for the review of her Police complaint and any internal steps by the respondent after which she would progress her complaint to the Local Government and Social Care Ombudsman.

39. The respondent's Chief Executive, Mr Metcalfe, acknowledged receipt of the claimant's email which he stated he understood to be a complaint about the way in which the interviews were conducted. The Chief Executive advised the claimant that he would ask the respondent's Director of Corporate Resources (Ms Shand) to have her complaint investigated and a reply sent to her (page 13 of Section C of the bundle). The Chief Executive further stated that the respondent had no connection with the Shanklin Chine and was therefore unable to comment any further on the allegations which she had made regarding its operation.
40. Ms Shand wrote to the claimant on 19 February 2020 advising the claimant that as the matter related to employees of the respondent, and in accordance with section 8 of the respondent's complaints policy, it would investigate the matter in accordance with its employee code of conduct utilising the respondent's disciplinary policy and employee conduct procedure. Ms Shand subsequently wrote to the claimant on 2 April 2020 apologising for the delay in concluding the investigation which she attributed to the impact of the covid 19 pandemic on the respondent's resources.

#### **The email dated 17 March 2020**

41. The claimant emailed Mr Metcalfe and Ms Shand on 17 March 2020 advising them that she had contacted the CQC and Justin Tomlinson MP and attached copies of her letters. The claimant also stated in her letter that she had attempted to contact the Local Government and Social Care Ombudsman but had been advised that she required a final response from the respondent before being able to progress the complaint (page 17 of Section C of the bundle). The accompanying letters dated 17 March 2020 are at pages 18-19 of Section C of the bundle).
42. The letter to the MP (page 19 of Section C of the bundle) is the document which is relied upon by the claimant as her protected public interest disclosure (paragraph 18 above). In brief, the letter complains about the following matters :- (a) the comments allegedly made by the respondent at the interview/ interviews that the claimant was "apparently 'mentally insane'" together with the claimant's consequential concerns regarding the stigmatisation and treatment of disabled people by the respondent during the recruitment process and

(b) the alleged financial irregularities in the operation of the Shanklin Chine Trust and the alleged involvement of one of the respondent's managers, Mr Porter. The letter makes no reference however, to the alleged discriminatory comments upon which the claimant relies for the purposes of her complaint of direct sex discrimination (paragraphs 5.3.1 and 5.3.2 of the CMO). The claimant stated that she had sent details of her complaint to the Police and to the respondent.

43. Ms Shand advised the claimant in July 2020 that it would then be possible to recommence the investigation.

**The claimant's reports of the interviews of 31 October 2020 and 5 November 2020**

44. On 13 July 2020 the claimant emailed Ms Shand and Mr Metcalfe attaching what she described as the full reports of the interviews on 31 October 2020 and 5 December 2020 (created on 12 July 2020) This email is at page 26 Section C of the bundle.

45. The claimant's report of the interview on 31 October 2019 is at page 2 Section B of the bundle. The claimant has recorded in the report multiple alleged inappropriate / discriminatory comments by members of the interview panel including that it was stated at the interview that she was mentally insane and that she had ugly lumps on her face. The claimant also recorded that Miss Martin had referred during the interview to an Employment Tribunal case from 2009 against the Post Office regarding allegations of a physical assault on the claimant. The claimant also submitted at that time a document recording alleged financial irregularities relating to the operation of the Shanklin Chine Trust of which it was alleged that Mr Porter was a trustee. This document is at page 4 Section B of the bundle.

46. Ms Shand acknowledged receipt of the reports submitted by the claimant and advised her that they would be passed to the investigating officer. The claimant was advised that as the complaint related to employees of the respondent it would not be possible to inform the claimant of the detailed progress of the investigation or the outcome of any disciplinary action.

**The further/ amended reports submitted on 14 July 2020.**

47. On 14 July 2020 the claimant emailed to Ms Shand her amended reports of the interviews on 31 October 2019 and 5 December 2019. (Page 28 of Section C of the bundle) The claimant stated that she believed that the amended reports were a full account of the interviews.

48. The claimant's further accounts of the interview on 31 October 2019 are at pages 5- 14 of Section B of the bundle. The notes record multiple

allegations of alleged inappropriate / discriminatory comments /conduct by the members of the interview panel. The recorded comments/ conduct include: - (a) alleged observations and comments regarding the claimant's bottom and (b) an alleged reference to "the Post Office" by Ms. Martin which the claimant stated in the document she understood to be a reference by Ms Martin to a previous Tribunal claim involving an alleged physical assault with "sexual tones".

49. The claimant's detailed accounts of the Interview on 5 December 2019 are at pages 15 – 22 of Section B of the bundle. The notes again record details of alleged inappropriate/ discriminatory comments/ conduct by members of the interview panel. The record includes an allegation that during the course of the interview Mr Higginson banged his hand on the table and said to the claimant that she should "get some contraception" which the claimant speculated in the notes might have been said by him because she had a blemish on her nose.

50. An investigation into the claimant's complaint was undertaken by a Strategic Manager in the Business Centre, to which the claimant was invited to contribute.

#### **The respondent's outcome email dated 18 September 2020**

51. Ms Shand emailed the claimant on 18 September 2020 advising the claimant of the outcome of the investigation into her complaints. This email is at pages 32- 34 of Section C of the bundle. In summary, the Ms Shand advised the claimant :- (a) that the respondent had concluded its investigation, in accordance with stage one of the respondents' complaints procedure, into the complaint which the claimant had raised with the chief executive concerning the conduct and behaviour of four of its employees (b) summarised the process undertaken including that additional information had been sought from the police regarding the crime reports submitted by the claimant (c) that as advised previously, she was unable to share with her the detailed investigation report as it related to the conduct of employees and was therefore investigated pursuant to the respondent's internal disciplinary procedure (d) assured the claimant that the allegations had been treated very seriously and a thorough investigation undertaken ( e) the investigation had however concluded that there was no evidence of any wrongdoing by the members of staff and that her complaint was therefore not upheld (f) if she was dissatisfied with the decision the claimant would normally have the right to refer the matter to a stage 2 review which would be carried out by another senior officer. However, having given the situation very careful consideration Miss Shand had concluded that this would not be an appropriate course of action in the circumstances of the case as a thorough investigation had been undertaken and the process had had a significant impact on the staff involved (g) in the circumstances she considered it necessary to take measures to protect the respondent's employees from any further distress being caused by any further

pursuit of the allegations (h) further, as she considered that there was nothing further to be attained by a stage 2 review she was “disapplying that option” in the exceptional circumstances of the case. Accordingly, the claimant had no further option to pursue the complaint pursuant to the respondent’s complaints procedure (i) that the respondent did and would continue to treat any complaint against an employee very seriously however unjustified complaints about the same matter would not be investigated further unless they were properly evidenced and substantiated by new information(j) she hoped that the claimant would be assured that the allegations had been taken seriously but also appreciate the importance of the need to protect the well-being of staff. Ms Shand concluded her letter by confirming the claimant’s right to complain directly to the Local Government and Social Care Ombudsman (“the Ombudsman”) and provided the contact details.

### **The claimant’s complaint to the Local Government and Social Care Ombudsman**

52. The claimant submitted a complaint to the Ombudsman on 19 February 2021. The claimant’s completed claim form is at pages 38 b – 38 c of Section C of the bundle. In brief summary, the claimant complained about the respondent’s refusal to allow her a right of appeal against its complaint response dated 18 September 2020. The claimant stated that she felt that the refusal of the appeal was both discriminatory and due to her raising whistle blowing concerns relating to the Shanklin Chine Trust. The claimant further stated that she had progressed the matter to the Employment Tribunals, the Solicitors Regulation Authority and to the independent office of Police Complaints.
53. The Ombudsman declined to investigate the claimant’s complaint on the grounds that it related to a grievance by the claimant relating to two job interviews with the respondent and that it was not allowed as a matter of law to investigate employment related complaints. The Ombudsman’s draft decision dated 22 March 2021 is at pages 41-42 of Section C of the bundle.
54. The claimant subsequently raised concerns relating to the matters raised in the Tribunal proceedings with other public bodies including a complaint to the Solicitors Regulation Authority concerning the alleged conduct of the respondent’s solicitor concerning the contents of the respondent’s response in the Tribunal proceedings, which complaint was rejected (the email dated 22 April 2021 at pages 43 - 44 of Section C the bundle).

### **The respondent’s complaints procedure**

55. The Tribunal has had regard to the provisions of the respondent’s Complaints Policy including in particular :- paragraphs 2, (the definition of a complaint) 3 (aims and objectives) 4 (who can complain)

– including that anyone can make a complaint if they believe that the respondent had done something wrong or done/ failed to do anything that they should or should not have done 5 (the respondent's undertaking to complainant's - including that they would not suffer any penalty or discrimination as a result of making a complaint, 7 (unreasonable complainant behaviours) – including that that respondent has a separate policy for dealing with unacceptable behaviours, 8 ( the procedure for dealing with complaint against members of staff) – including that complaints against members of staff are normally dealt with under the respondent's code of conduct for staff or through the internal disciplinary policy and procedure and further that it would not normally be possible to advise a complainant of the specific outcome of any disciplinary action taken, 9 & 10 (the procedures at stage 1 and stage 2 )- including that at stage 2 a Head of Service / Strategic Manager would consider the complaint and response at stage 1 and respond to the claimant – there is no stated right to refuse a request for a stage 2 review save that at paragraph 4 the policy states that the respondent would not always use the stage 2 procedure as some types of complaints had their own procedures. The alternative appeal procedures listed in the Policy are not however applicable in this case.

56. The claimant contended that she had brought previous Tribunal proceedings (including against the Post Office) and accepted that she had knowledge and experience of Tribunal procedures including relevant time limits for bringing a claim. The Tribunal was not provided with any documents relating to any previous proceedings but accepted for the purposes of this hearing, the claimant's evidence regarding such matters. The claimant was unable to provide any explanation for any delay in bringing these proceedings which she described as "stupidity on my part".

57. The claimant informed that Tribunal that she was a part qualified accountant (AAT). The Tribunal accepted the claimant's evidence for the purposes of this hearing.

58. The claimant confirmed for the purposes of any deposit order that: -  
(a) she was not currently working and was in receipt of state benefits and (b) that she had savings of approximately £11,500. The Tribunal accepted the claimant's evidence regarding such matters.

## **SUBMISSIONS**

59. The Tribunal has given careful consideration to the written and oral submissions of the parties which are briefly summarised in the relevant sections below.

## THE LAW

60. The Tribunal has had regard in particular to the legal provisions and authorities which are referred to in the relevant sections below.

## THE CONCLUSIONS OF THE TRIBUNAL IN RESPECT OF ISSUE 1.1

**61. Issue 1.1 (a) – whether the claimant was a worker/ had the necessary status to pursue her protected public interest detriment claims pursuant to sections 47 B(1) and Section 48 (1) of the Act.**

### The relevant law

62. The Tribunal has had regard in particular to the following statutory provisions and legal authorities: -

Sections 43 A, 43B, 43K, 47B, 48 and 230 (3) of the Act.  
**Elstone and anor 2010 ICR 879 EAT**

### Submissions

63. It is common ground between the parties that the claimant:- (a) was a job applicant (b) was therefore not a worker for the purposes of Section 230 (3) of the Act as extended by section 43 K of the Act and that (c) is therefore not entitled to pursue her protected public interest detriment claims pursuant to section 47 B / 48 (1) of the Act as they currently stand. The claimant however contends that she is entitled to rely on section 49 B of the Act (protection for applicants for employment in the health service)– considered separately below.

### The conclusions of the Tribunal

64. Section 43 A of the Act defines a protected disclosure as a qualifying disclosure which is made by a worker in accordance with any of sections 43 C – H of the Act. The claimant, as a job applicant, was not however, a worker pursuant to section 230 (3) as extended by section 43K of the Act. Section 230 (1)/ (3) of the Act defines an employee/ worker as an individual who has entered into or works or had worked under a contract of employment or other contract as defined in that section. Section 43K similarly applies to individuals who work or have worked for a person in the circumstances defined in that section. Further the Tribunal is reinforced in its view by the EAT Judgment in **Elstone** in which it was held that, having regard to the wording of sections 43A and 43B of the Act, whilst the protected disclosure may have been made to a previous employer, the detriment from which the complainant was protected was one which related to /affected his **current employment** (emphasis added). The Tribunal is accordingly satisfied that the Tribunal does not have jurisdiction to entertain the



claimant's detriment claims pursuant to sections 47 B/ section 48 (1) of the Act.

**Issue 1.1 a – whether the claimant can rely on section 49 B of the Act.**

65. The Tribunal has therefore gone on to consider whether, as contended by the claimant, she can however, pursue her claims of protected public interest detriment pursuant to section 49 B of the Act on the grounds that the respondent was at the time of her application an NHS employer for such purposes.

**Submissions**

66. The claimant accepts that the respondent, as a local authority, is not included in the list of NHS Employers/ as a NHS body for the purposes of section 49 B (6)/ (7) of the Act. The claimant contends however that the Government has expressly defined local authorities as an NHS employer through their inclusion on the NHS.org 'NHS employer's list (page 59 of Section B of the bundle) and/or that this was an omission and that the intention of the Government was to include all such employers.

67. The respondent contends that the claimant cannot rely upon section 49 B of the Act as by virtue of section 49B (6) of the Act an NHS employer means an NHS public body as defined in 49 B (7)(a) – (p) of the Act which does not include a local authority such as the respondent.

**The conclusions of the Tribunal**

68. The Tribunal is satisfied that :- (a) the respondent does not fall within the definition of NHS Employer/ NHS Body as defined in sections 49 B(6)/ (7)(a)- (p) of the Act (b) that any inclusion of the respondent in the document referred to at paragraph 66 above, does not in any way affect the statutory definition of an NHS Employer/ Body as listed at paragraphs 49 B (6)/ (7) (a) – (p) of the Act (c) there is no evidence before the Tribunal to suggest that the non – inclusion of local authorities in the statutory definition was an omission or that the Government had intended to include them as alleged by the claimant and (d) the claimant cannot therefore rely on section 49 B to advance her claims of protected public interest detriment.

**Issue 1.1 (b) whether the claimant is in any event able to establish worker / the necessary status by virtue of the application (in respect of claims pursuant to section 47B and /or section 49 B) of the EU Directive 2019/1937.**

### **The relevant Law**

69. The Tribunal has had regard to the provisions of EU Directive 2019/1937 (dated 23 October 2019) (“the Directive”) (and in particular paragraphs 38 and 39 of the Preamble and Article 4 of the Directive.

### **Submissions**

70. In summary, the claimant seeks to rely on the provisions of the Directive and in particular paragraph 39 of the Preamble which recognises that persons who are not workers may find themselves in a position of economic vulnerability in the context of their work-related activities and that protection should therefore be granted to persons such as job applicants.

71. In summary, the respondent contends as follows:- (a) the source of the whistleblowing legislation is the Public Interest Disclosure Act 1998 rather than European Law (b) the claimant has not set out any basis upon which she says the Directive can have direct effect or assist the interpretation of the domestic law ( before or after the UK’s withdrawal from the EU on 31 December 2020) as there is no such basis in law (c) the claimant does not , in any event, fall within the scope of Article 4 of the Directive as paragraph 3 of Article 4 only provides protection to job applicants where information “on breaches” has been acquired during the recruitment process.

### **The conclusions of the Tribunal**

72. Having given the matter careful consideration, the Tribunal is not satisfied, regardless of any potential effect of the Directive on domestic legislation, that the claimant, in any event falls within the scope of the Directive.

73. When reaching this conclusion the Tribunal has taken into account in particular that :- (a) there is no suggestion in this case that the information on the “alleged breaches”, which relate to Mr Porter’s alleged activities in respect of the Shanklin Chine Trust ( as referred to in the claimant’s alleged protected public interest disclosure contained in her letter to her MP dated 17 March 2020 referred to above ) was acquired by the claimant during the recruitment process. On the contrary, the “information” regarding the “alleged breaches” was already in her possession prior to / did not arise from the relevant recruitment process and (b) the protection provided by paragraph 3 of Article 4 of the Directive is limited to cases “where information on breaches” has been acquired during the recruitment process.

74. Further, the Tribunal is not satisfied, on the facts of this case, that even if the claimant was able to bring herself within the scope of the Directive, she has established any grounds/ the basis upon which the Tribunal is required/ should apply the Directive. The “whistleblowing

“provisions in Part IVA of the Act were inserted by the Public Interest Disclosure Act 1998. These provisions are not derived from European law and accordingly (and regardless of any effect of the withdrawal Act) the definition of worker does/ did not have to be read so as to conform to the requirements of EU law.

**Issue 1 1.1 (b) whether the claimant is, in any event, able to establish worker/ the necessary status by virtue of the application (for the purposes of section 47B / 48 (1) and/or 49 B of the Act) of the European Convention on Human Rights and/or the Human Rights Act 1998 (“the 1998 Act”) and /or the Enterprise and Regulatory Reform Act 2013.**

### **The relevant Law**

75. The Tribunal has had regard to the legal provisions referred to above (including in particular Articles 10 (freedom of expression) and 14 (prohibition of discrimination) of the Convention Rights contained in the Schedule 1 to the 1998 Act together with the Judgment of the Supreme Court in **Gilham v Ministry of Justice [2019] UKSC 44**.

### **Submissions**

76. In summary, the claimant contends that :- (a) the Tribunal is required, pursuant to section 3 of the 1998 Act, to read and give effect to primary and subordinate legislation in a way which is compatible with the Convention rights and (b) the failure (in respect of both section 47 B and/or section 49 B of the Act) to extend the “whistleblowing” detriment protections to job applicants such as the claimant is a violation of the claimant’s rights under Articles 10 and 14 of the claimant’s Convention rights.

77. The claimant further contends that the Tribunal is required to consider the four questions identified in **Gilham** as follows :- (i) do the facts fall within the ambit of one of the Convention rights – the claimant contends that they fall within the ambit of the right to freedom of expression protected by Article 10 (ii) Has the claimant been treated less favourably than others in an analogous situation - the claimant contends that job applicants have been denied protection in comparison to others who make responsible public interest disclosures within the requirements of the Act (iii) is the reason for that less favourable treatment one of the listed grounds (in Article 14) or other status – the claimant contends that a job applicant is an occupational classification which is clearly capable of being a status within the meaning of Article 14 and (iv) – is that difference without reasonable justification – the claimant contends that there is no justifiable reason for failing to afford protection to job applicants (including as for the purposes of section 49 B local authorities also recruit/ employ staff who care for vulnerable people)

and such exclusion must therefore be a breach of Articles 10 and 14 of her Convention rights.

78. In summary, the respondent's primary position is that there is no scope for extending whistleblowing protection to applicants, as opposed to office holders, by using human rights law. Further, Parliament has already considered the position of applicants and has chosen not to extend the NHS employer protection to other applicants for employment. In respect of **Gilham** the respondent contends in particular as follows :- (a) "job applicants" do not have "other status" for the purposes of Article 14, if it was extended in that way it would apply to anyone who applies for a job whereas officer holders (as in **Gilham**) do have such status and (b) Parliament has already considered "job applicants" as a category for whistleblowing protection but has chosen to limit the protection to those working in the NHS by way of section 49 B of the Act. There is reasonable justification for the decision to limit the extension of the protection to the NHS field as the NHS is a large employer with responsibility for patient safety and staff regularly move between NHS trusts (c) further a distinction should be drawn between this case and the situation in **Gilham** as for the purposes of remedy judicial officer holders such as **Gilham** readily fit within the worker relationship whereas job applicants do not have any such relationship and (d) as far as the claimant's contentions regarding section 49 (B) of the Act are concerned there is no justification for extending the section as contended by the claimant – the section carefully identifies which bodies are deemed to be NHS employers which definition is too tightly defined for any extension on Human rights grounds and (e) the respondent also relies, for the purposes of interpretation, on paragraph 16 of the EAT in **Elstone**, which stresses the importance of the relationship between the worker and the "employer" which is absent in this case.

### The conclusions of the Tribunal

79. Having given careful consideration to all of the above, including that the Tribunal is required pursuant to section 3 of the 1998 Act to read and give effect to legislation in a way which is compatible with Convention Rights, the Tribunal has reached the conclusions set out below.

80. The Tribunal has for such purposes given careful consideration to the four questions identified at paragraph 28 of **Gilham** as follows:-

- (i) – Do the facts fall within the ambit of one of the Convention rights – having for such purposes taken the claimant's case at its highest, the Tribunal is satisfied that the facts may potentially fall within Articles 10 (freedom of expression) and Article 14 (prohibition of discrimination – in respect of "other status") namely, that the claimant was allegedly subjected to a detriment

(the refusal of a right of appeal under the respondent's Complaints Policy) because she made an alleged protected public interest disclosure to her MP/ the respondent on 17 March 2020 concerning the alleged conduct of Mr Porter in respect of the financial operation of the Shanklin Chine Trust as referred to above.

- (ii) Has the claimant been treated less favourably than others in an analogous situation – the claimant compares herself with others who are afforded protection under the Act namely employees / workers generally and also job applicants applying to join an NHS employer/ NHS body (as defined in section 49 B of the Act). Having given the matter careful consideration the Tribunal is not satisfied on the facts of this case that the claimant has established that she was in an analogous situation to the above for the following reasons:- (a) the Tribunal is not satisfied that a job applicant is in an analogous situation to an employee or worker of an organisation who has, by way of contrast as a minimum, entered to a contract of employment or other contract/ office and has become a member of the workforce with associated rights and responsibilities. The position in this case is very different to that in **Gilham**. In **Gilham**, although the claimant was not a worker or employee, she was an officeholder who was integrated into and operated as part of the workforce and who held a substantive and highly responsible judicial role (b) further the Tribunal is not satisfied the a job applicant such as the claimant (who applied to a local authority for financial positions) is in an analogous situation to a job applicant who applied for a role with an NHS employer/body where staff, with specialist medical and associated skills, regularly transfer between such organisations and where patient safety is of paramount importance.
- (iii) Is the reason for that less favourable treatment one of the listed grounds in Article 14 of the Convention rights or some “other status?” The Tribunal is not satisfied that a “job applicant” which is a very wide and generic grouping constitutes, particularly having regard to the matters previously referred to at paragraph (ii) above, some “other status” for the purposes of Article 14 of the Convention Rights.
- (iv) Is the difference without reasonable justification – the Tribunal is, in any event, satisfied on the basis of the available information that there is reasonable justification for the difference in treatment between a generic and very wide ranging group of job applicants, who otherwise have no relationship with the organisation (to which the claimant belongs), and the categories which Parliament has chosen to protect namely :- (a) employees/ workers who work or have worked for the

organisation and (b) those that apply to NHS employers ( as defined). The situation in this case is very different to that in **Gilham**. Moreover, the Tribunal is strengthened in its view by the fact the EU, who considered the position of job applicants in 2019 chose to limit its protections to those job applicants who had gained “information of breaches” during the recruitment process.

81. For the avoidance of doubt the Tribunal is not satisfied that the claimant’s reliance on the Enterprise and Regulatory Reform Act 2013 (which was the mechanism by which the meaning of the term worker was extended by the amendment of section 43 K of the Act) adds anything to the above deliberations and this is therefore not separately addressed.
82. In all the circumstances, the Tribunal is not satisfied that it has jurisdiction to entertain the claimant’s complaint of detrimental treatment for making a protected public interest disclosure which complaint is therefore dismissed.

**Issue 1.2 – whether in respect of the claimant’s complaint of victimisation relating to the respondent’s refusal on 18 September 2020 to allow the claimant to pursue an appeal against the outcome of a complaint under the respondent’s complaints procedure the claimant was an applicant for the purposes of Section 39 of the 2010 Act.**

#### **The relevant law**

83. The Tribunal has had regard to section 39 (3) of the 2010 Act which states that: -

“An employer (A) must not victimise (B) –  
(a) In the arrangements A makes for deciding to whom to offer employment  
(b) As to the terms on which A offers B employment and,  
(c) By not offering B employment”

84. The Tribunal has also had regard to paragraph 10.8 of the Equality and Human Rights Commission Code of Practice on Employment (2011) (“the Code”) concerning what constitutes “arrangements”.

85. Paragraph 10.8 of the Code states as follows: -

“Arrangements refer to the policies, criteria and practices used in the recruitment process including the decision-making process,  
“Arrangements” for the purposes of the Act are not confined to those which an employer makes in deciding who should be offered a specific job. They also include arrangements for deciding who should be offered employment more generally. Arrangements include such

things as advertisements for jobs, the application process and the interview stage”.

86. In summary, the claimant contends that :- (a) the respondent has accepted for the purposes of this hearing, that the claimant has / may have done a protected act (b) notwithstanding that the claimant may not have complained about the outcome of the recruitment process, the refusal by the respondent to allow the claimant a right of appeal under its Complaints Policy regarding the alleged conduct of the respondent during the interviews is part and parcel of the recruitment process and therefore comes within the definition of “arrangements” for the purposes of section 39 of the 2010 Act.
87. In summary, the respondent contends as follows:- (a) the victimisation detriment claims pursued by the claimant are (i) the rejection of the claimant for the posts in November 2019 and December 2019 (Issue 7.3.1 ) and (ii) the refusal to allow the claimant a “grievance appeal” namely an appeal under the respondent’s Complaints Policy in September 2020 (Issue 7.3.2) (b) the respondent accepts that the alleged detriments identified at 7.3.1 are justiciable by reason of section 39 (3) of the 2010 Act (c) the respondent however contends that the alleged detriment identified at (ii) above is not justiciable as the respondent’s complaints procedure does not fall within the arrangements which the respondent makes for deciding to whom to offer employment or as to the terms on which employment is offered for the purposes of sections 39 (3) (a) or 39 (3) (b) of the 2010 Act (d) it would be a different position if the claimant’s appeal had been in respect of the decision not to appoint her to the posts however this is not the position in this case and (e) further the “arrangements” for the purposes of deciding whether the claimant should be appointed to the posts ceased in December 2019 and the claimant’s complaint did not prolong the selection process. The claimant’s complaint and subsequent refusal to allow her to pursue a complaint against the outcome thereof is in essence one step removed from the selection process for the purposes of section 39 of the 2010 Act.

### **The conclusions of the Tribunal**

88. Having given careful consideration to all of the above, the Tribunal is satisfied that the Tribunal does have jurisdiction pursuant to section 39 (3)(a) of the 2010 Act to entertain the claimant’s complaint of victimisation pursuant to section 27 of the 2010 Act in respect of the respondent’s refusal to allow the claimant to pursue a “grievance appeal” under the respondent’s complaints procedure (Issue 7.3.2).
89. The Tribunal rejects the contentions of the respondent that the fact that the alleged detriment namely, the refusal of a right of appeal against the outcome of a complaint under the respondent’s Complaint policy falls outside the ambit of “arrangements” for the

purposes of section 39 (3) of the 2010 Act. When reaching its conclusions the Tribunal has taken into account in particular, the following matters:- (a) that it is clear from paragraph 10.8 of the Code that the word “ arrangements” should be widely construed, that they are not limited to deciding who should be offered a specific post and that it includes the interview stage (b) the claimant’s complaint relates to the alleged conduct by the respondent’s staff at such interviews which interview process was part of the arrangements which the respondent put into place to decide who should be appointed to the relevant posts (c) as a job applicant (rather than an employee) the only policy available to the claimant to allow her to pursue a complaint concerning the alleged conduct of the interviews in question was the respondent’s Complaints policy which also afforded her a right of appeal (which was refused by Ms Shand on the particular facts of the case rather than on any “jurisdictional “ grounds). The Tribunal has also had regard to the fact that the Ombudsman, according to the draft decision at pages of pages 41-42 of Section C of the bundle and paragraph 53 above, refused to investigate the claimant’s subsequent complaint as it related to an employment matter which it stated it was not entitled, as a matter of law, to investigate.

90. In all the circumstances the Tribunal is satisfied that it has jurisdiction to consider the claimant’s complaint regarding the respondent’s refusal to permit the claimant to pursue an appeal under the respondent’s Complaints Policy (Issue 7.3.2).

**Issue 1.3 – whether any permitted claims were, in any event, presented within the relevant time limits and if not in respect of any permitted complaints of sex discrimination ( direct sex discrimination or victimisation) (as the only remaining claims) it is nevertheless just and equitable to allow them to proceed.**

### **Background**

91. In the light of the dismissal of the claimant’s complaint of protected public interest disclosure detriment the claimant’s remaining extant claims are as follows: -

- (1) Direct sex discrimination (section 13 of the 2010 Act) - (Issue 5.3 of the CMO) relating to (a) the alleged conduct /comments made by Mr Porter regarding the claimant’s bottom during the interview on 31 October 2019 (Issue 5.3.1) and (b) the alleged comments made by Mr Higginson during the interview on 5 December 2019 (issue 5.3.2) regarding the claimant taking contraception to help with her skin problems.
- (2) Victimisation (section 27 of the 2010 Act) – (paragraph 7.3.1. of the Order) relating to the refusal by the



interview panel (Ms Martin, Mr Porter and Mr Philbrick) to appoint the claimant to the post of DPSS Accounts officer (4 November 2019) and /or the refusal of the interview panel (Ms Martin, Mr Porter and Mr Higginson) to appoint the claimant to the post of Direct Payment officer (10 December 2019) and,

(3) The refusal by Ms Shand (on 18 September 2020) to allow the claimant to pursue an appeal under the respondent's Complaints Policy in respect of (1) above (Issue 7.3.2).

92. It was agreed between the parties, that having regard to the dates of the ACAS Conciliation process (notification received by ACAS on 18 September 2020 with the Early Conciliation Certificate issued on 18 October 2020) and the subsequent presentation of the claimant's claim form on 14 November 2020, any act occurring before 19 June 2020 was not presented within the statutory time limit.

93. This means that allegation (3) above was presented in time. The remaining allegations (1) and (2) were not however, presented within the statutory time limit unless they constitute conduct extending over a period (ending with (3) above) for the purposes of 123 (3) of the 2010 Act and/or the Tribunal, in any event, considers it just and equitable to extend time to allow them to proceed (section 123 (1) (b) of the 2010 Act.

94. When the matter was listed for this Preliminary Hearing Issue 1.3 was included by the Employment Judge ( who is also the Employment Judge at this preliminary hearing) in the light of the respondent's contentions (and associated application) (paragraph 3 of the CMO) that the claimant's claims in respect of allegations (1) and (2) above (relating to the interviews in October and December 2019 and the claimant's rejection for the posts) were presented outside the statutory time limits and further, that the claimant was unable to pursue the latter claim (allegation 3), in respect of the refusal by Ms Shand on 18 September 2020 to allow the claimant to pursue an appeal under the respondent's complaints procedure, because of lack of status. The focus of the time issue in paragraph 1.3 of the CMO was therefore on whether, if the Tribunal did not have jurisdiction to entertain allegation (3) and allegations (1) and (2) were prima facie out of time, it was nevertheless just and equitable to allow such claims to proceed. The Tribunal went on to give directions for the preparation for and conduct of the Preliminary Hearing including for the exchange of documents and witness statements limited to the preliminary issues.

95. The Tribunal further stated in the CMO (paragraph 5) that it was open to the Tribunal conducting this Preliminary Hearing to decide on

the basis of the information available to it that any of the time or associated issues were not suitable for determination at a Preliminary Hearing and should therefore be deferred to the full merits hearing.

96. It was recognised at this Preliminary Hearing that if, which has subsequently found to be the case, the Tribunal held that it had jurisdiction pursuant to section 39 of the 2010 Act to entertain the claimant's complaint of victimisation in respect of the refusal by Ms Shand on 18 September 2020 to allow her to pursue an appeal under the respondent's Complaints Policy (allegation (3) above) that there would also / alternatively be an issue as to whether the earlier alleged acts of direct sex discrimination / victimisation formed part of a course of conduct extending over a period for the purposes of section 123 (3) of the 2010 Act. The claimant asserts in her particulars of claim that there was such a course of conduct.

### **The relevant Law**

97. The Tribunal has had regard in particular to the following statutory provisions/ and legal authorities :-

**Section 123 of the 2010 Act**

**Paragraphs 15.20 – 15.32 of the Code**

**Tyagi v BBC World Service [2001] IRLR 465 CA**

**Hendricks v Commissioner of Police for the Metropolis [2002] IRLR 96 CA.**

**Aziz v FDA [ 2010] EWCA Civ 304 (paragraphs 35 and 36) CA**

**Arthur v London Eastern Railway Ltd 2007 IRLR 58 CA**

**E v 1) X2) L& 3)X and L v X2)Z& 3)E UKEAT0079/20/ RN and 0080/20/RN (with the further EAT Judgment referred to therein of Caterham School Limited v Rose 0149/19/RN,( the Tribunal drew these authorities to the attention of the parties).**

**Adedeji v university Hospitals Birmingham NHS Foundation Trust 2021 EWCA Civ 23 CA**

### **Submissions**

98. In brief summary, the respondent made the following submissions regarding time limits:- (a) if the Tribunal decides that it has jurisdiction to entertain Issue 7.3.2 (refusal to allow the claimant to pursue a "grievance appeal" on 18 September 2020) the earlier claims of sex discrimination / victimisation are nevertheless still out of time as there is no conduct extending over a period (b) the acts which allegedly occurred in 2019 (relating to the alleged comments at the two interviews and the refusal to appoint the claimant to either of the two posts, are of a completely different character/ involve different people to those involved in the refusal to allow the claimant a "grievance appeal" (c) if the claimant is allowed to proceed with the earlier allegations the respondent will be required to respond to stale allegations involving time and expenditure of public money and the prejudice to the respondent would be greater than that caused to the

claimant (d) the claimant was unable to provide any reason for not bringing her claims sooner which she admitted was due to her stupidity/ her own mistake/ error (d) there was no mistake of law or fact on the part of the claimant who is a part qualified accountant and who is clearly well versed in what she needed to do to bring a claim(e) the respondent recognised however (having regard to the authorities referred to above) that if the Tribunal held that it had jurisdiction to entertain the claimant's complaint regarding the refusal by Ms Shand on 18 September 2020 of an appeal under the respondent's Complaints Policy ( allegation (3)) the respondent's submissions on time were likely to be more relevant to any considerations of strike out/ deposit than jurisdiction as to time.

99. The claimant's submissions – in brief summary the claimant made the following submissions:- (a) the claimant contends that there was a continuing course of conduct by the respondent which extended from the conduct at the interviews/ the rejection of the claimant's applications for the posts to the refusal by the respondent to allow the claimant a right of appeal against the rejection of her complaint relating to the alleged conduct of the interviews (b) the Tribunal is in any event requested, if permissible, to extend time to allow any claims which are found to be out of time to proceed including as the claimant denies that the earlier ( allegations (1) and (2) above) are stale allegations/ that the respondent would in, any event, be prejudiced by the pursuit of such claims. The claimant contends for such purposes, that the claimant's complaint regarding the conduct of the interviews was pursued pursuant to the respondent's Complaints policy as part of which the claimant submitted transcripts of the interviews, the officers concerned were given an opportunity to respond, an investigation was undertaken and a report compiled and the pursuit of such allegations would not therefore put the respondent to any significant inconvenience or expense.

### **The conclusions of the Tribunal**

100. After giving the matter careful consideration, the Tribunal is not satisfied that in the circumstances of this case, including in particular that the Tribunal has held that it has jurisdiction to determine the allegation (issue 7.3.2 / (allegation (3)) relating to the refusal by Ms Shand to allow the claimant on 18 September 2020 to pursue an appeal against the rejection of her complaint pursuant to section 39 of the 2010 Act (which complaint was presented within the relevant statutory time limit), it is appropriate for the Tribunal to determine Issue 1.3 ( the time point) at this preliminary stage. When reaching this conclusion, the Tribunal has taken into account in particular, the following matters: -

- (1) The Tribunal's finding that the Tribunal has jurisdiction to entertain issue 7.3.2 of the Order (also referred to as allegation (3) above, relating to the refusal of the respondent to allow the

claimant to pursue an appeal against the rejection of her complaint, which gives rise to the question of whether the earlier allegations (Issue 5.3.1, 5.3.2 and 7.3.1 ( also referred to above as allegations (1) and (2) ) form part of a course of conduct extending over a period ending on 18 September 2020. If the claimant is able to satisfy the Tribunal that there was such course of conduct the earlier allegations would therefore be in time.

- (2) The useful guidance/ reminders contained in the **EAT Judgments of E X1) (paragraphs 46 -50) and Caterham (paragraphs 58 – 66 )** on the correct approach to be adopted at a Preliminary Hearing when considering a preliminary issue such as whether there has been a course of conduct extending over a period for the purposes of section 123 (3) of the 2010 Act. The above Judgments highlight that a different, more rigorous, approach is required for the definitive determination of a preliminary issue as to time (which cannot be revisited at the final hearing) compared to the determination of a strike out / deposit application. The former requires formal findings of fact to be made concerning the incidents in question so as to allow a proper assessment of whether they can properly be regarded as part of a course of conduct.
- (3) When this case was listed for a Preliminary Hearing there was a live issue as to whether the Tribunal had jurisdiction to entertain the claimant's complaint (Issue 7.3.2/ allegation (3)), concerning the refusal to allow her to pursue an appeal against the rejection of her complaint, pursuant to section 39 (3) of the 2010 Act and a clear understanding that if it did not have jurisdiction to do so there was also a live issue as to whether the claimant's remaining complaints were out of time ( as reflected in the wording of Issue 1.3).
- (4) There was a paucity of sworn oral evidence before the Tribunal at the Preliminary Hearing regarding what happened at the interviews on 31 October 2019 and 5 December 2019 (Issues 5.3.1 and 5.3.2 (allegation (1)) and also regarding some aspects of Issue 7.3.1 (the rejection of the claimant for the posts) (allegation 2). The claimant relied in respect of Issues 5.3.1 and 5.3.2 on the alleged transcripts of the interviews which are disputed by the respondent. Further a number of relevant matters were not fully addressed in the claimant's witness statement/ written submissions which required further clarification by the Tribunal as recorded at the beginning of this Judgment (including by way of example with regard to the nature of the protected acts) and in respect of which the respondent will need an opportunity to respond in the light of such clarification. Further there was an absence of any

information/ oral evidence from the respondent regarding its account of the relevant interviews/ reason for the rejection of the claimant's applications for the posts other than a strong denial of any wrongdoing in the respondent's response form. Moreover, the Tribunal was not provided with any details of the respondent's investigation into/ the outcome of the claimant's complaint regarding the conduct of the interviews other than the brief explanation given in Ms Shand's letter dated 18 September 2020 / the respondent's response.

- (5) In all the circumstances, the Tribunal is not satisfied that :- (a) it has sufficient information before it to make a proper determination of whether the conduct alleged at Issues 5.3.1, 5.3.2 and 7.3.1 occurred/ formed part of a course of conduct extending over a period for the purposes of section 123 (3) of the 2010 Act and (b) that it would be appropriate for it to determine in isolation, as there is a live issue as to whether this is a case in which there has been conduct extending over a period, any issues relating to any just and equitable extension of time.
- (6) The Tribunal is further satisfied in the light of all the above, that the most appropriate course of action is for any time issues to be determined at the final hearing.

**Issue 1.4 Whether the claimant should be permitted to amend her claim form to add a complaint of disability discrimination.**

101. As stated previously above the claimant confirmed that she does not wish to pursue any complaint of disability discrimination and the Tribunal is therefore no longer required to determine this Issue.

**Issue 1.5 Whether the claimant's claims (or any of them) should, in any event, be struck out and/or a deposit ordered as a condition of proceeding on the grounds respectively that they have no or little reasonable prospect of success**

**The relevant law**

102. The Tribunal has had regard in particular to the following: -

The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (including Schedule 1 – Regulations 2, 37 & 39. Article 6 of the Convention rights contained in Schedule 1 to the 1998 Act.  
The legal authorities referred to above in respect of Issue 1.3 (and in particular the guidance contained in the authorities of **Aziz, E v1 and Caterham**.

The further authorities referred to in the claimant's closing submissions namely: - **Anyanwu & anor v South Bank Union & anor [2001] ICR 391CA, Ezsias v North Glamorgan NHS Trust [2007] ICR 1128, Sharma v New College Nottingham UK EAT /0287/11/ LA EAT.**

### The submissions

103. The Tribunal has had regard to the submissions of the respective parties. In very brief summary, the claimant contends that the legal authorities caution against striking out in discrimination cases, which are generally fact sensitive, save in the most exceptional of circumstances. The Tribunal had also had regard to the submissions of the respondent (including as they had previously been contended in relation to the time limits issues at Issue 1.3 above). The Tribunal has also taken into account that the respondent acknowledged during oral closing submissions that if the Tribunal held that it had jurisdiction to entertain Issue 7.3.2 (allegation (3)) relating to the refusal of a right of an appeal) (as is the case) it would not be pressing the Tribunal to make strike out or deposit orders as the issues would need to be ventilated before a Tribunal.
104. Having given very careful to all of the above, the Tribunal is not satisfied that it is appropriate to make strike out or deposit orders in respect of any of the extant issues for the following reasons: -
105. **Issues 5.3.1 and 5.3.2** (the alleged comments/ conduct by Mr Porter at the interview on 31 October 2019 and the alleged comments by Mr Higginson at the interview on 5 December 2019). These allegations are fact sensitive. The claimant contends that the comments/ conduct occurred the respondent denies the allegations. When considering these allegations the Tribunal has taken into account that on face it of the claimant's "alleged transcripts" of the interviews contain accounts of extremely wide ranging discriminatory/ inappropriate behaviour on the part of the respondent giving rise to questions as to whether it is inherently probable that managers of the respondent would have acted in such a manner. The Tribunal has not however had the benefit of the respondent's account of either of the interviews (including as may have been contained in the investigation report referred to in Ms Shand's letter dated 18 September 2020 at pages 32 – 34 of Section C of the bundle) other than the general and vehement denial of the allegations contained in the respondent's response.
106. **Issue 7.3.1** (refusal to appoint the claimant to the posts of DPSS Account officer (4 November 2019) and/or Direct Payments Officer (10 December 2019). The respondent has acknowledged (as recorded above) that the claimant has identified for the purposes of this Preliminary Hearing potential protected acts / that the claimant's case is brought on the alternative basis that alleged detriments were

perpetrated because the respondent, in any event, believed that the claimant had done, or might do, a protected act (Issue 7.6 of the CMO). Further, the Tribunal has not at this stage been provided by the respondent with any reasoned explanation as to why the claimant was unsuccessful in her applications.

107. **Issue 7.3.2** (refusal to allow the claimant to pursue an appeal under the respondent's complaints procedure). The position is as for Issue 7.3.1 above with regard to the alleged protected acts. Further, there is no explanation in the letter of Ms Shand dated 18 September 2020 (page 32 of Section C of the bundle) of the reasons why the respondent concluded that the claimant's allegations were unfounded and/or why it was considered necessary to refuse the claimant the right of an appeal including why such refusal was considered necessary to protect the respondent's employees.
108. Further, the Tribunal has considered whether it is appropriate to strike out and/or order a deposit in respect of the allegations pre-September 2020 on the grounds that there is no or little reasonable prospect (even taking the claimant's claims at their highest) of the claimant establishing that there was a course of conduct extending over a period and/or that it is, in any event, just and equitable to extend time. The Tribunal has had regard to the guidance contained above including the helpful guidance contained at paragraph 50 of **E v 1** together with the Tribunal's findings concerning Issue 1.3 (time limits).
109. Having regard to all of the matters previously ventilated above, the Tribunal is not satisfied on the basis of the available information that there is no or little reasonable prospect of the claimant establishing that the various acts are so linked as to be continuing acts, or to constitute an ongoing state of affairs.
110. When reaching such conclusion, the Tribunal has taken into account the difficulties which the claimant may have in establishing a course of conduct having regard in particular to :- (a) the length of time between the alleged discriminatory conduct (November / December 2019 and September 2020) and (b) the different nature of the alleged conduct and different individuals involved. The Tribunal has however balanced against such considerations the factual matters in dispute and the limited information currently available from the respondent regarding such matters. The Tribunal has also taken into account that the acknowledged in time allegation (Issue 7.3.2 relating to the refusal of an appeal) may (albeit that this will be an issue for the full Tribunal to decide) potentially be considered to be linked to the allegations of alleged misconduct at the interviews in 2019 (Issues 5.3.1 and 5.3.2) in the sense that it relates to an appeal against the respondent's determination of the claimant's complaint concerning the respondent's alleged discriminatory conduct at such interviews.

111. Notwithstanding that the Tribunal has declined to strike out the claimant's extant complaints/ order a deposit order, the claimant is however encouraged to consider carefully whether she still wishes to pursue in particular, her allegations at Issues 5.3.1 and 5.3.2 (the alleged conduct at the interviews). The claimant was undecided at both the original case management hearing and during this Preliminary Hearing as to whether she wished to pursue these allegations. The claimant perceptively observed during the Preliminary Hearing the difficulty of pursuing allegations which involve "a he said/ she said" situation. In situations like this, the burden is on the claimant to establish, on the balance of probabilities, the facts upon which she relies (including that they are facts from which the Tribunal could conclude in the absence of an adequate explanation from the respondent that they constitute unlawful discrimination). In this case the respondent vehemently denies in its response that the alleged conduct occurred and further disputes that the claimant's alleged transcripts are an accurate account of what happened. When determining what happened during such interviews the Tribunal conducting the case will have to determine, on the balance of probabilities, and having weighed any relevant oral and documentary evidence, what occurred. As part of that exercise a Tribunal is also likely to take into account, whether given the alleged nature of the alleged discriminatory / inappropriate comments and behaviour by the respondent's officers during such interviews, it is inherently likely that they would have acted in such a manner.
112. The claimant is therefore allowed to proceed with her claims of direct sex discrimination and victimisation (as identified above) to a full merits hearing, at which any relevant time issues will be determined by the Tribunal. Further directions for the future conduct of the matter will therefore be given in a separate case management order.

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Employment Judge Goraj  
Date: 4 January 2022

JUDGMENT SENT TO THE PARTIES ON  
7 January 2022 By Mr J McCormick

FOR THE OFFICE OF THE TRIBUNALS