EMPLOYMENT TRIBUNALS

Claimant: **Mrs U Izakiewicz-Kozina**

Respondent: **University Hospitals Birmingham NHS Foundation Trust**

Heard at: Birmingham **On:** 19 to 23 June 2023

Before: Employment Judge Edmonds
Mr Liburd
Miss Fritz

Representation
Claimant: In person
Respondent: Mr Crow, counsel

JUDGMENT

The unanimous decision of the Employment Tribunal is that the claimant's claim for victimisation does not succeed and is dismissed.

REASONS

Introduction

1. At the relevant time when the issues in this case arose, the claimant was employed by the respondent as a Band 6 Systems Developer. The claimant subsequently moved roles to the role of Band 7 Senior NET Developer and remains in the respondent's employment at the date of this hearing.

2. The claimant claims that she was unsuccessful in an application for a Band 7 role within the respondent in June 2021 because she had previously raised complaints of race discrimination against the respondent. She commenced ACAS early conciliation on 20 September 2021 and the certificate was issued on 21 September 2021. She submitted her Employment Tribunal claim on 18 October 2021.

3. The claimant had previously submitted a separate Employment Tribunal claim relating to other matters, but that claim was withdrawn on 24 August 2021 and therefore is not relevant to the matters to be decided in this case.

4. At the end of the hearing, the Tribunal gave its Judgment and Reasons orally to the claimant however, given that English is not the claimant's first language, we agreed that written reasons would be sent to her. We explained to the claimant that the written reasons would not be word-for-word the same as the oral reasons but that they would contain the same reasons for the outcome and would also contain additional information such as regarding the procedure followed and law.

Claims and Issues

5. The issues in this case (other than remedy if the claimant succeeds) had been set out in the Record of Preliminary Hearing of Employment Judge Choudry dated 26 July 2022 as follows:

   Equality Act, section 27: victimisation

   i. The claimant relies upon the following as protected acts:

      a. *Her complaints of bullying, harassment and discrimination in promotion opportunities raised in formal complaints raised on 2 June 2020 and 15 June 2020.*

   ii. The respondent accepts that the claimant's complaints raised on 2 June 2020 and 15 June 2020 amount to a protected act.

   iii. Was the claimant unsuccessful in her application for Band 7 Senior NET Developer which she made on 14 June 2021 because the claimant did a protected act?

6. Given that the respondent accepts that the two formal complaints in June 2020 were protected acts, this means that in reality there was only one issue to determine in the case (other than remedy), as set out in paragraph 5(iii) above.

7. It was agreed at the start of the hearing that we would consider issues relating to remedy if the claimant was successful in her claims, instead of considering remedy as part of the main evidence.

Procedure

8. We heard evidence from the claimant and, on behalf of the respondent, from Mr Jonathan Daniels, Mr Taranjot Sahota and Miss Amy Lester. Each of them had provided written witness statements. Upon receipt of each other's witness statements, however, Mr Sahota prepared a "Supplemental Witness Statement" to address what he saw as new arguments raised by the claimant against him (as he had previously understood her complaints to have been directed at others). In that Supplemental Witness Statement he made a comment with which the claimant disagreed, leading the claimant to prepare her own "Supplemental Witness Statement", which included an email and

attachment by way of further evidence. Mr Sahota responded with a "Further Supplemental Witness Statement", attaching two further documents labelled as "Exhibit 1" and "Exhibit 2". These are addressed further in our findings below. Although neither party objected to the use of the supplemental witness statements, the claimant expressed a wish to respond to that Further Supplemental Witness Statement and was permitted to do so orally at the start of her witness evidence.

9. Each of the witnesses gave oral evidence alongside their written statements. However, the claimant declined to ask any questions of Mr Daniels. It was explained to the claimant that, if she wished to challenge any matters in his statement, this was her opportunity to do so and if she did not challenge it we would not know whether she disagreed with what he had said. The claimant reiterated that she did not wish to ask any questions. The Tribunal did ask Mr Daniels a number of questions, and then the respondent's representative asked a further question in re-examination. At this point the claimant asked if she could in fact ask Mr Daniels a question, and she was permitted to do so.

10. There was a Tribunal file of 445 pages (and references to pages within these Reasons are to the relevant page number of the file). On the third day of the hearing, the claimant requested that the respondent be required to disclose a recording of a particular internal investigation meeting, however we declined to do so on the basis that the request should have been made at an earlier stage and that the information she was looking for did not appear to be relevant because the matter she was seeking to prove was something that the witness had already accepted (that Mr Sahota was aware of the claimant's grievance).

11. Both parties also helpfully provided written submissions: the respondent chose to supplement these with additional oral submissions however the claimant explained that her written submissions covered everything that she wished to say.

Interpreter

12. A Polish interpreter was present throughout the hearing (Ms Anna Maria Kaczmarczyk on 19, 20, 21 and 23 June 2022, and Ms Marta Niedziolka on 22 June 2022). This had been arranged following the preliminary hearing with Employment Judge Choudry on 26 July 2022. At the start of the hearing, we asked the claimant and Ms Kaczmarczyk to spend some time understanding how they would work together during the Tribunal reading time.

13. At the start of the first day of the hearing, we discussed with the claimant what level of translation would be required (i.e. whether the interpreter would translate everything, or only certain matters where the claimant struggled to understand). The claimant expressed a preference that the interpreter only translate when the claimant was in difficulty and we agreed that the claimant would signal to the interpreter directly when that was the case. We stressed to the claimant that she should make sure she did not struggle on without using the interpreter given that the interpreter was available.

14. We then proceeded to discuss the timetable for hearing, with the respondent initially setting out how long he felt each stage of the case would take. The

Tribunal then asked the claimant if she had been able to understand what was said and the claimant said that she had struggled. The Tribunal therefore asked the interpreter to translate everything that was said during the hearing to avoid any risk of the claimant not understanding matters. The claimant did not object at this stage.

15. We started to hear evidence, the claimant giving evidence first, on the first afternoon of the hearing. Before moving to cross-examination, the claimant was permitted to put forward supplementary evidence in response to Mr Sahota's Further Supplemental Witness Statement, which she chose to do in English. Once that had been done, and it was time to move onto cross-examination, we suggested that the interpreter translate and the claimant agreed at that stage. However, although the interpreter translated the questions for the claimant, the claimant chose to respond in English.

16. As the hearing progressed that afternoon, we were concerned that the claimant might not be explaining things exactly as she wished to explain them (noting that there were occasions where the claimant did not appear to have exactly answered the question put to her) and also that it was taking considerable time to progress the case because the claimant (understandably) needed additional time to collect her thoughts in English. We therefore encouraged the claimant on several occasions (as did the respondent's representative) to respond in Polish and allow the interpreter to translate for her. The Tribunal asked the claimant if there was a reason why she was replying in English and the claimant said that this was because she had no Polish colleagues in work and was used to using English. At this stage she did not say that she was finding Polish confusing. We reassured the claimant that we would not hold anything against her for using an interpreter and suggested that it might held her to explain herself and for her evidence to flow freely. After a break, we confirmed to the claimant that her evidence did appear to progress more smoothly when she spoke in Polish, and the claimant responded that she was used to speaking English but would try.

17. At the end of the first day of the hearing, the claimant raised a concern that she was finding it extremely difficult to speak in Polish, that she was unhappy about having an interpreter, that she had never asked for one and that she found it confusing because she was trying to listen to both the respondent's representative speaking English and the interpreter's Polish translation, and in addition because the documents were all in English. We discussed how to proceed both with the parties, and privately between the Tribunal panel, and agreed that if the claimant did not wish to use an interpreter, she would not be compelled to do so as it was a matter for her as to how she might best follow proceedings. We proposed two additional measures:

    a. The claimant was informed at the end of the first day that she had permission to make any additional points she wished to make to her evidence at the start of the second day, in case she reflected and thought that there was anything that she had missed from her evidence; and

    b. The Tribunal insisted that, despite the claimant saying that she did not want the interpreter to be present at all, the interpreter should

attend the Tribunal at the start of the second day, but stay in the waiting room, so that the Tribunal could assess whether matters proceeded smoothly or not without the interpreter before making a decision as to whether to release the interpreter entirely.

18. At the start of the second day, the respondent's representative presented us with an agenda from the preliminary hearing of the claimant's first Tribunal claim (which had been subsequently withdrawn), in which she had in fact specifically requested an interpreter because she said she was afraid of misunderstanding the questions directed at her. The claimant explained that this simply meant that she wanted assistance with the questions, not that she would talk in Polish herself. We asked her, given that she had at that point wanted an interpreter to assist her with the questions, whether she did want that support for the rest of the hearing (rather than not wanting an interpreter at all, as she had said at the end of the previous day). The claimant confirmed that she did and the interpreter was brought back into the hearing room. It was agreed that the claimant would raise her hand if she wished anything to be translated, however in the end the claimant only did so on a very small number of occasions throughout the hearing.

19. We would make clear that we do not believe that the claimant was disadvantaged by having the interpreter translate for her on the first day of the hearing, and in fact we remain of the view that it would have assisted the claimant to have various matters translated (even if not everything). Whilst we can appreciate that the claimant may have found it difficult having the documents in English but having words translated and/or hearing the respondent speak in English and not being able to "switch off" the English, we did have a separate concern about the claimant's level of understanding when things were not translated. Specifically, we would note that:

    a. There was one particular point on the second day of the hearing (at around 12.45pm) where the claimant was asked if paragraph 81 of her witness statement (relating to autonomy) was a reference to her previous performance, and she confirmed that it was. A few moments later, however, she said that it was not about performance. When she was challenged on this and it was explained to her that we had a note that showed that she had said that it was, the claimant replied "Oh my god, can I correct myself please". We accept that the claimant had not deliberately changed her answer and that in fact she had not understood what she had been asked.

    b. The claimant paused for lengthy periods, which we believe was because the claimant was trying to think of the correct way to phrase her answers in English.

    c. The claimant's facial expression sometimes suggested that she was struggling to follow things (we did remind the claimant that the interpreter was available to her on a number of occasions).

    d. After giving the oral judgment and reasons, the claimant did not appear to be entirely clear about what exactly our findings were. However, we had specifically checked whether the claimant wished

for the judgment and reasons to be translated, but she had said that she did not (and that she would raise her hand if she needed assistance). In any case, we agreed that we would send these written Reasons to the parties so that the claimant can fully understand the reasons for the Tribunal's decision.

Fact-findings

Background and previous applications

20. The claimant's employment commenced in December 2016, initially with Heart of England NHS Foundation Trust but then by the Respondent following a TUPE transfer on 1 April 2018. The claimant is Polish.

21. Prior to the TUPE transfer on 1 April 2018, Mr Daniels acted as an informal mentor to the claimant. From 1 August 2019, Mr Daniels took on the role of Software Solutions Architect and became responsible for the claimant's wider team. He directly managed 8 members of staff, including three team leaders within the Application Development team. The claimant worked within that team and reported into one of the team leaders. Mr Tanajot Sahota, Ms Sara Kanwal and Mr Mohammed Tabriez were all team leaders within that team at various points in time. Mr Daniels would have regular team meetings with his direct reports.

22. The Application Development team was made up of employees from white British, British Asian and Pakistani backgrounds. As far as the Tribunal is aware, the claimant was the only Polish member of the team.

23. The claimant, who was at that time a Band 6 level employee, applied for a role as a Senior Full Stack Developer which was advertised on 7 June 2019 (role code 304-A-19-74524). She was unsuccessful, with Curtis Herrick being appointed, however she was offered (and accepted) a 12 month secondment at Band 7 along with the other unsuccessful candidate.

24. She then undertook that secondment from 1 August 2019 to 31 July 2020, initially as a Senior C# Developer reporting into Ms Kanwal. It appears that there were difficulties between them and some concerns about her ability to do the C# work (we return to C# work later in these findings). Then in November 2019 the claimant was moved to other Band 7 work, not on C# but using another programming language called Visual Basic. Ms Kanwal was going on maternity leave at around that time and the claimant was moved under the line management of Mr Tabriez. The claimant did not enjoy the work that she was doing for the remainder of her secondment and felt that C# work would have improved her skill set. She did however remain on secondment until July 2020, when she returned to her substantive role at band 6 under Mr Tabriez.

25. In November 2019, there was a conversation between the claimant and Mr Daniels about her future. The claimant says that he threatened to dismiss her if she did not do the work that she was ordered to do. Mr Daniels has a different account of that discussion (page 236, and repeated in evidence to the Tribunal). He says that they discussed difficulties that the claimant had

been having working with both Ms Kanwal and Mr Tabriez. He says that he would have explained to her that the only other team leader in the IT department was Mr Sahota – so they could move her under Mr Sahota but if that did not work out, there were no other options within that team and they would have had to consider whether there were any other roles in other departments, by way of redeployment. We accept his explanation. We also accept that the claimant misinterpreted the intent behind Mr Daniels' words and did take it as a threat, although it was not one.

26. The claimant then applied for three other roles as follows (as set out in Exhibit 2):

    a. Role 304-A-19-82066, which was advertised on 23 October 2019, with the claimant being interviewed on 1 November 2019. Michael Porter was appointed.

    b. Role 304-A-19-83605, which was advertised on 21 November 2019, with the claimant being interviewed on 27 November 2019. Ann Mundinamani, Matthew Bennion and Mark Bluck were appointed.

    c. Role 304-A-20-89292, which was advertised on 27 February 2020, with the claimant being interviewed on 3 March 2020. Stuart Bedworth was appointed.

27. On 6 March 2020 the claimant raised an informal complaint (page 28) about the final unsuccessful job application. She said that the successful candidate, Stuart Bedworth, should be "disqualified" for sleeping whilst at work which she alleged was gross misconduct. In her complaint she said that the decision to promote him "*demonstrates disrespect to our values*". In evidence she said that this meant that he was not the best candidate, however that was not what she said. We find that she wanted Mr Bedworth to have the offer removed from him.

28. On 27 May 2020 the claimant raised a further informal complaint to Dean Grinham, who was Mr Daniels' line manager at that time (page 104). In this email she raised allegations that Mr Daniels did not like her because of her nationality. She alleged that Mr Sahota and Mr Tabriez were influenced by him not to promote her. The clear focus of her complaint was on Mr Daniels and the way she believed he was manipulating others. Mr Daniels was the target of her complaint, not Mr Sahota or Mr Tabriez.

<u>Grievance 2 June 2020</u>

29. The claimant raised a grievance dated 2 June 2020 (page 107) because she was dissatisfied with the informal approach. It is accepted that this was a protected act. This complaint was specifically about the failure to promote the claimant following her various job applications and was titled "grievance for discrimination in promotion". In the content of her complaint, she described the four permanent positions she had applied for but did not make any specific allegations against any specific individual, including both Mr Daniels and Mr Sahota, although her grievance clearly stated that it was regarding alleged discrimination. Given it did not specifically target Mr Daniels as an isolated individual, and given that Mr Sahota was on the interview panel for

all four roles, we find that the natural interpretation of the wording used would suggest that the allegations were made against all those on the panels.

30. The claimant had copied Mr Daniels, Mr Tabriez and Mr Sahota on her email to HR accompanying her grievance (Exhibit 1). HR then emailed Mr Daniels, Mr Tabriez and Mr Sahota on the same day, asking each of them for "individual submissions from yourselves outlining your response to Urszula's grievance". Mr Sahota did reply to that email on 5 June 2020, copying Mr Daniels, Mr Tabriez and Deborah McKee (another senior manager, who became Mr Daniels' line manager although we are not clear whether she was at that time) (Exhibit 2). In his response, he said that "*there is clear evidence that we have followed a rigorous process…"* and set out details of each of the applications in turn, using the NHS job reference number quoted by the claimant in her grievance.

31. Following receipt of the claimant's witness statement in these proceedings, in which the claimant made specific allegations against Mr Sahota, Mr Sahota responded with a supplementary statement. In that statement he said that "*although I was aware she had raised previous grievances which led to a change in line management….I was not aware of the content of the complaints of 2 June 2020 and 15 June 2020*." This prompted the claimant to provide her own supplemental statement, in which she alleged that Mr Sahota was aware of the contents of the 2 June 2020 complaint because he was copied into it. Mr Sahota then submitted a second supplementary statement, explaining that he had now searched his email records and although he could not find the original emailed grievance copying him in, his IT department had shared with him the email he sent on 5 June 2020 containing his comments on the claimant's grievance.

32. In evidence Mr Sahota said that:

    a. He still could not recall these emails but accepted that they had been validly sent and he must have seen the email containing her grievance, because he replied to the email from HR;

    b. These events occurred three years ago so he could not remember exactly what had happened;

    c. He could not remember how he understood what to put in his email to HR – in that he could not recall whether he reviewed the claimant's grievance and responded to that, or spoke with Mr Daniels and/or Mr Tabriez who asked him to share information about the recruitment processes;

    d. He would have quoted the reference numbers in the same way as the claimant because that is how it would have been stored on the recruitment system so in checking the details of the recruitment in order to respond, he would have seen the reference numbers.

    e. Even if he had read the grievance, he would not have understood it as a grievance against him.

    f. He could not remember whether he was interviewed or not about the

grievance, or that he saw the outcome letter.

33. The claimant on the other hand submits that Mr Sahota must have read it in order to respond, as he was specifically requested to do, and that the fact he quoted the reference numbers in the same way as she had done was further evidence of this. She referred to his language "*we have followed a rigorous process"* that indicated that he had understood it to be an allegation that he had not followed a proper process. She also referred to the eventual grievance outcome letter (page 123), which stated that 8 individuals had been interviewed, and said that he would have been one of them, and further that he would have received a copy of the outcome as "perpetrator" in line with the respondent's policies.

34. We find that Mr Sahota would have read the grievance, and it is implausible to consider that he would have replied to a specific request from HR to respond to a grievance relating to his actions, without reading what the grievance said. We agree with the claimant that the tone used in his reply where he says "*we followed a rigorous process*" shows a clear understanding that the nature of the grievance was to complain about the recruitment processes, with which he was heavily involved. We therefore also find that he would have taken the grievance to relate to his own actions and not only those of Mr Daniels, who in fact was not specifically accused of anything in that particular grievance.

35. We would add that we are unconvinced by Mr Sahota's lack of recollection of this matter. We find that Mr Sahota had understood the serious nature of the complaint which specifically referenced discrimination, given that he added Debbie McKee, a senior manager, to the email chain. In addition, given that he clearly emailed HR in detail about the grievance, we would have expected him to remember seeing it even if he did not remember all the details. We cannot say for sure who was interviewed by the investigation manager, Lorraine Simmonds, however if 8 individuals were interviewed, given that Mr Sahota was on the interview panel for each of the roles the claimant had applied for, we would find it strange if he had not been one of those interviewed and therefore find on the balance of probabilities that he would have been. However, as he was not specifically named in the grievance as the perpetrator, we do not necessarily find that he would have received a copy of the outcome. That said, whilst we are unconvinced by Mr Sahota's explanation on this point, we would make clear that in relation to his evidence more generally, we did find it to be candid.

<u>Grievance 15 June 2020</u>

36. The claimant raised a further grievance dated 15 June 2020 (page 114). This grievance was wider than the 2 June 2020 grievance, and in addition to repeating her concerns about not being promoted, the claimant listed other allegations regarding the treatment of her by others. She specifically said that she was harassed by Mr Daniels, and that this was executed by a number of other individuals including Mr Bedworth and that "*discrimination in promotions was executed by Jonathan Daniels, Taranjot Sahota, Mohammed Tabriez*". She said that she was harassed because of her nationality. It is accepted that this was a further protected act.

37. We have not seen the email which would have accompanied this grievance and so it is impossible to say with certainty whether it was copied to anyone outside HR, as her 2 June 2020 grievance had been. Mr Sahota said that he could not recall seeing it, but in light of him failing to recall seeing the 2 June 2020 grievance, he accepted that it was possible that he had. We make no finding as to whether he received a copy of it, but do not believe this to be of significance given that the allegations insofar as they related to him were also within the 2 June 2020 grievance which he had seen. We also find that he would have been made aware of it through general discussions.

38. Ultimately, both grievances were addressed together and responded to on 18 August 2020 (page 123): although we note that the outcome letter says that it was in response to the 2 June 2020 grievance, the content of it refers to both grievances and we were informed that this related to both, which we accept. What this means is that, having found that Mr Sahota would have been interviewed about the 2 June 2020 grievance, we find it likely that this interview would have referenced the fact that there were two grievances.

39. The claimant's grievances were not upheld, although some recommendations were made, for example a facilitated meeting for the whole team to agree standards of behaviour, and panel memberships being the same for all interviews. In relation to the job applications, it was found that proper processes had been followed and that the claimant was simply not the highest scoring candidate on any of the occasions. The claimant did not appeal that decision.

Further complaints

40. The claimant raised a further complaint on 9 November 2020 (page 133), which included a complaint against Mr Daniels and Mr Tabriez specifically. The focus of the complaint was on the way that Mr Tabriez treated her in the workplace, specifically alleging that he was aggressive towards her. There were no allegations against Mr Sahota.

41. Separate to this grievance, on 10 December 2020 the claimant attended a meeting with Lorraine Simmonds and Nicky Partridge (page 140) as a follow up meeting from her grievance outcome in August 2020. During this meeting the claimant commented that "*I would like to work for Tas. I can trust him; he has many years of experience*." "Tas" is Mr Sahota.

42. The claimant's grievance from November 2020 was not upheld, which was confirmed by letter dated 18 January 2021 (page 145) and again the claimant did not appeal. By this time the claimant's line management had been changed to Mr Sahota (see below), and the outcome letter recorded that the claimant had thanked Deborah McKee for that and indicated that this was a positive change. In this outcome letter it stated that "*You responded by thanking me for allowing the recent change in line management from Mohammed Tabriez to Taranjot (Tas) Sahota and stated that this has changed the situation for you in a positive way and that you are very happy with this change in line management*". The claimant confirmed in evidence that this reflected how she felt at the time. This shows that, at this point in time at least, the claimant felt positively about Mr Sahota and we find that she

did not believe him to be a discriminator more generally.

43. Mr Sahota was asked to take over managing the claimant in January 2021 following issues between the claimant and Mr Tabriez. Mr Sahota said in evidence that he had not wanted the claimant in his team. We find that this was because the claimant had a reputation within the team for being difficult to work with. This had ultimately led to the breakdown of her relationship with Mr Tabriez (although it was also acknowledged that Mr Tabriez had not handled the situation particularly well). It was also suggested to us, and we accept, that there had been difficulties in the relationship between Ms Kanwal and the claimant. Examples of the behaviours which demonstrated the difficulties working with the claimant were included in the file. We saw that, for example:

    a. on one occasion when the claimant did not start work until 10am, she was sent a message on Teams at 9.26am and instead of waiting until 10am to reply, she instead replied with "*I work from 10 – please do not disturb me now*".

    b. during the same conversation, she was told that she had been sent an invitation to some training, and she replied with "*Unfortunately I am not interested*". The claimant says that this reply did not mean that she would not attend the training, but because the message was sent before 10am, she was not interested in the message.

    c. There were general comments about her being difficult to work with, including arguments over a monitor and desk location.

44. Mr Daniels would have weekly catch up meetings with his direct reports, and we find that during the course of some of those meetings, those difficulties with the claimant would have been discussed, particularly around the time that they were considering moving her line management. We also note that there appear to have been performance concerns relating to the claimant during her secondment, which we find would also have been discussed at these meetings.

45. The claimant raised a further informal complaint to Deborah McKee and Dean Grinham on 9 April 2021 (page 161). In this she complained of professional degradation, and asked for C# work. The claimant and Mr Daniels had differing views on the exact nature and relevance of C#. C# is a programming language, as is Visual Basic, which the claimant was working on at that time. The claimant says that Visual Basic was obsolete, hence her wanting to work with C# moving forward. Mr Daniels told the Tribunal that both languages were introduced by Microsoft in the early 2000s and were designed to be equivalent. However, as time went on, there became an industry preference for C#. He added that, in fact, both Visual Basic and C# were now considered to be older style technologies however the respondent has many programs in both and therefore has to maintain them both. The newer technology, React, is yet to be adopted by the respondent although some training on it has been rolled out.

46. We find that Mr Daniels' explanation is an accurate one, however we also understand why, in light of the industry preference for C# over Visual Basic,

the claimant would have been keen to improve her skills in that area.

47. It is worth noting that, at the end of her complaint, the claimant specifically added that she had very good cooperation with Mr Sahota and that he was a great team leader. Again, at this stage she clearly has no concerns about him or his attitude towards her. The claimant suggested in evidence that in fact she did not position him as a discriminator because this complaint was not about recruitment but about C#. We find, if that were the case, she simply would not have mentioned him at all, rather than calling him a great team leader.

48. On 28 April 2021 the claimant raised a formal complaint relating to the same matters as the informal complaint dated 9 April 2021 (page 165). In this complaint she made allegations against Mr Tabriez and Mr Daniels, but not Mr Sahota. This complaint was ultimately combined with her later grievance of July 2021 to which we turn below, and was not upheld (report at page 248, outcome letter at page 275).

Job Application

49. The claimant applied for a new role on 14 June 2021, following an advertisement posted on 10 June 2021 (page 202). Two people applied, the claimant and a colleague named Mr Amir, and both were shortlisted for interview. The role was at Band 7 but still reporting into Mr Sahota: the claimant at that time was Band 6 and Mr Amir was Band 5 but reporting into a different team leader. Mr Daniels and Mr Sahota knew him as part of the wider team and saw him on occasions such as monthly meetings, but he was not line managed by either of them.

50. On 18 June 2021 the claimant was sent an email (page 396) informing her who would be interviewing her - Mr Daniels, Mr Sahota and Miss Lester. She did not object at the time. When asked why not as part of her later grievance investigation she said that this was because she believed they should treat her fairly but it was stupid not to do anything. In evidence she accepted that she was only now saying that they had not treated her fairly because she was unsuccessful.

51. Miss Lester was a member of the HR team and was on the panel to provide an independent view. Although this was not something that had regularly been done in Mr Daniel's business area before, we accept Miss Lester's evidence that it was by that time considered good practice within the respondent to have a third, independent, panel member from outside of the hiring department. This would sometimes be someone from HR, sometimes from another department. We therefore find that there was nothing untoward or strange about Miss Lester being on the panel.

52. Mr Sahota was on the panel as the future line manager of the successful applicant, and Mr Daniels was on the panel as Mr Sahota's line manager. Whilst ordinarily this would be entirely appropriate, in this case Mr Sahota and Mr Daniels were both aware that the claimant had raised concerns about previous recruitment decisions made by Mr Sahota, and had alleged that Mr Daniels had influenced those decisions. Given that, it does seem unwise that

both technical experts in the process were implicated in those prior complaints. Whilst it would not have been ideal not to have the future line manager on the panel, given the circumstances we find that consideration should at least have been given to replacing one or both of them with a different team leader or someone else unconnected with those complaints.

53. Miss Lester did not challenge Mr Sahota or Mr Daniels about why they were on the panel. We find that this was because she was completely unaware of the claimant's prior complaints. This is supported by the fact that the claimant has submitted that Miss Lester should have taken steps to find out whether there was a prior complaint. We would add that we do not consider that it was for Miss Lester to take those steps in any case: her role was to be an independent panel member, not to review the process.

The interview

54. The claimant was interviewed on 25 June 2021 (notes at pages 321 from Miss Lester, page 325 from Mr Daniels and page 330 from Mr Sahota, with the scores at page 346, followed by the notes from Mr Amir's interviews at page 334 to 345). She was however unsuccessful, whilst Mr Amir was appointed. Whilst it is unusual for a Band 5 employee to jump straight to Band 7, it is not unheard of.

55. The interview questions had been written collaboratively by Mr Sahota, Mr Daniels and the two other team leaders in the IT department who worked under Mr Daniels. The fact that the other two team leaders who worked alongside Mr Sahota had involvement in this supports our view that they would have been capable of holding the interviews instead of Mr Daniels and/or Mr Sahota.

56. The claimant has suggested that the interview questions were designed to disadvantage her. However, Mr Sahota explained in evidence, and we accept, that the questions had been drafted before the applications were received. We also generally see no basis for the assertion that the questions disadvantaged her in any way: having reviewed the interview questions, they seem appropriate for the role being recruited and whilst one question related to .NET Core technology that she had no experience of, there is no reason why the question could not have been answered satisfactorily on a hypothetical basis. In an interview situation, it is commonplace to have questions about tasks that the applicant has not actually done, to understand how they would approach such a task if required. We saw a screenshot showing that Mr Amir had sent around a tip for dealing with .NET Core technology, however this does not in fact show whether or not he worked on that technology himself.

57. Each of the interviewers scored each candidate against each question independently. Those scores were then added together to reveal the total score for each. The claimant scored 43 (Mr Daniels), 30 (Mr Sahota) and 38 (Miss Lester), making a total of 111. The other candidate, Mr Amir, scored 50 (Mr Daniels), 54 (Mr Sahota) and 52 (Miss Lester) making a total of 156. We note that the scores were similar from each interviewer for Mr Amir, but differed significantly in respect of the claimant. Each interviewer made notes

during the interviews (mostly typed, save for Miss Lester's notes of Mr Amir's interview which were hand written), and the claimant accepts that the notes are accurate summaries of her interview.

58. It was submitted by the claimant that Miss Lester was not qualified to score some of the questions because she had no technical experience. We accept that she did not, however Miss Lester took steps to prepare before the interview, specifically reading the job description and person specification, some model answers and speaking with Mr Daniels and Mr Sahota about the core requirements for the role. We do not accept the claimant's submission that speaking with Mr Daniels and Mr Sahota would have led to them influencing her, we find it was a sensible step for her to have taken as part of her preparation and we find that she was in a good position to mark the candidates. We also find that, even if she lacked technical knowledge, this would impact her ability to score Mr Amir in the same way as for the claimant.

59. We also find that the model answers for each question were genuine model answers designed to assist the interviewers to score the candidates, and neither those nor the questions themselves had been designed to favour one candidate over the other.

60. Mr Daniels gave the claimant the highest score of the three interviewers. He said in evidence that he was pleasantly surprised by how well she did at interview, and that he wanted to give her the benefit of the doubt because she had not done well at previous interviews. We do find that Mr Daniels was more generous than the other interviewers in the scores that he gave, and that his scores were higher that you might expect. Mr Sahota gave the lowest score by a considerable margin, at 30.

61. During the hearing we were taken to the first three interview questions and Mr Sahota (but not the other interviewers) was asked about those. Taking each in turn:

    a. Question 1: Mr Amir scored 4 and the claimant scored 2. The reason he gave for this was because Mr Amir had pointed to management responsibilities, working with younger developers to support them, leadership and taking the initiative, whereas the claimant did not. The claimant submitted that the job description for the role did not include management or leadership duties. Whilst the role was not a managerial role, within the job description there was a reference to "*providing leadersh*ip" (page 153) and the person specification (page 159) included a reference to the ability to supervise others. In addition, Mr Sahota explained in evidence that there was an expectation at Band 7 to take on a role of mentoring junior staff. We also accept more generally (as set out at page 243) that both Band 6 and Band 7 roles require similar technical capability and a key difference between the Bands centre around the ability to support the wider team and to work autonomously. We find that Mr Sahota genuinely felt that Mr Amir answered the question better than the claimant had done.

    b. Question 2: The claimant pointed out that her response was longer

than that of Mr Amir, and inferred that this should have led to a higher score. We would note at this stage that the length of an answer is not necessarily an indication of its quality, and we also note that we are relying on non-verbatim notes taken during the interview and so we cannot say exactly how long each answer was. This question focussed on teamwork, which we find is a soft skill which the respondent expected Band 7s to be able to show. Reading the question "*give an example of where you have worked as part of a team and how you helped the team achieve the goals set out*", there are two parts to this question. Firstly, examples of where the candidate has worked on a team, but secondly how they helped that team. Mr Amir scored 4 out of 5, whereas the claimant scored 3. Mr Sahota explained in evidence that the key difference was that Mr Amir had set out how he helped the team – specifically, that he broke the information down and reviewed it together which is a key skill. This showed how he had transitioned the application in question. On reviewing the question and responses given, the Tribunal finds that the claimant has omitted to answer the second part of the question: she has talked about teams that she worked with, but not what she brought to those teams. Again, we find that Mr Sahota genuinely felt that Mr Amir had given a better answer to that given by the claimant.

c. Question 3: this question related to a hypothetical scenario where the candidate was building a new application using the latest .NET Core technologies. Mr Amir scored 5 and the claimant scored 1. The claimant suggests that Mr Amir had an unfair advantage because of his previous experience of this technology. Whilst he clearly had some interest in it as shown by a screenshot of a message sent on Teams a few months earlier, we do not know whether he had worked with this technology or not. In any case the question is hypothetical and we find that candidates should be able to answer questions about specific projects that they have not worked on, using general principles learned through other work. In this case, the model answer for example references SOLID principles and we find that the claimant could have referred to these. Whilst the Tribunal is not familiar with the terminology used in the answers, we can see that Mr Amir gave a detailed answer referencing various technical language, including "SOLID" which was terminology that also appeared in the model answer. To the Tribunal's untrained eye, he does appear to have given a comprehensive answer to the question. The claimant's answer does not reference "SOLID", and refers to leaving the decision to the team leader, which indicates a lack of the leadership qualities that Mr Sahota was seeking. Part (b) of the question does not appear to have been answered by the claimant and more generally the answers given do not appear to reflect the model answer. Mr Sahota has noted that he believes she has misinterpreted the question. We find that he genuinely believed that to be the case, and that Mr Amir had given a comprehensive answer in comparison to the claimant.

62. We were not taken to the other questions by either party specifically, so we are unable to address the precise quality of each answer given. However, as

a general theme, Mr Sahota submits that the claimant's answers demonstrated a lack of soft skills. By soft skills, he meant (as he said at page 244) skills outside of technical ability such as team work and communication. The Tribunal finds that the claimant's answer to question 2 did demonstrate a lack of soft skills, in that she could not identify how she had supported the teams she worked with and in question one she did not bring any points forward showing soft skills either. In evidence Mr Sahota did accept that the claimant's answer to question 2 demonstrated some soft skills: whilst the claimant relies on this to show that she had soft skills, we accept Mr Sahota's evidence that he was not saying she had no soft skills, simply that she only had some and Mr Amir appeared to have more.

63. We find generally that Mr Amir performed better than the claimant during the interview. However, we also find that Mr Sahota's scores were particularly low and, despite Mr Amir having performed better than the claimant, we are surprised that they were so low in comparison to the other interviewers.

64. Each of the interviewers collated their scores, and in most cases noted them on the question form (although Miss Lester placed the claimant's scores directly into a template spreadsheet). After the interview, once each of them had allocated their scores, Miss Lester, Mr Sahota and Mr Daniels had a meeting to discuss the outcome. They shared their scores with each other, completed a spreadsheet of all the scores (page 346), adding them up and agreeing that Mr Amir would be offered the role as he had received the higher score. They also agreed that Mr Sahota and Mr Daniels would provide joint feedback to the claimant later that day on the interview. They decided to do this jointly because the claimant had been unsuccessful in applications on a number of occasions and they wanted to show senior level support to her: we accept this intent although we find that in fact it may have had the opposite effect.

65. In order to assist them with that, Miss Lester also sent an email to Mr Sahota and Mr Daniels (page 172) summarising her view of each candidate overall. This represented her view and not those of Mr Sahota or Mr Daniels. She highlighted in this that the claimant had demonstrated great technical ability but not how she would use her skills in a management role or work independently from management when making decisions.

66. The claimant has made a number of allegations of unfairness in the process, separate to the individual scores applied:

    a. She has alleged that Miss Lester was not qualified to score technical questions. We have addressed our findings on this above.

    b. She alleged that Mr Sahota took account of his personal views as to her soft skills, as shown in a later interview as part of a grievance investigation. We find that Mr Sahota was indeed influenced by his general perception of the claimant's lack of soft skills, and that this is one reason why he scored the claimant significantly lower than the other two interviewers.

    c. Likewise, she alleged that Mr Sahota took account of her performance on a project called "Clinical Portal" which she did not

reference during the interview. Again, based on his answers to the subsequent grievance investigation where he referred to "Clinical Portal" and the claimant's attitude and skills more generally (page 244), we find that this he did and again this is a reason why he scored the claimant significantly lower than the other two interviewers.

d. She alleged that Mr Daniels was influenced by his view of her as being "*odd*", as he mentioned during his interview in relation to her later grievance. We find that he did find her "*odd*" (page 229) and again we believe that this would have influenced his view of the claimant at interview.

e. She has alleged that Mr Sahota and Mr Daniels influenced Miss Lester's scores, either directly or by skewing the questions and her information about the technical requirements so as to disadvantage the claimant. We do not accept that.

f. The claimant submits that she can work autonomously as shown by her work on her Test Your Care project. The respondent submits that the claimant cannot argue on the one hand that the scores should be based on the interview alone, but on the other hand that something she did not reference in interview should be taken into account. We find that there is a conflict here, and that the claimant should have drawn attention to her autonomous working during the interview.

g. The claimant says that Mr Amir was awarded the role because of his work on C#. We do not accept this, we find that he was awarded the role based on his performance at interview.

h. The claimant maintains that the answers she gave were good, even if they did not mirror the model answers. Whilst we are unable to assess the technical aspects of the answers given, we have found that the claimant focussed heavily on technical skills and not the wider skills that the respondent was looking for.

i. She alleged that the scoring was influenced by her grievances. We turn to that in our conclusions below.

<u>Grievance 29 July 2021</u>

67. The claimant raised a further grievance dated 29 July 2021 regarding the decision not to appoint her to that role (page 201). The complaint clearly references the failure to promote her to the Band 7 role and argues that this was victimisation based on her previous complaint about Mr Daniels, but is targeted at the actions of Mr Daniels. We find that this was because the claimant believed that Mr Daniels was the key perpetrator and assumed that his scores would have been particularly low, and also that he would have been able to influence the scores of the other interviewers. In short, she blamed him for her not been offered the role. At this point the claimant had not seen the scores and so would not have known that Mr Sahota and Miss Lester scored her lower than Mr Daniels did.

68. On 16 September 2021 Georgina Begley, investigating officer, interviewed

the claimant about her complaint (page 207). At box 107 of the interview notes (page 215) it is clear that Ms Begley believes the complaint to be centred around the treatment by Mr Daniels. The claimant confirmed to Ms Begley that her summary of the allegations was correct, and did not mention Mr Sahota. She said later in the interview that she had very good relations with Mr Sahota and the only person she had a problem with was Mr Daniels (box 184, page 222). We find that this was because her key concern was indeed how Mr Daniels treated her. During the meeting the claimant also referred to her priority being to rebuild her C# skills (box 142, page 217).

69. During the meeting the claimant also said that Mr Daniels did not like people from "East Europe". She did not reference Poland specifically and we find that the claimant had not really considered whether Mr Daniels was discriminating against her as a Polish individual or an Eastern European individual.

70. The claimant went onto discuss the interview itself (page 224). At box 196 it was pointed out to her that there was an interview panel of three. The claimant said that Miss Lester did not have any special experience and that she was an "accidental" third person. We find that by this she meant that Miss Lester was not qualified to assess performance at interview, and not any suggestion of victimisation by Miss Lester. She also said that Mr Daniels would have the final word.

71. Mr Daniels was interviewed in relation to that complaint by Georgina Begley and Sophie Rowe on 1 October 2021 (page 228). Miss Lester was interviewed on 7 October 2021 (page 239). Mr Sahota was interviewed on 14 October 2021 (page 242). The information provided in those interviews to Ms Begley was generally consistent with the evidence that each of them gave to this Tribunal. One additional point however which was not discussed in evidence but which the Tribunal feels is relevant is a comment by Mr Daniels in his interview (page 237) that "*We are going all out to support her and I am sure if she is appointed all of this will stop. If we can help her and make our life's easier*". By this we find that he meant that the only way for the claimant to stop raising complaints would be if she was awarded a band 7 role.

72. Ms Begley produced a report (page 248) and wrote to the claimant with the outcome by letter dated 15 November 2021 (page 275). The claimant's grievance was not upheld. The claimant says that she did not see the report and suggested it was created for the purposes of her later appeal. We accept that she may only have been sent the outcome letter and not the internal report, however we would expect it to have been created alongside the outcome letter rather than for the appeal. It does not however have any relevance to the case when exactly this document was created.

73. The claimant says that the report was inaccurate in that on page 5 of it, (page 267) at 7.1.4, she said that she had not explained, as the report says she had, that the interview included competency and scenario based questions. She said that in her understanding the questions were just technical. Based on her understanding of the questions, we find that she would not have knowingly said that it was a mixture of competency and scenario based, however we find it telling that the claimant has not interpreted the questions

as being anything other than technical in nature. The Tribunal finds this to be an indication that the claimant had not fully understood what skills the questions were seeking to ascertain and that she had not identified the soft skills that the role required. This also supports the fact that the nature of the answers given by the claimant to which we were taken in evidence did focus on the technical skills.

74. The claimant appealed on 23 November 2021 (page 284). Again she referenced treatment by Mr Daniels and not by Mr Sahota. The appeal outcome was issued on 10 February 2022 (page 300) and was not upheld.

75. The claimant applied for a further Band 7 role later than year, and was interviewed by a different panel. The claimant was successful in that application and took on a Band 7 role from 1 January 2022. The job title for this role was "Senior NET Developer", which is the same job title as the role applied for in June 2021.

76. Finally, it is worth referencing the relationship between Mr Sahota and the claimant between January 2021 and June 2021. We find that during this time, and in fact beyond it until documents were exchanged for the purposes of this claim, the claimant believed she had a good relationship with Mr Sahota and felt that he was supportive of her. She referenced this on numerous occasions, including expressing gratitude for being moved under his line management, and a consistent theme of her complaints was that she placed the blame with Mr Daniels and if anything went out of her way to show that she did not blame Mr Sahota. In contrast, we find that Mr Sahota found the claimant difficult to work with, and we noted his frank admission that he had not wanted her in his team. We find that he behaved professionally as a manager, not letting on how he felt, but that he was on occasion frustrated with her.

Law

Victimisation

77. Section 27 of the Equality Act 2010 ("the Equality Act") provides:

(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.

(2) Each of the following is a protected act:

a) Bringing proceedings under this Act;

b) Giving evidence or information in connection with proceedings under this Act;

c) Doing any other thing for the purposes of or in connection with this Act; and

d) *Making an allegation (whether or not express) that A or another person has contravened this Act.*

78. The detriment will not be due to a protected act if the person who put the individual to the detriment did not know about the protected act (*Essex County Council v Jarrett EAT 0045/15*, and *Deer v Walford and anor EAT 0283/10* where awareness of "some sort of legal case" was insufficient to establish knowledge).

79. For victimisation to occur, the detriment must be because of the protected act. It does not need to be solely because of the protected act to amount to victimisation, but it does need to have a significant influence (*Nagarajan v London Regional Transport 1999 ICR 877, HL*). This means an influence which is "more than trivial" (*Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases 2005 ICR 93*).

80. The motivation does not need to be conscious (*Nagarajan,* above). It is possible for a dismissal or detriment to be in response to a protected act but nevertheless not amount to victimisation if the reason for the treatment is not the complaint itself but a separable feature of it such as the way in which the complaint was made (*Martin v Devonshires Solicitors [2011] ICR 352*).

81. The focus should be on the motivation of the person who submitted the individual to the detriment. If a third party provided "tainted information" to influence the decision maker, that would need to be raised as a separate allegation, otherwise an innocent party could find themselves liable for an act for which they were personally innocent (*Reynolds v CLFIS (UK) Ltd and ors 2015 ICR 1010, CA*).

Burden of Proof

82. Section 136 of the Equality Act (burden of proof) states that:

(1) This section applies to any proceedings relating to a contravention of this Act.

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

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

83. This is in essence a two stage test: first, the claimant must show facts from which the Tribunal could decide that unlawful discrimination has taken place. If the claimant cannot, the claim fails. If the claimant can show this, then the burden shifts to the respondent to show that it did not discriminate against the claimant. Although the burden of proof is a two stage test, there are cases where an Employment Tribunal can legitimately proceed directly to the second stage of the test (see, for example, *Laing v Manchester City Council*

and anor 2006 ICR 1519, EAT).

84. In many cases there will be no direct evidence of discrimination and therefore the Tribunal should consider drawing inferences from the facts when considering whether the burden of proof has shifted to the respondent, taking account of all the evidence. However, the simple fact of differential treatment will normally be insufficient to shift the burden of proof. As stated by Lord Justice Mummery in *Madarassy v Nomura International plc 2007 ICR 867, CA*:

"The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".

Conclusions

85. It is accepted that the claimant's grievances dated 2 June 2020 and 15 June 2020 amounted to protected acts. Therefore, the sole issue in this case is as follows:

Was the claimant unsuccessful in her application for Band 7 Senior NET Developer which she made on 14 June 2021 because the claimant did a protected act?

86. It is accepted that the claimant was unsuccessful in her application for the Band 7 Senior NET Developer role in June 2021. Therefore, in reality, the only question for the Tribunal is whether the reason she was unsuccessful was because of her protected acts. In order to assess this, we must consider the conscious and subconscious motivation of the respondent.

87. It is not necessary for the sole reason for the treatment to be the protected acts, provided the protected acts have a "significant influence" on the respondent. "Significant influence" in this context means more than trivial: it does not have to be the primary cause of the treatment, but it does need to be a significant factor. In addition, it does not have to be a conscious decision to victimise an individual: subconscious motivation for treatment can still amount to victimisation.

88. We have considered whether the claimant has shown facts from which we could decide, in the absence of any other explanation, that the respondent has victimised the claimant (and therefore shift the burden of proof to the respondent to show that it did not discriminate). In considering this, we note that there is no direct evidence linking the protected acts to the failure to appoint her at interview. However, equally, there rarely is in such cases and we need to look beyond that, at the wider picture.

89. Here, we have taken into account some relevant circumstantial evidence, as follows:

    a. The claimant applied for another role, with the same job title, approximately six months later, before a different interview panel,

and was awarded the role. We acknowledge that this, without more, does not mean that discrimination took place on the earlier panel, but it is worthy of note.

b. Two members of the interview panel were people who were aware of the claimant's protected acts (see below), and indeed were implicated by them (including Mr Sahota, who was implicated insofar as the protected acts made allegations that the interview processes in which he had participated were discriminatory, even if there were no specific allegations against him as an individual).

c. The person who was appointed to the role was a Band 5 employee whereas the claimant was Band 6. Whilst not unheard of, it is not common to jump from a Band 5 to a Band 7 role.

d. When interviewed about the reasons for not awarding the claimant the role (page 244), Mr Sahota gave some reasons which were unrelated to the interview.

e. Mr Sahota initially denied seeing the grievance dated 2 June 2020, but had to accept following further disclosure that it had in fact been sent to him and he had commented on it.

f. Mr Sahota had been on every interview panel on which the claimant was unsuccessful (although we do note that earlier interviews pre-dated the protected acts).

90. In light of these factors, we do find that the claimant has provided sufficient facts from which, in the absence of another explanation, discrimination has occurred. The burden of proof therefore shifts to the respondent to show that it did not victimise the claimant. We now turn to the question of whether the respondent has shown that discrimination has not occurred.

91. We address first the question of knowledge. Clearly the respondent had knowledge, but we need to address whether the individuals who scored the claimant had knowledge themselves as it is only if they individually had knowledge that the scores can have been tainted. For the avoidance of doubt, we do not conclude that Mr Daniels and/or Mr Sahota somehow influenced the scores attributed by Miss Lester, or that Mr Daniels influenced the score given by Mr Sahota.

92. There were three interviewers and we take them in turn:

a. Miss Lester. Even the claimant accepts that she had no knowledge, given that she argues that Miss Lester should have taken additional steps to find out whether the claimant had raised prior grievances. We do not consider that the questions were designed to disadvantage the claimant (which might have led Miss Lester to inadvertently have been influenced by the protected act, had the questions been designed in such a way because of that protected act). In those circumstances, Miss Lester simply cannot have victimised the claimant as she simply did not know that the claimant had complained of race discrimination previously. Her scores must

therefore be untainted by discrimination. She gave Mr Amir a score of 52 and the claimant a score of 38, a considerable difference.

b. Mr Daniels. There is no suggestion that Mr Daniels was unaware of the protected acts, he clearly was. The test for knowledge is met.

c. Mr Sahota. We conclude that Mr Sahota clearly had knowledge of the claimant's grievance dated 2 June 2020. We have found that it was unconvincing that he would not have read it at the time, but even if he had not, he had clearly, and he accepts, been told about it and about the fact that it related to the job applications where he was on the interview panel. The grievance clearly referenced discrimination in bold. We are confident that Mr Sahota would have had knowledge of this protected act. In relation to the protected act of 15 June 2020, there was no evidence as to whether this was sent to him or not. However, given the relationship which he had with Mr Daniels and their regular team meetings, we conclude that he would have had awareness of this protected act too, even if he had not seen the physical document. We also expect that it would have been referred to as part of the combined grievance investigation into both the 2 June and 15 June grievances.

93. Therefore, we conclude that Mr Daniels and Mr Sahota had knowledge of the protected acts, although Miss Lester did not.

94. The next question is whether, in Mr Daniels and Mr Sahota's case (having found that Miss Lester cannot have victimised the claimant due to lack of knowledge), either or both of them were significantly influenced by those protected acts.

95. We note that Mr Daniels scored the claimant the highest out of all three interviewers, with a score of 43 (in comparison to the score he gave Mr Amir of 50). Whilst he still scored Mr Amir higher than the claimant, the fact that he has given the highest score to the claimant out of the three interviewers is relevant, particularly given the claimant's assertion that he was the one who was the instigator of the discrimination. We accepted his evidence that he wanted the claimant to do well and gave her the benefit of the doubt because she had not succeeded in previous applications. Having considered the fact that Mr Daniels' scores were higher than the other interviewers, combined with his comments during the 1 October 2021 grievance investigation meeting suggesting that he felt the complaints would only stop if she was successful in being awarded a Band 7 role, we in fact find that if anything Mr Daniels artificially inflated the score that he gave to the claimant in the hope that this would avoid her raising further complaints about him. We have found that Mr Amir did perform better than the claimant at interview, and we find that Mr Daniels' scores for the claimant were surprisingly high. Therefore, we find that the protected acts may in fact have caused Mr Daniels to unusually treat the claimant more favourably rather than placing her at any detriment.

96. In relation to Mr Sahota, we have analysed the three specific questions that we were taken to above. Whilst Mr Sahota's scores were particularly low in relation to the claimant, Mr Sahota satisfied us with his answers that Mr Amir

gave better answers to those questions than the claimant had done and therefore deserved a higher score than the claimant. We were particularly persuaded by the rationale in relation to question 2, in that the claimant failed to answer half of the question and omitted the section about soft skills. We have also accepted more generally that Mr Amir performed better at interview than the claimant.

97. We do however find that Mr Sahota's scores of the claimant are particularly low. The key question then is what is the reason for that, and was that influenced to a more than a trivial extent by the protected acts. We conclude that in reality the reason why he marked her particularly low was because he was influenced by his general perception of the claimant as being difficult to work with and lacking in soft skills. He was aware that she had had problems with several managers, and that her communication style presented challenges in the workplace. This is reinforced by the answers he gave when interviewed about her grievance where, as well as saying that the scores were based on the interview, he did stray into other matters. Crucially however, he did not stray into the claimant's grievances and we do not believe that the claimant's grievance dated 2 and 15 June 2020 formed any part in his decision making process. In addition, even if he had not taken account of anything other than the answers given at interview, we find that the claimant would still have been unsuccessful, although her score would have been slightly higher.

98. Taking all of the above into consideration, we conclude that the respondent has shown that:

    a. the claimant genuinely performed worse than Mr Amir at interview and therefore that the decision to offer Mr Amir the role was due to his performance, and not because the claimant had raised protected acts; and

    b. to the extent that factors outside of the interview process were taken into account in the decision making process,

        i. in relation to Mr Sahota, that related to the general view of the claimant as having a lack of soft skills and being difficult to work with, not her grievances,

        ii. in relation to Mr Daniels, if anything he inflated her scores because of his concern that she might otherwise raise further complaints; and

        iii. in any case, it would not have affected the overall outcome given that Mr Amir performed better, and Miss Lester did not even know about the grievances and yet scored Mr Amir significantly higher than the claimant.

99. The respondent has therefore shown that it did not contravene section 27 of the Equality Act and victimisation did not occur.

100. The claim is dismissed.

Employment Judge Edmonds
4 July 2023