mf

EMPLOYMENT TRIBUNALS

Claimant: **Ms J Lewis**

Respondent: **London Borough of Hackney**

Heard at: **East London Hearing Centre**

On: **1-3 March 2017**

Before: **Employment Judge Russell**
Members: **Mr S Morphew**
Mr M L Wood

Representation
Claimant: **In person**
Respondent: **Mr Elliot Gold (Counsel)**

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

(1) The claim of unfair dismissal fails and is dismissed.

(2) The claim of victimisation contrary to section 27 of the Equality Act 2010 fails and is dismissed.

(3) The complaint of harassment contrary to section 26 of the Equality Act 2010 fails and is dismissed.

(4) The complaint of direct race discrimination contrary to section 13 of the Equality Act 2010 fails and is dismissed.

(5) The claim for redundancy pay and notice pay fail and are dismissed.

REASONS

1 By a claim form presented to the Tribunal on 13 September 2016, the Claimant brought claims of unfair dismissal, discrimination on grounds of race, victimisation, harassment, for redundancy payment and notice pay. The Respondent defended all

claims. The matter was considered at a Preliminary Hearing by Employment Judge Goodrich who identified the issues to be decided in the case. We adopted and followed this list of issues when reaching our own conclusions.

2 The Tribunal heard evidence from the Claimant on her own behalf. For the Respondent it heard evidence from Ms Kay Brown (Director of Customer Services, Finance and Corporate Resources Directorate), Mr Stuart Thorn (Strategic HR Business Partner for the Chief Executive's Directorate) and Mr Mac Kelany (Security Analyst).

3 We were provided with an agreed bundle of documents and we read those pages to which we were taken in the course of evidence.

Findings of fact

4 The Respondent is a local authority responsible for providing a range of services to the local community. The Claimant commenced employment in 2009 as an Executive Support Officer.

5 Following a restructure of the Senior Management team, the Claimant was transferred in April 2011 to the Directorate of Health and Community Services.

6 The Claimant provided secretarial and administrative support to Mr Tom McCourt (Assistant Director - Public Realm). She was based at 2 Hillman House and was employed on a PO1 grade. Secretarial and administrative support was provided to other Assistant Directors by four Executive Assistants. They were based out of the Hackney Service Centre situated adjacent to Hillman House and employed on SO1 grade. The Claimant and Mr McCourt were the only Assistant Director and Executive Support Officer within that Directorate based at Hillman House. The Corporate Director, to whom Mr McCourt reported, was Ms Kim Wright.

7 In late 2011 and early 2012, the job descriptions of all secretarial and administrative support staff supporting the Directorship Leadership team were reviewed with a view to standardising the job descriptions and grades upon which the Executive Assistants were employed. The Claimant was included within this review. It was proposed that all Executive Assistants should be employed at the lower SO2 grade. The restructure of support roles took place with effect from 1 December 2012.

8 The Claimant was unhappy with the proposal and presented a Tribunal claim on 8 February 2013 alleging race and sex discrimination. She also raised a grievance on 1 March 2013 raising the same concerns about the re-grading restructure and discrimination. That grievance was rejected on 11 December 2013. However as part of the process, it was agreed that the Claimant would revert to her original job title and description, remaining on the PO1 grade in reflection of the additional duties which she performed by comparison to the four Executive Assistants.

9 The Tribunal claim was heard by a Tribunal chaired by Employment Judge Lewis on 15 and 16 May 2014 and all claims were dismissed. In its findings, the Lewis Tribunal set out the background to the restructure and at paragraph 9 found that the purpose of the review was for consistency and fairness. It would be more

advantageous from a management perspective if everyone was working to the same job description; it would be easier to provide effective cover and if there were any future restructures required (which seemed likely in light of the Council's financial position) it would make the procedure less complicated and fairer for all affected support staff.

10 The Lewis Tribunal found that the Assistant Directors were also potentially likely to be the subject of further reorganisation or restructuring and it was envisaged that the support staff underneath any director in such a restructure would form more of a pool, or cohort, of support staff across the Directorate at that level. This would mean that if there were a reduction in Assistant Directors, it would not necessarily mean a reduction in the support staff as it would be easier to slot them into a role supporting another Assistant Director.

11 The desire for greatest consistency of job descriptions and a move towards pooled working amongst support staff is also demonstrated in a number of emails sent during 2012 and early 2013.

12 The evidence shows that the Claimant was a good, professional worker whose primary job was to provide support to Mr McCourt. On balance, we find that when asked by Ms O'Hara or Mr McCourt on specific occasions to help with other support work, the Claimant agreed to do so. Nevertheless, throughout her employment, the Claimant regarded herself as dedicated executive support to Mr McCourt providing ad hoc support to others in response to a particular business need. By contrast, from a very early stage, Ms Wright wanted to move the service towards a principle where the Executive Support staff were pooled to support the Directorate generally. This led to some friction between the Claimant, Ms Wright and Ms O'Hara as can be seen from the contemporaneous emails.

13 In an email of 26 April 2012 dealing with cover arrangements for the absence of an Executive Assistant, Ms Wright reluctantly approved agency cover. Ms Wright asked that Ms O'Hara (Head of Directorate Executive Support and the Claimant's line manager) ensure that the Claimant was fully engaged in supporting the work of the Directorate as she was a full member of the Directorate Support Team even if she was based in 2 Hillman Street at that time.

14 A further email from Ms Wright, on 17 May 2012, recorded that Mr McCourt and the Claimant would both be based at the Hackney Service Centre for two days a week from 1 June 2012. Ms Wright believed that this would facilitate better integration, better and more efficient sharing of workload between and amongst Executive Assistants and more opportunities for Mr McCourt and Ms Wright to have ad hoc conversations. Neither the Claimant nor Mr McCourt considered that such an arrangement was necessary, not least as they shared Hillman House with Ms Wright's own office. Nevertheless it appears that they did comply with that instruction at least until August 2012.

15 During this time, on 14 June 2012, Ms Wright emailed Ms O'Hara asking that whilst Mr McCourt was on leave he should ensure that the Claimant was based at the Hackney Service Centre every day to provide support and to be supported by the broader team. The Claimant objected as she did not consider it either necessary or

desirable. In the event, Mr McCourt arranged for the Claimant to work from another centre during his leave.

16 On 14 January 2013, Ms O'Hara sent an email asking that the Claimant and the four Executive Support Assistants use generic job titles on their email signatures, rather than the name of a specific Assistant Director or part of the Directorate. The Claimant was not happy with the proposal. Her view was that it was important to identify clearly to whom and to which service area she provided support. The disagreement persisted for some time. It was only when Ms O'Hara raised the issue again in June 2014, that the Claimant modified her email signature insofar as she removed the name of Mr McCourt but still described herself as the Executive Support Officer to the Assistant Director – Public Realm.

17 In October 2014, an issue arose with regard to access to diaries. Ms Wright wanted greater detail recorded about the reason for any absence of support staff. The Claimant regarded the request for more detail as 'uncalled for scrutiny' and made clear that she did not intend to change what she recorded in her calendar, despite the fact that this was a request made by her Corporate Director.

18 In February 2015, a telephone list for Health and Community services was circulated. It identified by name and telephone extension the Corporate Director, the Assistant Directors and Heads of Service. Managers and Executive Support Assistants to Corporate Directors were named. Those providing executive support to the Assistant Directors were not named but referred to by the generic job title and with their telephone extension. Mr McCourt asked the Claimant to add her name to the proposed list. The Claimant agreed, not least as she objected to the anonymity caused by the removal of her name. We find that the telephone list as drafted was consistent with Ms Wright's wish to move to a generic job title and pooled support service arrangement for Assistant Directors who could cover for each other when required, rather than a dedicated support assistant or officer as had previously been the case. We also find that the Claimant's objection was understandable, given her higher grade and employment history, and to some extent her view was shared by Ms Worrell who also considered it could be useful to name the Executive Support Assistants.

19 It is against this background that, on 30 April 2015, Mr McCourt attended a one-to-one supervision meeting with Ms Wright, his line manager. The notes of that meeting state that it was agreed that during Mr McCourt's periods of annual leave, the Claimant would provide cover support to other Assistant Directors and be based in the Hackney Service Centre. The reason that the Claimant was identified by Ms Wright was that she was the only member of the team not located in HSC and not already working in that more flexible way.

20 Mr McCourt showed the notes of his 1:1 to the Claimant as he disagreed with the accuracy of the stated agreement. On 12 May 2015, Mr McCourt sent an email setting out his view that the Claimant already covered for other Executive Assistants and the issue of cover of other Executive Support Assistants' absence and her attendance at the Hackney Service Centre were a matter for discussion between the Claimant and Ms O'Hara. Ms Wright disagreed; she maintained that she and Mr McCourt had discussed the general need for support in the Hackney Service Centre and that the Claimant could be effectively utilised in his absence as a resource to

support Assistant Directors across the Directorate rather than just Mr McCourt. Ms Wright explicitly referred to a need to provide cover to Ms Genette Laws whose Executive Support Assistant was on leave at the same time as Mr McCourt.

21 Following the exchange of emails with Mr McCourt, Ms Wright emailed Ms O'Hara in the following terms:

> "**Hi Liz**
>
> **I'm aware of the high levels of activity within the ESA's generally and so, having discussed this with HR and Tom, we need to ensure we are deploying the ones we have effectively. Therefore, while Tom is on leave for periods of more than just the odd day or two, please ensure that Jackie is based in the HSC to assist, rather than staying in 2 Hillman Street. I'm sure her skills and abilities will be much welcomed and, as a resource for all the AD's across the Directorate, she will be able to bring an "extra pair of hands" to the team based in HSC.**
>
> **Tom is on leave from 26 May – 8 June inclusive so this is the first period when I would expect this to happen for the entire period – I understand that Debbie is away 26-29 May so I'm sure it will prove especially useful for the team, and Genette, then**."

22 Ms O'Hara forwarded this email to the Claimant stating that they could discuss the practicalities of it when they met the following week for her appraisal with Mr McCourt. There is no evidence that the instruction would have caused the Claimant an excessive workload, particularly as Mr McCourt would be absent. In the event, the practicalities were not well arranged as the Claimant encountered severe IT problems when she attended Hackney Service Centre such that she did not achieve a great deal.

23 Ms Laws was informed of the proposed support from the Claimant. She contacted Ms O'Hara to inform her that there was an ongoing restructure which might affect the Claimant's sister. Whilst she made clear that she had no doubt that the Claimant was professional and discrete, Ms Laws stated that she would prefer not to put the Claimant in the position of seeing sensitive information going through her Outlook account and so asked for that part of the work to be passed to someone else. We find that this was not an improper request. Ms Laws was trying to avoid a potentially embarrassing position for the Claimant; she was not suggesting implicitly or explicitly that either the Claimant or her sister would behave in an unprofessional manner or could not be trusted. There was no evidence from which we could find or infer that Ms Laws knew about the Claimant's earlier grievance and Tribunal proceedings and we find that they were unrelated to reasons for restricting access.

24 The Claimant was asked to work in HSC again in August 2015. She did not do so as on 25 August 2015 she emailed Ms O'Hara raising concern about the arrangements and the need for a workplace assessment. We find that the Claimant understood that Ms O'Hara remained responsible for the practicalities of what work would be done, how and for whom whilst she was at HSC.

25 On 21 May 2015, following the first request to work in HSC, the Claimant submitted a six page letter of complaint in which she made numerous references to bullying, harassment, victimisation and the previous Employment Tribunal proceedings. The Claimant did not expressly allege breach of the Equality Act or race discrimination

nor did she expressly state that she was submitting her complaint under the Respondent's bullying and harassment policy. The contents of the complaint made clear that the Claimant continued to refuse to accept the Lewis Tribunal's Judgment that there had been no race or sex discrimination in the original restructure. The Claimant complained that whilst she had set aside her feelings of grievance after the Employment Tribunal and had sought to behave in a polite and professional manner in her dealings with those involved, Ms Wright had not shown the same level of professionalism. The Claimant stated that Ms Wright's instructions about working arrangements were deliberately meant to undermine her and implied that she was unreliable and untrustworthy, that Ms Wright involved herself in monitoring the Claimant's work in a manner which was uncalled for and had an agenda which was not acceptable or justifiable. The Claimant made repeated references to dishonesty by senior managers and employees with whose decisions she disagreed. She objected strongly to the use of the word "resource" by Ms Wright in her email, suggesting that it likened her to a piece of equipment and was an offensive term used deliberately to dehumanise her. The Claimant asked that Ms Wright's instruction be rescinded and she be allowed to work in 2 Hillman Street without further interference.

26 The Respondent's case is that this second grievance was made in bad faith; Mr Gold went so far as to describe it as puerile and facile. We do not agree. On balance we find that the Claimant genuinely felt aggrieved at the instruction given by Ms Wright. The Claimant felt that her status was being downgraded from an individual Executive Support Officer to individual Assistant Director to what she regarded as a dehumanised or anonymised pooled support service. This was in the context of an earlier restructure which had proposed to reduce her grade. The manner in which the Claimant repeated earlier complaints rejected by a Tribunal and her emotive use of language demonstrate a lack of objective insight and were capable of misinterpretation. However, we find that the Claimant was subjectively focused on the effect upon her own position of Ms Wright's desire to move to a shared support service. Her lack of objectivity, lead to her intemperate manner of expression.

27 The Claimant did not receive a response to her grievance until 16 June 2015. That belated response arose from an intervention by the Claimant's trade union who noted that the Respondent had not, in their view, ever been particularly proactive in addressing staff complaints. We infer from this comment that the tardy response was not unusual and not particular to the Claimant's complaint.

28 Mr Shields' response on 16 June 2015, was as follows:

> "**Dear Jacqueline**
>
> **Thank you for your Email and the attached letter.**
>
> **I would like first of all to apologise for the delay in replying.**
>
> **I have read the contents of your letter with interest and it seems that over the years you have raised a number of issues which I will not comment on.**
>
> **Your specific complaint seems to be that you have been asked to work from a different building whilst the person that you 'directly support' is on leave. I use the words 'directly support' as your letter makes many references to your job title and that fact that you**

'directly support' Mr McCourt.

One of the critical issues between a senior manager and their support team is direct daily contact and clear face to face communication. It also requires communication with the wider team. If staff are asked to relocate to support senior managers then I see that as a reasonable request particularly when the building they are being asked to relocate to is less than 40 feet away.

Your request is that I rescind Kim's instruction that I [sic] work from the HSC.

Unfortunately I can see no reason to rescind that instruction.

I am sure that this decision will be a disappointment to you."

29 The Claimant describes this reply as condescending and ridiculing. We do not agree. We accept that it is somewhat terse, deals only with the instruction to move to Hackney Service Centre and did not engage or address her broader complaint about Ms Wright. The content of the Claimant's written complaint should have put Mr Shields on notice that the Claimant was raising a wider grievance.

30 After the Claimant made clear that she was raising a formal grievance, Ms Kay Brown, an Assistant Director from another Directorate, was appointed to hear it. The Claimant was not given notes of interviews conducted by Ms Brown with Ms O'Hara and Mr McCourt. This was consistent with a distinction drawn in the Respondent's policies whereby witness statements are provided in disciplinary proceedings but not in grievances.

31 Minutes of the grievance hearing were taken by Ms Kerry Boddington. The first draft of the minutes was provided to the Claimant who made a number of amendments. A final version of the minutes was then produced, with some but not all of the Claimant's amendments adopted. The Claimant's evidence is that not only are the final minutes inaccurate but that they were deliberately so, with relevant answers removed and/or edited to show incorrect or monosyllabic responses by her. The Claimant's case was that the inaccuracies in the minutes were so serious that we should draw the inference that there had been discrimination on grounds of race. Ms Brown's evidence was impressive when dealing with the alleged differences; accepting that things may have been said that she did not recall or had simply been overlooked.

32 We had regard therefore to the extent of the differences in the final minutes produced by Ms Boddington and those submitted by the Claimant. We take into account the fact that Ms Boddington was not familiar with the issues and protected acts being discussed and that her initial minutes were not intended to be verbatim. On balance, we find that there were not material inaccuracies. There were some areas where the Claimant's minutes contained fuller sentences and some additional material but none where the overall sense of the minutes was different and none of sufficient consequence to permit any inference of race discrimination safely to be drawn.

33 We found Ms Brown to be an open and reliable witness; she appeared thoughtful and was prepared to make concessions which supported the Claimant's case where appropriate, for example agreeing that the Claimant had not breached confidentiality in seeing Mr McCourt's 1:1 notes and that due to IT problems the

Claimant had not had an ideal time at HSC in May 2015. On balance, we find that she conducted the grievance in a fair and impartial manner, both in the hearing and her subsequent decision-making process. Ms Brown considered the totality of the evidence before her, including the Claimant's responses and the statements from Ms Wright, Mr McCourt and Ms O'Hara. In considering the reasonableness of the request, Ms Brown drew on the practice in her own Directorate where Assistant Directors and the assistants moved from office to office and operated a pool system for support. Based upon all of this, Ms Brown concluded that Ms Wright's instruction had been reasonable and that there had been no bullying or harassment.

34 Ms Brown confirmed her decision to reject the grievance in a carefully reasoned letter sent on 7 January 2016, in which she included the following:

> "**I would expect you to consider your actions going forward and remind you that it is contrary to the Code of Conduct to raise grievances that could be seen as erroneous and without foundation**."

The Claimant suggests that this was an attempt to intimidate and threaten her. We do not agree. It was not standard practice to include this paragraph where a grievance failed. We accepted Ms Brown's evidence that she was concerned that the Claimant was repeating complaints which had previously been determined as without evidential foundation and would not accept decisions with which she did not agree. To some extent, as we have set out above, we agree with this description of the Claimant's approach. Ms Brown included the paragraph not in an attempt to intimidate the Claimant but to encourage her to consider first whether she had evidence to support to complaints rather than making allegations reliant only on subjective belief and emotion.

35 The Claimant appealed against the decision to reject her appeal. The Claimant's grounds were that Ms Brown had failed to investigate the grievance fairly and impartially, appearing to suggest that Ms Brown had deliberately chosen to ignore the Claimant's evidence and was unduly eager to support Ms Wright. The Claimant also complained about the paragraph above which she interpreted as an attempt to intimidate her into silence. The language used by the Claimant is again emotive, describing Ms Brown's reasoning variously as "contrived", "totally facetious" and an attempt to cover for Ms Wright.

36 The appeal was considered by Mr Neil Isaacs, an employee of Hackney Homes. The Respondent chose an external person to ensure fairness and answer any concern of the Claimant that management would "close ranks" against her. The appeal was not successful. Mr Isaacs believed that Ms Brown had reached conclusions which were reasonable; that there was nothing offensive in the use of the word "resource"; that the Claimant had not been entitled to copies of witness statements and that Ms Brown was right to alert the Claimant to potential consequences of raising grievances that are unfounded. Indeed Mr Isaacs made explicit the advice:

> "**Should you wish to raise any grievance in the future I would advise you to consider the issues as dispassionately as possible, consider whether any management instruction is reasonable (not whether you like it) and balance alternative explanations for decisions. However strongly you hold your views it is unlikely that grievances will be upheld in the absence of any corroboration**."

37 What is clear from the grievance, the appeal and from the Claimant's evidence to this Tribunal is that she strongly and sincerely disagrees with the business merits of Ms Wright's decision. Indeed, her belief is that the approach to a shared support model is so without merit that she infers that Ms Wright was acting with improper motive. We do not agree. Whilst the Claimant may have reached a different decision if she were the Corporate Director, the fact is that she was not and Ms Wright was. The decision to move away from executive support dedicated to a particular Assistant Director and towards a shared approach was a legitimate one, made for valid business reasons not least given the anticipated restructure in the Directorate.

38 In January 2016, the Respondent produced a delegated powers report of the Chief Executive considering changes to administrative support for a new senior management structure. The report recorded the financial challenges facing local authorities and the Respondent in particular, caused by dramatic cuts to central government funding and the effects of austerity measures. The Respondent had already reduced its spending by £130m but still needed to make further savings of approximately £60m over the next three years, with possibly more in the years ahead. The proposed restructure envisaged making savings of £713,898 (over 50% of the current budget) by deleting 33 posts and creating 16 new posts.

39 In order to achieve such savings, the Respondent decided to reorganise its senior management team to reduce the number of management posts. This had a consequent effect upon the Support Service which would also shrink. A number of alternative options were considered in the report. Options to keep Executive Officers dedicated to a particular Director and to keep Executive Assistants for each Director were rejected. In both cases, the Respondent decided that having the support as a group would provide a more powerful and useful resource, with greater flexibility and consistency of job description and pool support to senior managers more widely. The proposed new structure envisaged three generic role types in descending order of seniority: Executive Support Manager, Executive Support Officer and Executive Support Assistant. As existing support staff were on different grades, HR proposed the creation of two selection pools. Pool 1 identified those existing grades of support staff from whom the new PO3 grade Executive Support Officers would be selected. Pool 2 identified the existing grades of support staff from whom the new SO2 grade Executive Support Assistants would be selected. The Claimant was included in Pool 2. Ms O'Hara was in Pool 1.

40 The Claimant was advised of the proposed restructure in January 2016 and informed that a period of consultation would end on 10 February 2016. As part of the consultation process, affected employees were asked to consider whether they wish to take voluntary redundancy. The Claimant decided that she did. This was not surprising as the Claimant had commented on the proposals to the effect that she did not consider them workable for Public Realm. The Claimant attended two individual consultation meetings with Mr Stuart Thorn during which they discussed the proposed restructure. Some of the points advanced by the Claimant, and other employees, during consultation were accepted the Respondent, for example the ratio of support to director was increased and the number of support posts increased.

41 During the consultation meetings, the Claimant and Mr Thorn also discussed

terms upon which she would accept voluntary redundancy. At the meeting on 10 February 2016, the Claimant asked whether her leaving date could be 30 June 2016. Mr Thorn stated that this might be possible. On 22 February 2016, Mr Thorn sent the Claimant an email to confirm that the application for voluntary redundancy had been approved and that the Claimant would be required to work part of her notice period and paid in lieu for the remainder. As to termination date, he said:

> **"The Final Delegated Powers Report will be issued later this week and we will then commence the process of implementation. Once we have moved further into the implementation stage, I will be in a position to brief you further in relation to a possible release date for you. However, as I explained to you at your second individual consultation this will be unlikely to be before 30th June 2016 and the terms of your release will be in accordance with a settlement agreement as explained in my email of 16th February 2016."**

42 The Claimant confirmed by email on 4 April 2016 that she did not wish to participate in the selection process but wished instead to accept voluntary redundancy. There was no settlement agreement concluded between the parties.

43 On 15 April 2016, Mr Haynes the Head of Corporate Strategy wrote to the Claimant giving her notice of redundancy. Mr Haynes noted that the Claimant was entitled to a notice period of 12 weeks and referred to an agreement that she should work for four weeks with the remaining eight weeks' notice to be paid in lieu. The Claimant was advised of her right to time off to attend interviews, a right she exercised. The Claimant's employment terminated on 15 May 2016. At the date of termination the Claimant's annual salary was £34,380.

44 In or around June 2016, the Respondent agreed a pay rise which was backdated to 1 April for current employees. The Claimant had already received payment of the monies due on termination. The Respondent paid the Claimant the amount of the backdated the pay rise from 1 April 2016 to the date of termination but did not apply the pay rise to the sums already paid in lieu of notice and for redundancy.

45 Other Executive Support Assistants and Officers accepted voluntary redundancy in the restructure. The chronology for ESA's termination dates was as follows:

Name	Effective date of termination	Ethnicity
Pauline King	29 February 2016	Black other
Peter Wale	30 April 2016	White
Claimant	15 May 2016	Black Caribbean
Denise Longmore	30 June 2016	Black Caribbean
Samantha Crosbie	31 July 2016	Black
Karen Kuhnemann	31 July 2016	White
Joyce Moss	31 August 2016	White
Janice McKenzie	30 September 2016	White

The Claimant relies upon Ms Moss as an actual comparator. The Claimant also relies upon Ms O'Hara (part of the Support Officer pool) whose effective date of termination was 31 October 2016 and who is White.

46 As part of the senior management restructure, on 9 May 2016, the Respondent

recruited a new Director to discharge the roles previously covered by Mr McCourt and another Assistant Director who was primarily supported by Ms Moss. Both the Claimant and Ms Moss had applied for voluntary redundancy. Both the Claimant and Ms Moss expressed a desire to work for longer than the normal notice period if possible, pending recruitment of a permanent Executive Support Assistant. As the new Director would only require one of them, a decision needed to be made as to whether it would be the Claimant or Ms Moss who would have the later termination date. We accepted the evidence of Mr Thorn, whom we found to be a straightforward and reliable witness, that Mr Haynes decided to retain Ms Moss because she was prepared to stay until appointment of the new ESA whereas the Claimant wanted to leave at the end of June 2016 which could be sooner. Mr Haynes did not wish the Claimant to build up a relationship with the new Director and leave after a short period of time, requiring further interim support, but preferred Ms Moss who was prepared to stay for a longer run off period. Mr Gold accepted in his submissions that it might be thought that the Respondent did not want the Claimant to work with the new Director given her objection to the new working arrangements. We tend to agree but are satisfied that the concern was not that the Claimant had previously complained about race discrimination, but her hostility to the idea of working as shared support and the principles to be achieved by the restructure.

47 As for Ms O'Hara, she was more senior than the Claimant and was in a different selection pool. She worked until 31 October 2016 in a managerial position, also supporting Adult Social Care, where there had been a large number of senior management changes and she provided consistency about the service pending the finalisation of the new structure.

48 As for the others identified in the list, we accepted Mr Thorn's explanation that leaving dates were determined according to the needs of the role for an effective handover and were agreed by the relevant management team. Ms Longmore's employment was extended as she was on secondment until June, with her employment terminating when she returned to her substantive post. Were it not for the secondment, Ms Longmore would have left sooner as, like the Claimant, the Director to whom she had primarily been reporting had already left. Ms McKenzie was retained to perform ICT related roles which required consistency until they could be handed over to the new appointment. Overall, we are satisfied that release dates were decided based upon business need and not in any sense due to race.

Access of personal records

49 On 13 October 2015, the Claimant complained to the Respondent that documents in her personal file had been improperly accessed by Ms Michelle Taylor and Ms Kay Rout. Ms Taylor was the personal assistant to Mr Shields, to whom the Claimant had sent her complaint letter in May 2015. Ms Rout was executive personal assistant to Ms Wright. On 14 October 2015, the Claimant was contacted by Mr Murphy, ICT Security Manager, to confirm that her complaint would be investigated and he passed the matter to the Head of Technical Services. The Claimant provided screenshots of documents which had been accessed, including an expression of wishes for payment of a death grant, a performance appraisal, the grievance notification and grievance decision. The Claimant subsequently added to her complaint access to her birth certificate and grievance appeal decision by Ms Sharon

Mercieca (Executive Support Assistant) on 9 November 2015.

50 No progress was made by the Respondent until early November 2015 when it decided to obtain a report from the Information Management Team to show what documents had been accessed and by whom. Whilst the Claimant had already provided some screenshots, we accept that the Respondent considered it necessary to obtain a more full record in order for the Information Security team to investigate whether such access was legitimate. The Claimant was unhappy with the delay and repeatedly pressed the Respondent for progress and to implement restrictions to prevent further access to her personal file.

51 From early December 2016, following a handover from Mr Murphy, Mr Mac Kelaney assumed responsibility for the investigation. The Claimant accepted in evidence that Mr Kelaney had no knowledge of the protected acts. The IMT report was produced in late January 2016 and sent to HR by Mr Kelaney in early February 2016. The report also showed whether documents had been checked in or out (in other words actually opened or closed) where others had been viewed. We accept Mr Kelaney's evidence that for the latter category, this could occur automatically when shown on a preview page without in fact being read. Some of the documents, such as the expression of wishes and unconditional letter were viewed for one second, not opened and closed. Others, such as the birth certificate, appraisal and grievance letters were opened and closed.

52 The IMT report confirmed that Ms Taylor, Ms Rout and Ms Mercieca had access rights to the Claimant's files as part of their role as proxy to Ms Wright and Mr Shields, just as they did to other employees managed by the same. In other words, there had been no security breach but there remained a question about whether those rights had been used for good business reason. By 8 February 2016, Mr Tony Hart (Head of Technical Services Finance and Resources) sent an email internally confirming that the outstanding question be passed to Ms Wright and Mr Stephen Haynes, the line managers of those concerned, for investigation. This was notified to the Claimant by Mr Kelaney on 17 February 2016. The Claimant's reply, on 1 March 2016, was that access itself was a data breach given the nature of the documents.

53 On 22 February 2016, Mr Haynes confirmed that Ms Taylor did not recall deliberately accessing the expression of wishes record but had accessed the other documents related to the Claimant's grievance. We note from the IMT report that Ms Taylor had also accessed appraisals for other employees.

54 It was not until 12 April 2016 that Ms Wright produced a table setting out the responses of Ms Rout and Ms Mercieca. Both accepted accessing the appraisal and related documents as part of their job. Neither remembered accessing documents related to the grievance or the birth certificate. The table included a note to the effect that there had been issues with ICT, which they had reported, with documents including those opening on screen when not asked for.

55 As she had still not received a full response to her complaint, the Claimant raised her concerns with the Information Commissioner's Office who investigated. It was not until 29 April 2016 that Mr Keith Gatt (Technical Architecture and Development Manager, Technical Services ICT) informed the Claimant that the access had been

permitted by reason of the three women's proxy status, that a business need existed generally as part of their job but that they could not remember accessing many of the documents identified. The Claimant adduced no evidence from which we could find or infer that Mr Gatt knew that the Claimant had done a protected act. The Claimant was not satisfied with the response. The ICO concluded that it was likely that the Respondent had complied with the requirements of the DPA and found no evidence that a breach had occurred.

Law

Unfair Dismissal

56 It is for the employer to show the reason for dismissal and to satisfy the tribunal that it is a potentially fair reason, section 98(1) Employment Rights Act 1996 ('ERA'). Redundancy is a potentially fair reason for dismissal, section 98(2)(c) ERA. The definition of a redundancy is set out at section 139 ERA.

57 In order for the dismissal to be fair, the Respondent must follow a fair procedure. Guidelines for what is generally expected when considering the fairness of a redundancy were set out by the EAT in **Williams –v- Compair Maxam Ltd** [1982] IRLR 83, suggesting that there should be: (i) as much warning as possible; (ii) objectively chosen and fairly applied selection criteria; (iii) consultation about ways of avoiding redundancy, such as alternative employment; and (iv) where there is a trade union, whether the union's views were sought. We remind ourselves that these are guidelines only and are not principles of law.

58 If a dismissal is unfair due to procedural failings but the appropriate steps, if taken, would not have affected the outcome, this may be reflected in the compensatory award, **Polkey v A E Dayton Services Ltd** [1987] IRLR 503, HL. This may be done either by limiting the period for which a compensatory award is made or by applying a percentage reduction to reflect the possibility of a fair dismissal in any event.

Victimisation – s.27

59 Victimisation is defined in section 27 of the Equality Act 2010 as follows:

> **"(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;**
> **(d)making an allegation (whether or not express) that A or another person has contravened this Act.**
> **(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith."**

60 There is no need to show that a comparator would have been treated more favourably. There must however be: (i) a protected act; (ii) unfavourable treatment; and (iii) a causal link between the two.

61 Giving false evidence, false information or making a false allegation will not be protected if it is in bad faith, s.27(3) EqA 2010. In **HM Prison and others v Ibimidun** [2008] IRLR 940, the EAT held that the dismissal of an employee for bringing discrimination proceedings with the intention of harassing the employer and some of its other employees does not amount to victimisation for the purposes of section 2 of the Race Relations Act 1976. In the RRA, failure to act in good faith disqualified the employee from relying on the victimisation provisions. In the EqA, bad faith prevents an act from being protected. In other words, where proceedings or allegations are made with the intention of harassing the employer, s.27(3) will apply so long as the allegations are also false.

62 If satisfied that there is a protected act, the Tribunal must be satisfied that any unfavourable treatment was because of the same. As with direct discrimination, it is not necessary for the Claimant to show conscious motivation, it is sufficient that the protected characteristic or protected act had a significant influence on the outcome. If the author of the unfavourable treatment did not know that there had been an allegation of discrimination or discrimination proceedings, then the necessary causal link is not established, see **South London Health Care NHS Trust v Dr Al-Rubeyi** UKEAT/0269/09/SM.

63 In certain circumstances, it will be permissible to separate out factors or consequences following from the making of a protected disclosure from the making of the protected disclosure, as long as the Tribunal ensures that the factors relied upon are genuinely separable from the fact of making the protected disclosure and are in fact the reasons why the employer acted as it did, **Panayiotou v Chief Constable of Hampshire** [2014] IRLR 500, see paragraphs 50 to 54. Lewis J held that there is no additional requirement that the case be exceptional. Although this was a protected disclosure case, we accept Mr Gold's submission that the same principles will apply to a victimisation claim based upon a protected act.

Harassment

64 Harassment is defined in section 26 of the Equality Act 2010 as follows:

> **"(1) A person (A) harasses another (B) if -**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
>
> **(b) the conduct has the purpose or effect of -**
> **(i) violating B's dignity, or**
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
>
> **…**
>
> **(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account -**

(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect."

65 In **Richmond Pharmacology v Dhaliwal** UKEAT/0458/08/CEA, the EAT provided guidance to the effect that an Employment Tribunal deciding harassment claims should consider in turn: (i) the alleged conduct, (ii) whether it was unwanted, (iii) its purpose or effect and (iv) whether it related to race. As to effect in particular, at paragraph 15, the EAT made clear the importance of the element of reasonableness in determining effect, having regard to all of the relevant circumstances, including context and in appropriate cases whether the conduct was intended to have that effect.

Direct Discrimination - race

66 Section 13 Equality Act 2010 provides that a person discriminates against another if, because of a protected characteristic, he treats that other less favourably than he treats or would treat others. Race is a protected characteristic. Conscious motivation is not a requirement for direct discrimination, it being enough that sex had a significant influence on the outcome. The crucial question is why the complainant was treated in the way in which they were, **Chief Constable of West Yorkshire Police v Khan** [2001] ICR1065, HL.

Burden of proof in discrimination cases

67 In considering the burden of proof, we referred to s.136 Equality Act 2010 and the guidance set out in the case of **Igen Ltd v Wong** [2005] IRLR 258, CA as approved in **Madarassy v Nomura International Plc** [2007] IRLR 246, CA. This guidance reminds us that it is for the Claimant to prove facts from which the Tribunal could conclude, in the absence of adequate explanation, that the employer has committed an act of unlawful discrimination. The outcome at this stage of the analysis will usually depend upon what inferences it is proper to draw from the primary facts found by the Tribunal. Where the Claimant has proved such facts, the burden of proof moves and it is necessary for the employer to prove on the balance of probabilities that the treatment was in no sense whatsoever on the prohibited ground. If the Respondent cannot provide such an explanation, the Tribunal must infer discrimination.

68 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 we could conclude that there had been discrimination, **Madarassy** at paragraphs 54-57. The protected characteristic must be an effective cause of any less favourable treatment. We must take care to distinguish between unfair or unreasonable treatment and discriminatory treatment as the two are not the same.

69 Where a discrimination claim is based upon multiple allegations, it is necessary for the Tribunal to consider each allegation individually and also to adopt a holistic approach to consider the explanations given by the Respondent. We should avoid a fragmented approach which risks diminishing the eloquence of the cumulative effect of primary facts and the inferences which may be drawn, for example see **X v Y** [2013] UKEAT/0322/12. We must consider the totality of the evidence and decide the reason

why the Claimant received any less favourable treatment.

Redundancy Pay and Notice Pay

70 The Employment Tribunal has jurisdiction to hear claims brought by an employee for the recovery of damages or any other sum if the claim arises or is outstanding on the termination of the employee's employment. The Claimant's case is that her notice pay and redundancy pay were not made in full as they failed to take into account the backdated pay increase. As the redundancy payment was based upon actual salary, rather than the weekly maximum provided by the Employment Rights Act 1996, this was advanced as a contract claim also.

Conclusions

Unfair Dismissal

71 Dealing first with the reason for dismissal, we have no hesitation in concluding that the Respondent has proved that redundancy was the sole reason for the Claimant's dismissal. The effect of austerity measures upon local government funding and the need to make substantial cost savings is well known. The Claimant was one of a large number of employees affected by this particular restructure which itself arose out of a restructure of senior management which had reduced the number of Directors to whom executive support would be given, as such the Respondent had a diminished requirement for work of the particular kind undertaken by the Claimant.

72 As for procedural fairness, this was a large exercise which involved both individual and collective consultation. Affected employees were put at risk. The Respondent's reasons for restructuring, the different options considered and the selection pools were shared with employees and comments invited. Even though the Claimant was on a higher grade, it was reasonable to include her in the selection pool for Executive Support Assistants along with her peers who also provided support to Assistant Directors.

73 The Claimant refers to there being a foregone conclusion as to what the Respondent was going to do irrespective of what was said by employees in consultation. We accept that there was a degree of high inevitability as to the outcome of the consultation period but conclude that it arose out of the very pressing need to make drastic and deep cutting reductions in cost which significantly affected what realistically the Respondent could do. The Claimant's proposals and objections were largely predicated on her belief that the option chosen of shared support was not sensible or necessary. No doubt this view is genuinely held but we consider it indicative of the Claimant's inability to appreciate objectively the bigger picture rather than focusing narrowly and subjectively on her own role. This is not unusual and it is understandable that an employee will be focused upon their own position in a difficult restructure. However, it falls far short of establishing either a sham or a failure meaningfully to enter into consultation. The Respondent was entitled to, and did, reasonably take a different view for the efficiency and needs of the service overall. Where appropriate, the proposals were modified in light of employee comments, such as the support to director ratio. The Claimant's dismissal for redundancy was fair in all of the circumstances of the case.

Victimisation

74 The Respondent conceded that the Employment Tribunal proceedings brought on 8 February 2014 and the Claimant's first grievance dated 1 May 2013 were protected acts.

75 The Respondent's case was that the subsequent grievance dated 21 May 2015 was not a protected act relying on two grounds: (i) it did not allege discrimination and (ii) it was false and in made in bad faith.

76 Dealing with content of the grievance, we have found that it did not explicitly allege race discrimination nor refer to the Equality Act 2010. Section 27 does not require this for a protected act, quite the contrary as s.27(2)(d) recognises that an allegation need not be express. The Claimant made repeated references to her belief that she had been treated unfavourably, to her earlier Tribunal proceedings and asserted that she had been victimised. We are satisfied that read holistically the grievance of 21 May 2015 satisfied the requirements of s.27(2)(d).

77 We must then consider whether the contents of the grievance were false *and* made in bad faith. On the basis of the facts found by the Tribunal, we consider that the grievance and its allegations were not well founded. The request to move to HSC and Ms Wright's treatment of the Claimant were entirely due to her vision of the way in which executive support should be provided and desire to move towards pooled rather than dedicated support. It follows that we conclude that the allegations were false. The real dispute is the Claimant's motive when making her allegations.

78 Mr Gold's submission was that the 21 May 2015 grievance was put in the most vitriolic of terms, alleging dishonesty against all those whose decisions the Claimant did not accept, was in parts puerile or facile and deliberately ignored or misrepresented facts. Mr Gold submitted that matters of race have particular sensitivity. We agree. On the one hand concerns about race discrimination should be raised with care, based upon evidence and not levelled against an individual carelessly. On the other hand, race discrimination is more usually covert than overt and often relies upon inferences drawn from primary facts which may appear innocent. There are good public policy reasons why equal care must be taken to ensure that a person who genuinely believes that they have suffered discrimination because of race (or as here victimisation for having previously complained about it) is able to make their complaint without fear of victimisation or retribution. The sensitivity of believing oneself to be discriminated against will often, in our experience, cause an employee to respond in emotive terms rather than the carefully calibrated tone of a lawyer's letter. We consider that this is just such a case.

79 As Mr Gold put it, the Claimant has an unfortunate trait of interpreting neutral matters as solely relating to her and in the most negative way. As she candidly accepted, she was not slow to allege bad faith and bias in her correspondence where (in her view) it was warranted. Throughout, the Claimant was prepared to voice her disagreement in forthright terms in her emails. Her approach, including to the Judgment of the Lewis Tribunal, was that where somebody reached a decision with which she disagreed, she would not accept it and move forward but challenged it as

incorrect, unjust and at times, went so far as to suggest that others must be lying or disagreeing deliberately.

80 The Claimant did not, and seems still not to, accept that people may make honest mistakes or have genuine differences of opinion without necessarily acting in good faith. Whilst a more temperate response may be wiser, in our experience, it is not unusual for an employee in dispute with her employer over important issues of pay, grade and status to become upset and experience a strong sense of injustice as the Claimant has here. This does not, in our view, demonstrate bad faith although it did affect to some extent her credibility on some issues such as the reason for dismissal and in considering the reasonableness of her reaction to conduct also relied upon as harassment. On balance we found that the Claimant genuinely felt aggrieved and this caused her to use emotive and intemperate language when expressing her grievance. The Claimant demonstrated a lack of objectivity and was capable of misinterpretation, however we consider that it is not sufficient to find or infer bad faith. As such, we conclude that there were three protected acts by the Claimant.

81 The first act of unfavourable treatment relied upon as victimisation is the instruction of Ms Wright on 13 May 2015 that the Claimant work in the HSC whenever Mr McCourt was on leave when there was no business need. As set out in our findings of fact, there was a longstanding conflict between Ms Wright's desire to move towards a system whereby the executive support function became less dedicated to a specific Assistant Director and more of a shared source of support. The Claimant did not object in principle to helping other Assistant Directors but believed that it should only be where there was a specific business need. The Respondent has not falsely asserted, as the Claimant submits, that she refused to participate in cover arrangements rather that she would not agree to do so as a matter of general principle.

82 Ms Wright's desire to move to a standardised support function was evident from as early as the 2011/12 reorganisation. The Lewis Tribunal found that the purpose of the review was for consistency and fairness, making it easier to provide effective cover with the support staff forming more of a pool in the event of a reorganisation of the Assistant Directors. Whilst the Claimant's case was that there was no link between the request in 2011 and those in 2016 we disagree. In May and June 2012, again well before any protected act, Ms Wright had instructed the Claimant to work at HSC when Mr McCourt was absent on leave. It is consistent with the desire for more generic email signatures and the more generic telephone list. It was part of a consistent and overarching theme that became more pressing as the impending restructure was considered from 2015. In that sense, it was Ms Wright's instruction for the Claimant to provide cover more generally and work as part of a pooled support structure which caused the protected acts, not the other way around.

83 The Claimant's case is that it was not necessary for Ms Wright to have involved herself in staffing matters which were properly within the remit of Ms O'Hara and that she only did so in order to 'target' the Claimant. The Claimant did not accept that Ms Wright had demonstrated a specific business need to provide cover executive support to Ms Laws and therefore regarded the instruction as improper. Ms Wright was the Corporate Director; it was within her role to determine the way in which support would be provided, especially in light of the ongoing restructures for administrative efficiency. As long as the management instruction was reasonable, it was for the Claimant to

follow whether she agreed or disagreed. On this occasion, Ms Wright saw a need for cover amongst the team and instructed Ms O'Hara to make it happen in practice. Ms O'Hara was the Claimant's line manager and did not object to the proposal. The Claimant was specifically identified because she was the only Executive Support employee not already based in the Hackney Support Centre. Rather than a question of specific business need, Ms Wright regarded this as an opportunity to embed the principle of shared support which she wanted to introduce. We accept that she had a legitimate business reason to instruct the Claimant to be based in HSC whenever Mr McCourt was on leave, whether or not there was a specific business case. Furthermore, the instruction was in no sense whatsoever caused by the Claimant's earlier grievance and Tribunal proceedings.

84 It follows therefore we reject the Claimant's case that the requirement to work at the Hackney Service Centre during the period in May 2015 or the instruction that in the future she should work there whenever Mr McCourt was on leave and the requirement to cover Ms Laws were any act of victimisation. We have found as a fact that there were genuine reasons for restricting the Claimant's access to Ms Laws' email account. There was no evidence that Ms Law knew of the protected acts. As such, we do not accept that the protected acts were any part of the cause of the restriction.

85 Also relied upon as an act of victimisation is Mr Shields' response to the Claimant's 21 May 2015 grievance. Whilst Mr Shields did not treat the complaint as a formal grievance as he ought to have done, the letter written by the Claimant's trade union representative suggests that this was a broader failing on the part of the Respondent and not specific to the Claimant's case. The content of Mr Shields' response leads us to infer that he understood himself to be dealing with a single issue of the instruction to work at the HSC, not a complaint submitted under the bullying and harassment procedure raising a broader grievance about Ms Wright's treatment of the Claimant. Albeit rather late in the day, Mr Shields did respond to and determine the complaint about the specific instruction to work at HSC. We have not found as a fact that his email was either condescending or ridiculing as the Claimant has suggested. Whilst it would have been better practice to have passed the matter to HR for consideration and/or to clarify whether the Claimant wished to make a formal complaint under a relevant procedure, we do not accept that the Claimant has proved primary facts from which we could conclude that the failure to do so, in all of the circumstances, was because of the allegations of victimisation contained therein.

86 The third area of unfavourable treatment relied upon is concerned with the handling and outcome of her grievance once made formally. In her evidence and submissions, the Claimant appeared to focus more upon whether she had been treated fairly in the grievance procedure as opposed to whether such treatment was *because of* a protected act.

87 The Claimant objects to the appointment of Ms Brown and Mr Isaacs, complains that they failed to conduct the grievance hearing in a fair and impartial manner and (by extension) that their decisions not to uphold the grievance were equally flawed. We took into account the Claimant's concession that she was not aware of any direct link between Ms Brown and Ms Wright or indeed her directorate. Furthermore, Mr Isaacs was an external person chosen to hear the appeal to ensure fairness. We do not accept that either appointment was unfavourable treatment or a detriment. Nor would

we conclude that the Claimant has proved primary facts from which we could conclude that the selection of these two people was materially affected by the protected acts. Somebody had to be appointed to hear the grievance. Neither Ms Brown nor Mr Isaacs were specifically chosen because there had been allegations of race discrimination, victimisation or reference to the earlier proceedings. In cross-examination, the Claimant accepted that she had accused every person with whom she had disagreed in the three years from the first grievance to Ms Brown's rejection of the second grievance, of a lack of fairness and impartiality. We also considered our conclusion, expressed above, that the Clamant appears unable to accept that not all decisions with which she disagrees are necessarily motivated by bad faith. Overall, we consider that the Claimant would have levelled the same claim of victimisation against any manager who did not uphold her grievance.

88 As for the manner in which Ms Brown and Mr Isaacs conducted the grievance hearings, we have not found that there was any unfair or impartial conduct. Insofar as there were differences in the minutes of the grievance hearing, we have not found the same to be material and accepted Ms Brown's explanations as impressive. No specific allegations were made against Mr Isaac regarding his conduct of the appeal, beyond the complaint about the outcome. Insofar as the Claimant was not provided with copies of the witness statements following interviews, we have accepted the Respondent's evidence that this was because its grievance procedure did not allow for the same (unlike the disciplinary procedure). Whether or not this is good industrial practice, and it appears not to be in express breach of the ACAS Code, we accept that it was the genuine reason why the Claimant was not given copies of statements. The same would have applied to any grievance, irrespective of the nature of the allegations contained therein. It would, in our view, have been better to provide copies to the Claimant. The combined effect of the delay in hearing her grievance, the failure to provide statements from witnesses and/or to finalise an agreed version of the notes exacerbated the Claimant's genuine belief that the Respondent was not dealing with her fairly and/or was not being open-handed. To say that things could be better handled however is not the same as victimisation. We do not consider that the protected acts were in any material sense the cause of such omissions; quite the contrary we consider that the same would be true irrespective of the content of the grievance or the earlier Tribunal proceedings.

89 We have not accepted that the Respondent restructured the Claimant out of the organisation. The Claimant chose to apply, and was accepted, for voluntary redundancy as part of a wide-ranging restructure. The outcome of the restructure was to implement Ms Wright's preferred model of shared support but, as we have concluded above, this pre-dated any protected act and was for sound business reasons in light of the requirement for significant cost saving and the reduction in the number of Assistant Directors. It is perhaps indicative of the Claimant's tendency to see the case only from her subjective perspective, and inability to accept that there may be other interpretations, that she regards the entire restructure as an act of victimisation to dismiss her.

90 The final complaint connected with the grievances is that Ms Brown and Mr Isaacs attempted to intimidate the Claimant by stating in their decision letters that her grievances were unwarranted and that she could be subject to disciplinary action if she raised another grievance. In our findings of fact, we have not agreed with the Claimant

that there was any attempt to intimidate or threaten her. The letters both encouraged the Claimant to consider the evidence in support of any complaint, Mr Isaacs in particular advised her to consider future grievances objectively. The Claimant was not being told that she could be disciplined if she raised a further grievance, only if she raised a grievance which was erroneous and without foundation. We see nothing unfavourable in such advice. It was not an act of victimisation.

91 The Claimant also claims that the Respondent's conduct of her complaint into access to her personal file was an act of victimisation. The investigation took some six months, an unduly long period of time. This was in part due to the handover in ICT, in part due to the decision to look at a broader range of documents than those initially identified by the Claimant and in part due to the involvement of more than one team. Whilst the Claimant had provided prima facie evidence by way of screenshots, we have accepted that the reason for the broader investigation was to investigate the legitimacy (rather than fact) of access. In other words, to provide context which was in fact given where the records showed that Ms Taylor had accessed the appraisal records of employees other than the Claimant. Mr Gatt's eventual response on 29 April 2016 did not provide any explanation for access to some of the documents beyond lack of memory or possibly IT error, for example the birth certificate. We accept that the very tardy response to the Claimant's complaint and the absence of any substantial explanation for the apparent access of some documents has added to the Claimant's sense of grievance and mistrust of the Respondent and its motives. As such, the Claimant has shown unfavourable treatment in connection with this complaint.

92 Mr Gold relies upon **Al-Rubeyi** as the Claimant conceded that Mr Kelaney, responsible for oversight of the investigation of the complaint from December 2015, did not know about the protected acts. There was no evidence from which we found, or inferred, knowledge of the protected acts by Mr Gatt either. Whilst the Respondent could and should have handled the complaint with greater speed and pressed further for an explanation, rather than accepting a broad denial by the three women involved, we do not consider that any of these failings were caused by the protected acts which were unknown to those handling the investigation. The protected acts were neither consciously nor unconsciously part of the reason why the investigation and resolution of the personal data complaint were handled as they were. Unreasonable conduct without more is not the same as discrimination, or victimisation. We consider that the failings in the investigation (which we do not accept amounted to a cover up) were entirely unrelated to race or the earlier protected acts but were due to administrative inefficiency and the ICT handover.

Harassment

93 The Claimant's case is that failure to respond to her on numerous occasions by the promised deadlines and that this caused her distress. This apparently relates to the investigation into her complaint about improper access to her personal file. It is not in dispute that there was a failure to respond within promised deadlines and that this may have caused distress. The issue is whether or not such conduct related to the protected characteristic of race. We do not consider that the Claimant has proved primary facts from which we could find that there had been discrimination. We have set out above, when considering victimisation, our conclusion that the reason for the delay was the decision to undertake a broader investigation, the involvement of more

than one department, the ICT handover and (to an extent) administrative inefficiency. The reason for the missed deadlines was in no sense whatsoever related to race. The claim of harassment related to race fails and is dismissed.

Direct Discrimination - race

94 Although rather ambiguous in the issues, we have considered whether or not the matters relied upon as acts of victimisation were also acts of direct discrimination because of race. In doing so, we bear in mind that for this claim the Claimant must show less favourable treatment. There is no actual comparator named and, therefore, we considered whether or not a hypothetical comparator of a different race would have been treated differently in the same or not materially different circumstances. We do not conclude that they would. As set out at length in our findings of fact and conclusions, we have accepted that Ms Wright had valid reasons for her instruction that the Claimant be based in HSC during Mr McCourt's periods of absence and that this was part of her broader strategic aim of pooled support, particularly in contemplation of a senior management restructure. There are no primary facts from which we could conclude that there was any race discrimination. Whether consciously or subconsciously, race was no part of Ms Wright's reason for her instruction to do so generally or specifically in respect of cover for Ms Laws. The Claimant was not being asked to work any differently than the other executive support assistants who already provided such cover. Furthermore, the reason why access to Ms Laws' emails was restricted was because of the restructure in which the Claimant's sister was involved. It was not an implication that the Claimant could not be trusted and we are satisfied that it would have applied equally to any executive support assistant in such circumstances.

95 We have not accepted that Mr Shield's response to the Claimant's complaint was condescending or ridiculing. Whilst it would have been better for Mr Shields to appreciate that the complaint was about more than the specific instruction to work at HSC, there is no evidence from which we could conclude that he would have responded differently for any other member of staff. To the contrary, the trade union email suggests that a lack of proactive handling of staff complaints was a general problem. We do not find that Mr Shield's response was an act of less favourable treatment, far less that it was in any sense whatsoever because of race.

96 As for the handling of the Claimant's grievance in May 2015 and its eventual rejection, it was not put to either Ms Brown or Mr Isaacs that race played any part in their decision (as opposed to the protected acts themselves which we have considered above). Again there is no evidential basis from which we could conclude that a proper hypothetical comparator would have been treated more favourably. Indeed, in light of our findings about the reliability of their evidence, their reasons for rejecting the grievance and appeal and, specifically, for including the paragraphs referring to future reasons, we are satisfied that such a hypothetical comparator would have been treated in the same way. Race played no part whatsoever in the conscious or subconscious reasons for the conduct of either Ms Brown or Mr Isaacs.

97 The other complaint which is possibly advanced in the alternative as an act of direct discrimination is the handling of the Claimant's complaint about access to her personal file. In connection with victimisation and harassment, we have set out why we

have concluded that the delay and any shortcomings in the investigation were caused by internal matters unrelated to protected acts or race. This claim also fails when advanced as direct discrimination.

98 The matter expressly identified in the issues as an act of direct race discrimination is the termination date. We have found that the Claimant did have a different termination date to other Executive Support Assistants. There is a difference in race in that the Claimant is Black and Ms Moss is White. There were two relevant Assistant Director posts deleted, one to whom Ms Moss provided support and one to whom the Claimant provided support. Both the Claimant and Ms Moss expressed a desire to work longer than their notice period and both were told that they were unlikely to be dismissed before 30 June 2016. We consider that these are primary facts from which we could conclude that there had been an act of discrimination such that the burden of proof passes to the Respondent.

99 The Respondent has provided an explanation which we accepted, namely that only one Executive Support Assistant was required, the intention was to provide interim support pending appointment of the new ESA and Ms Moss was chosen because she was prepared to work until such appointment whereas the Claimant wanted to leave at the end of June 2016 such that a second interim support assistant may be required. We have also accepted that part of the reason was the Claimant's oft expressed hostility to the new model of shared support. The termination date is not relied upon as an act of victimisation. For the avoidance of doubt, we would not have found that this reluctance was because of the allegations of discrimination or the Tribunal proceedings but because of understandable concern that the Claimant may not work as effectively as Ms Moss in furtherance of a restructure to which she was so opposed whereas Ms Moss was leaving on good terms at retirement. None of these reasons were, in our view, because of race in any event. We have not found primary facts from which we could conclude that there had been race discrimination. On the totality of the evidence, we consider that an employee in the same or not materially different circumstances as the Claimant but of a different race would have been treated in the same way.

100 Insofar as the Claimant relies upon the later termination date of Ms O'Hara, we consider that her circumstances were materially different to those of the Claimant. Ms O'Hara was in a different selection pool, worked in a managerial position, in a different area where there was a need for service consistency due to the large number of management changes. She was not a statutory comparator. Nor do we draw any inference from the termination dates for Ms O'Hara and the other named ESA's in circumstances where we accepted Mr Thorn's explanation in respect of each and were satisfied that the reason was business need and not in any sense race.

Overview

101 We are conscious that we have considered each of the issues in turn and under each separate head of claim but that it is important not to lose sight of the case and the Claimant's complaints overall. Viewed holistically, the attempts by Ms Wright to move the Claimant towards a model of executive support which was more pooled than had previously been the case were long-standing and were considered by the Lewis Tribunal as being for genuine, non-race related reasons. The reason for the instructions did not change, if anything the need became more pressing as the

anticipated senior management restructure became closer. The Claimant's hostility and opposition was clear and, whilst we not go so far as to term her obstructive, it is evident that the Claimant would not accept an instruction with which she disagreed, even when given by the Corporate Director. To some extent, the Claimant was supported by Mr McCourt in a number of the disputes regarding her job title and role, in particular the need to work at the HSC, which may have affected her perception of how reasonable she was being. This is regrettable not least as the Claimant was a capable and professional worker who was an asset to the Respondent. The dispute, however, soured the Claimant's view of Ms Wright and anybody else who supported her instruction to the extent that the Claimant became increasingly resolute in her belief that she was being improperly targeted by Ms Wright and that all those with whom she disagreed were motivated in bad faith and by race. We have not agreed that the Claimant was correct but we accept the sincerity with which she held this belief.

102 The cumulative effect of the facts found and our conclusions, confirm our overall conclusion that race and the protected acts had nothing to do with the matters about which the Claimant complains.

Money claims

103 The money claims depend upon whether or not the Claimant was contractually entitled to payments of redundancy and notice calculated on the basis of a pay rise not agreed when the payments were made but subsequently applied with retrospective effect. The date for calculation of a redundancy payment and payment in lieu of notice is the effective date of termination. The terms of the backdated agreement did not refer to the effect on payments already made in full. Whilst the Respondent exercised its discretion to pay the increase for work actually done, we have not been provided with any evidence of a contractual obligation to do so or to apply it further to payments not in respect of actual work done. As such, we conclude that the Claimant's pay and redundancy were properly calculated based upon the salary at the date of termination. The difference in the value would have been recoverable as damages if the race discrimination claim regarding termination date had succeeded (which it did not), but they were not contractual entitlements. The money claims fail and are dismissed also.

Employment Judge Russell

10 August 2017