EMPLOYMENT TRIBUNALS

Claimant: Dr J Hubbard

Respondent: Rotherham Metropolitan Borough Council

HELD AT: Sheffield **ON:** 25, 27, 28 February 1 and 4 March 2019

BEFORE: Employment Judge Rostant
Mr P R Kent
Mr L Priestley

REPRESENTATION:

Claimant: In person
Respondent: Mr C Fender of counsel

JUDGMENT

It is the unanimous Judgment of the Employment Tribunal that the claims fail and are dismissed.

REASONS

1. By a claim presented to the Employment Tribunal on 21 May 2018, following a period of early conciliation from 2 to 17 May, the claimant brought complaints of age discrimination and victimisation.
2. The matter came before the Employment Judge at a preliminary hearing for case management and an order identifying the issues and making orders for the preparation and hearing of this case was sent to the parties on 12 July 2018. The case was originally due to be heard over four days on 29 October but due to a lack of judicial capacity the case had to be postponed and was then re-listed for the current hearing.

The claims and issues are as follows

1. The claimant contends that the decision by the respondent not to appoint her to the post of Project Manager, in January 2018, was directly discriminatory because of her age. The claimant at the time was 60 and the successful candidate was 30. The respondent denied that the decision was influenced in any way by the claimant's age.

2. The claim of victimisation raised two issues. The first was whether, by the sending to the respondent of an email on 6 March (directed to the claimant's line manager Mrs Broadest) the claimant had done a protected act and secondly, whether the claimant's dismissal from her post as Collections and Customer Experience Manager was because the claimant had done a protected act. The respondent conceded that the claimant did send a letter which did amount to a protected act but that was not until 8 April 2018 in a letter directed to the Chief Executive. The respondent's case was that the earlier email did not meet the definition of a protected act in S27 Equality Act 2010. In any event, the respondent contends that even if the first questionnaire sent to Mrs Broadest was a protected act, the claimant's dismissal was not because of either or both acts but was because of the claimant's performance in the post and her consequent failure to pass her probation.

Procedural issues

3. In accordance with case management orders, the parties produced witness statements and an agreed file of documents. A further file of documents (referred to as the additional bundle) was produced by the respondent after the original date for the creation of the agreed file and the claimant also sought to rely on extra and supplementary documents known as the claimant's supplemental bundle. Those matters were dealt with at the outset of the hearing and in large measure agreed.

4. The claimant gave evidence on her own behalf and, for the respondent, evidence was heard from Mrs Broadest the claimant's line manager, Mrs R Stothard, Commercial Manager, Mr S Hollsworth, Leisure, Tourism and Green Spaces Manager, who was the manager who dealt with the final part of the probation review process and who decided not to confirm the claimant's employment, and Mr John Crutchley the human resources officer who supported Mr Hollsworth during the probation procedure.

The law

5. Section 13 and section 39 of the Equality Act 2010 make it unlawful for an employer to directly discriminate on the grounds of any of the protected characteristics and in so doing subjecting that employee to a detriment. Section 27 provides that victimisation occurs where an employee does a protected act as defined in section 27(2) and because of that protected act is subjected to a detriment contrary to section 39(3). In all claims of discrimination, the burden of proof provisions in S123 require that the claimant prove the facts upon which she relies and that those facts be sufficient to allow the Tribunal to presume that the claimant's treatment was because of the protected characteristic or act. If, having found the facts and drawn any appropriate inferences, the Tribunal considers that that burden has been discharged, it is for the respondent to show that any treatment of the claimant was in no sense whatsoever because of a protected characteristic or act.

Neutral facts

6. The claimant was appointed to the post of Collections and Customer Experience Manager with the respondent, a 30-hour week post, and started work on 29 August 2017.

   6.1 Her line manager was Mrs L Broadest. Mrs Broadest and a colleague, Mrs Fisher, had been the interview panel for the post.

   6.2 The claimant's appointment was subject to a satisfactory passing of a six-month probationary period.

   6.3 The respondent's probation procedure (see B1 to B3) envisages formal interviews at the end of the first month and the end of the third month of employment. As part of the process, the relevant line manager is required to record the meetings and areas of discussion on a review form.

   6.4 A final decision about employment is made at the end of the six-month period.

   6.5 Although both the first and second of those meetings are to be conducted formally, it is envisaged that the final six-month review meeting will differ in character depending on whether or not there is the possibility of the employee failing their probation period.

   6.6 The claimant should have had a three-month review meeting at the end of November. A date in December was set but for reasons outside of Mrs Broadest's control that meeting had to be abandoned and the claimant did not have her three-month review until 23 January, by which time five months had elapsed.

   6.7 At that review, Mrs Broadest raised two low level matters of concern and it was agreed that, because of the delay in dealing with the three-month period meeting, the next and final meeting would not occur until the end of March.

   6.8 In December, the respondent decided to set up a project to deal with the effects on the respondent's collection of a severe flood in 2007.

   6.9 The project required staff and a project manager.

   6.10 The two members of staff for the project were interviewed by the claimant and Mrs Broadest in December and the claimant was aware of the fact that there would be a recruitment process for the project manager post, which was to be full-time.

   6.11 Initially, the claimant did not indicate an interest in applying for that post and accepted an invitation from Mrs Broadest to form part of the interview panel for the post.

   6.12 The final day for application for the post was 14 January and the claimant made a very late application for the post on that day.

   6.13 In circumstances which will be dealt with in greater detail later in our judgment, the claimant was interviewed for the post at an interview on 8 February.

   6.14 The following day she was notified that she was not successful.

   6.15 On 6 March, the claimant sent an email (E35) to Mrs Broadest asking 21 questions about the interview and appointment process for the Project Manager post.

   6.16 On 14 March, Mr Hollsworth wrote to the claimant, inviting her to attend a meeting on 16 March. This was a bringing forward of the probationary review meeting originally contemplated for the end of March.

6.17 The process was to be carried out not by Mrs Broadest, the claimant's line manager, but by Mr Hollsworth, a manager at the same level as her, supported by Mr Crutchley from human resources.

6.18 The claimant applied for, and was granted, an adjournment for the meeting of 16 March and the meeting was then held on 28 March 2018.

6.19 The purpose of the meeting was to consider the claimant's probation in the light of what was expressed to be serious concerns regarding the claimant's performance in her role. Four points were identified – poor communication and poor interactions with management and work colleagues on important work issues; lack of diligence, attention to detail, judgment and failure to accept responsibility/accountability in the discharging of work duties, impacting on standards and quality; repeated failures to respond positively to feedback, take on board guidance and advice from management and follow instructions; conduct which was inconsistent with the council's values/standards, expectations. The claimant was advised of her right to attend with a trade union representative.

6.20 The 28 March meeting did not reach a conclusion and there was a further meeting on 13 April 2018. That too did not reach a conclusion and a third meeting was held on 26 April 2018, which meeting resulted in Mr Hollsworth advising the claimant by letter (F22 to F23) that he had decided not to confirm the claimant in her employment with the respondent and giving her one month's notice of termination.

6.21 The claimant appealed the decision but was unsuccessful.

The Tribunal's conclusions

Issues of credibility

7. There were some areas in this case where the Tribunal found it necessary to choose between conflicting evidence on the part of the claimant and the respondent's witnesses. Principle amongst those areas was the evidence given by the claimant and Mrs Broadest about the claimant's conduct in a variety of meetings between them. Put briefly, the disagreement concerned Mrs Broadest's evidence that the claimant had conducted herself in a way which was increasingly disrespectful and challenging. She had refused to accept appropriate criticism or take responsibility when legitimate areas of concern were raised with her. The meetings culminated in a meeting on 2 March when, it was alleged, the claimant behaved in such a way that the claimant admitted, had it been true, would have been unacceptable behaviour on the part of a subordinate towards a line manager.

8. The Tribunal will set out its findings on the areas of dispute in the relevant parts of the judgment but at this stage it is appropriate to make some observations about the general credibility of the relevant witnesses. In respect of the respondent's witnesses the Tribunal had no cause to doubt their credibility in general terms. Whilst Mr Hollsworth was somewhat vague on the question of his knowledge of the email of 6 March, there was no point at which his evidence appeared to be clearly implausible or unlikely. Ms Stothard had some difficulty in dealing with an issue about an apparent discrepancy between her notes of the interview process and her scoring but again there was nothing to suggest that she was attempting to obfuscate or mislead deliberately. Mr Crutchley's evidence g ave no grounds for

doubt. Mrs Broadest was an extremely impressive witness whose evidence, although at times emotional, particularly in recounting her relationship with the claimant in 2018, was otherwise clear, measured and consistent with the documents.

9. That cannot be said in relation to the claimant. There were three areas of the claimant's evidence which, although not central to the issues which the Tribunal had to decide, gave us cause to consider that the claimant was not being entirely straightforward with us.

10. The first of those was the claimant's evidence explaining why she had delayed sending in the email of 6 March by nearly a month following being advised that she had been unsuccessful in that job. That email was sent, the claimant said, because she had come to believe that the reason for her failure to succeed in the Project Manager's post was that she had suffered some form of discrimination. At the time that the claimant sent the email of 6 March, she did not know the identity of the successful candidate. The claimant explained that it was for that reason that the email asks questions about age *and* gender. A later email, sent to the Chief Executive on 8 April was more specific in that it asked questions only about age. By that stage the claimant had been advised of the identity of the successful candidate and knew that the successful candidate was female but some 30 so years younger than her. The claimant's evidence was that she did nothing about the issue of the appointment initially because she had decided to accept the result. She then appeared to change her mind and to say that she had *always* had anxieties and concerns about the decision and was convinced from the outset that something had gone awry. This raised the question as to why she had not sent the questionnaire until 6 March. The claimant explained that she felt that she needed to wait until she had been employed for six months before she could make waves because she was concerned that her job insecurity would mean that the respondents could retaliate against the sending of the questionnaire. That explanation struck the Tribunal as implausible. The claimant purported to explain the delay by reference to the six-month period on the basis that at the end of six months (the end of February) the probationary period had finished and that she was therefore more secure in her job. In the first place, the Tribunal does not accept that the claimant genuinely believed that she had passed her probation. She knew that there was to be a final review set for the end of March. That date had been selected because of the delay in dealing with the three-month stage detailed in our neutral findings of fact. That meeting had not taken place. Secondly, the claimant has occupied the position of a senior manager in a number of roles during her career and the Tribunal takes the view, and indeed the claimant confirmed, that she well knew that in terms of employment law her job was no more or less secure in its seventh month than it was in its sixth whatever might be the probation position. The Tribunal takes the view that it is probable that the 6 March email was sent in response to a very difficult meeting between the claimant and her line manager on 2 March, and at least in part as an attempt to deflect criticism of her conduct. More will be said about that meeting at a later point in our judgment.

11. Next, the Tribunal is concerned about the evidence that the claimant gave about the circumstances in which she initially withdrew her job application for the project manager's post. That withdrawal was conveyed by the claimant to Mrs Broadest at a meeting on 31 January. That meeting itself had been set up on 23 January to continue to discuss Mrs Broadest's concerns, described at that stage as low level, with the claimant's performance. By that stage, Mrs Broadest had spoken to the

claimant about the circumstances in which the claimant had made her application at the last minute. The effect of that last-minute application had been to require Mrs Broadest to make rapid arrangements to change the identities of the interview panel since the claimant had initially agreed to be one of the members. The interviews for the post were due to be held on 2 February and it was not known until 14 January that the claimant was a candidate. The Tribunal is satisfied that Mrs Broadest was concerned about the lack of courtesy on the part of the claimant when making that application in failing to advise Mrs Broadest that that was what she was doing. It is a matter of record that the claimant did indeed fail to advise Mrs Broadest on that point. It was put to Dr Hubbard that in that meeting she had described Mrs Broadest's attitude towards her in discussing the late application as antagonistic and said that she felt that she did not need to put up with "crap and antagonism". Dr Hubbard's surprisingly response to that question was "I'm not sure, I might have". The Tribunal takes the view that it is highly likely that Dr Hubbard would recall using that sort of language if she had used it and it seems more probable than not that Dr Hubbard did indeed use that language. It is recorded in Mrs Broadest's personal notes of that meeting. It was also put to Dr Hubbard that she described Mrs Broadest's complaints about the lack of courtesy as behaviour which "could be seen as bullying". Dr Hubbard agreed with that and added that she had never said that it *was* bullying, just that it could be seen as bullying. That struck the Tribunal as disingenuous. Suggesting to a line manager that her behaviour over a particular issue which had resulted in a decision by a subordinate to withdraw a job application "could be seen as bullying" is evidently intended to convey to the line manager the subordinate's view that she had been bullied into withdrawing an application. Our view is that Dr Hubbard knows that too. We were also puzzled by why Dr Hubbard should take that view in the first place. During her evidence before us she seemed unable to understand what struck the Tribunal as obvious, which was that it would have been a normal courtesy for her to inform Mrs Broadest at the earliest opportunity of the fact of her application and entirely reasonable to be expected to apologise for not having done so.

12. Finally, there was Dr Hubbard's evidence about one of the matters that she considered showed a discriminatory mindset on the part of Mrs Broadest and that was over the appointment of two assistants for the project post. Dr Hubbard's evidence purports to contrast the treatment of the younger of the two appointees with that of the older of the two appointees. In the older appointee's case he was only given a provisional offer of employment, whereas the younger one was given an unconditional offer. It was put to Dr Hubbard that in fact both candidates had had conditional offers, albeit for different reasons. The older candidate's conditional offer was caused by his scoring poorly on a key skill (a matter not challenged by the claimant) and was conditional on his improvement in that skill area. The younger offer was conditional on him passing a driving test (at the time of the interview he only had a provisional license). As a matter of fact, the younger candidate did not have his appointment confirmed because he did not take driving lessons during the initial period of his employment. Dr Hubbard persisted in asserting that there was a difference in treatment, when the evidence clearly pointed to the fact that the respondent had treated the two candidates in the same way in that it had placed conditions on their continued employment albeit for different reasons and that there was no difference of treatment let alone any difference of treatment in relation to age. Dr Hubbard's refusal to see what struck the Tribunal as self-evident did not assist her general credibility as a witness.

The claim of direct discrimination – appointment to project manager post

13. In what follows, the Tribunal has sought to address the case for each party as outlined in the evidence and in the helpful closing submissions. Although we do not always explicitly refer to the latter, it can be taken that our judgment engages as far as possible with the points made, particularly by Dr Hubbard's very full and detailed written closing.

14. The claimant was one of four candidates interviewed for the post. She was the oldest. The successful candidate was aged 30 at the time of her appointment, the claimant being aged 60. By virtue of her lengthy career, the claimant had significantly more experience in the museum sector than the successful candidate. The claimant was also better academically and professionally qualified than the successful candidate. The claimant asserts that she was treated differently to the successful candidate and that the reason for that difference of treatment is the claimant's age. The claimant asserts that the disparity between her experience and qualifications and that of the successful candidate is enough, on its own, to shift the burden of proof. The Tribunal does not agree with that proposition. The respondent's interview process is such that, provided candidates meet the essential criteria for the post in terms of experience, qualifications and the other essential requirements for the job, all candidates start equal on the day and success depends upon which candidate gives the best interview. We do not therefore consider that a difference in experience and a difference in qualifications, over and above the minimum required, between the successful and unsuccessful candidate is sufficient *on its own* to raise the possibility that discrimination is at play, even where the successful candidate is significantly younger than the claimant.

15. The claimant points the finger directly at Mrs Broadest as being the person with the discriminatory mindset and raises a number of matters, extraneous to the interview process that indicate a bias on the part of Mrs Broadest against older employees. The claimant complains that she was appointed to her post on the bottom of the salary scale and subsequently a colleague, Ms Buck, was appointed on the middle of the relevant salary scale. Ms Buck is significantly younger than the claimant. The facts around the two appointments however, provide grounds for concluding that there is no evidence here that age was a factor. The respondent's policy is that candidates be appointed at the bottom end of the salary range. That policy can be departed from on the appointing the manager's discretion where there are grounds for so doing. We heard unchallenged evidence that the practices is that unless a candidate raises the issue of pay during the appointment process, and makes a case for being appointed for a particular reason at a point higher than the bottom of the scale, candidates will be appointed at the bottom of the scale. The claimant accepted that she did not raise the issue of her salary at any point during the appointment process. The Tribunal did not accept the claimant's explanation that she assumed that she would be appointed higher up the scale by virtue of her length of experience. The claimant must have been involved in many job application processes in her time and the Tribunal is bemused as to why she thought that she would be appointed at some point higher than the bottom rung of the scale without raised the matter with anybody. The respondent gave unchallenged evidence that, in contrast, Ms Buck did raise the issue of her salary during the appointment process and pointed to her considerable expertise in a particular area as justifying the extra pay and that, in consultation with human resources, Mrs Broadest agreed that on that basis Ms Buck should be appointed

at a point above the bottom of the scale. This does not strike the Tribunal as material on the basis of which we could draw an inference.

16. Next, Dr Hubbard pointed to what she considered to be a discriminatory approach to management on the part of Mrs Broadest. It is agreed evidence that when Dr Hubbard was appointed, Mrs Broadest drew to her attention the fact that she was about to take over the line management of three people, two of whom were displaying performance which gave Mrs Broadest concern. Dr Hubbard's case is that it transpired that those two people were the older two members of staff, both in their 50s and that the one report that she was told displayed no concern was a younger person. Dr Hubbard went further by saying that she felt, on taking over the management of the staff, that she had no concerns about the performance of the two members of staff and she could only conclude that Mrs Broadest had taken against them because of their age. Mrs Broadest's evidence, which we have no grounds to disbelieve, was that those two members of staff had both survived processes of restructuring and were, in her view, finding it difficult to deal with the inevitable change, stress and increased workload that the restructures had given. She stated that in her view that was nothing to do with their age and was simply to do with capacity. She pointed out that it would have been remiss of her not to draw to Dr Hubbard's attention the fact that one of the things that she was going to have to deal with was potential performance management on part of two members of staff. Assuming that Mrs Broadest's evidence is truthful, and the Tribunal has no grounds for rejecting it, there is no grounds for suspicion in that version of events and certainly nothing to suggest that Mrs Broadest had a generalised dislike of older members of staff. Dr Hubbard was, of course, not able to comment on the performance of the staff before she arrived.

17. The claimant's next allegation was that Mrs Broadest was not interested in developing older staff but was interested in developing younger staff. The example that Dr Hubbard gave was the fact that one of the two senior members of staff that she was expected to manage had applied for a training course and that Mrs Broadest was "not keen on her going". In fact, it transpires that once Dr Hubbard discussed the matter with Mrs Broadest, they both agreed that provided that member of staff was able to bring back to the department the benefits of the training she could attend the training. The Tribunal is at a loss to see evidence of a discriminatory approach to development here. There was an understandable concern on the part of a line manager that a member of staff should not be absent from the office on training which was not necessary and which would not benefit the department. It is evident that once a case could be made for the department benefiting from the training, Mrs Broadest was agreeable to the candidate going.

18. Finally in this category, there is Dr Hubbard's view that Mrs Broadest was keen on the appointment of apprentices. Here too the Tribunal finds no basis upon which we can draw inferences. First, apprentices can be any age, although it is more likely that they will be younger. Secondly, a desire to offer opportunities and training to young people does not evince a bias against older people. At best it evinces a desire to recognise the difficulties that younger people have in getting on to the job ladder and to offer them opportunities to do so. There is no evidence that Mrs Broadest would have rejected as a candidate for an apprenticeship somebody in her or his fifties as opposed to somebody in their late teens or early twenties.

19. It will be seen therefore that there are no findings of fact on matters extrinsic to the appointment process that the Tribunal considers material upon which we can draw an inference against Mrs Broadest's motivation, conscious or otherwise.

The interview process itself

20. The claimant makes some criticisms of the procedure adopted and invites the Tribunal to draw inferences from those procedural criticisms. The claimant complains that her interview was not until 8 February and that the other three candidates, from whom of course the successful candidate was drawn, were interviewed a week before her. The claimant alleges that this put her at a disadvantage, although the claimant was not specific about what the disadvantage was. It was perhaps an implicit suggestion that by the time the claimant was interviewed, the scores of the other candidates were known and this increased the possibility that the claimant could be deliberately down-marked to ensure that she was not successful. If that was what was being suggested it was not put to Mrs Broadest or Ms Stothard. At any rate, the reason for the claimant's interview being separated from that of the others was that the claimant had applied, withdrawn and had then been reinstated. Her reinstatement was so close to the first interview that it was thought unfair to require her to prepare with so little time and she was given an extra week. The claimant did not complain at the time about that and did not state that she would prefer to be interviewed with the other candidates. It is evident from the email traffic that this was a course agreed between Mrs Broadest and the human resources officers responsible for the interview process. The Tribunal does not regard this as a procedural failing but rather evidence of a desire to be fair to Dr Hubbard.

21. The claimant also complains that the process by which the scoring was carried out was contrary to the respondent's own procedure. The claimant asserts that the evidence appears to show that the individual members of the panel, three in number, did not score each candidate themselves but agreed a common score and that this process opened the way for Mrs Broadest, in her position as the chair of the panel and the most senior employee present, to use undue influence. The Tribunal heard from Mrs Broadest and Mrs Stothard and they gave the same evidence about the process of scoring, with Mrs Stothard giving rather more detailed evidence because of the more detailed cross-examination she was subjected to. The evidence was that at the end of each candidate's interview, a score for each question was arrived at by the following process. The chair asked each of the other two members of the panel to give their own score for the candidate's response to each question. The chair then give her score. If the scores agreed, there was no further discussion and that was the score allocated to that candidate for that question. If the scores did not agree, there was a discussion and an examination of the detailed record of the answer, given by the candidates to the relevant question, against the person specification, to discern whether the answer displayed evidence to support a score between one and four, where one was the best. Mrs Stothard told the Tribunal that from her recollection the total scores were not totted up until after the claimant was interviewed the following week. The Tribunal does not take the view that that later point goes one way or the other because a glance at the scores for each individual question would give anybody with a determination to ensure that the claimant was not appointed an easy idea of the total score or the approximate total score of the best candidate thus far.

22. The claimant asserts that a proper procedure required that each member of the interview panel scored as they went along, presumably during the course of the interview. That was the course that the claimant adopted when she was involved in interviewing. Dr Hubbard points to her own personal notes of her interview training which she undertook in preparation for the interview she was involved in in December of 2017. A relevant part of the notes reads as follows:

    "Scoring – one sheet per person, useful to have sample answers. Bullet points etc – can help to mark."

    The Tribunal does not regard that as evidence that the respondent's procedures required the interview panel to mark each candidate as they went along. At best it suggests that that might be a helpful approach recommended by that particular trainer. None of the three members of the interview panel had attended the same training course as the claimant, although all had been trained at some point. Mrs Stothard gave us convincing evidence as to why she did not do that, based on her discomfort at writing down marks which might be visible to the candidate across the table. There is nothing in the respondent's procedure itself that requires individual scoring as each candidate answers each question, and it is evident that in this case each member of the panel kept a record of the answers given, upon which they then (presumably) based their scores when asked for them by the chair of the panel, Mrs Broadest. Nor can the Tribunal discern anything else about the way in which this process was carried out which was in breach of the respondent interview process. The claimant is critical of the fact that Mrs Broadest wrote the questions. Since the same questions were asked for each candidate, and it was not suggested by the claimant that any of the questions were obviously aimed at disadvantaging her, or advantaging another candidate, we derive no assistance from that fact. For that reason, the Tribunal can see no procedural irregularities that would allow us to draw an inference against the respondent.

23. Next, there is the question of what, if anything, can be inferred from the results of the panel's deliberations. The successful candidate obviously ranked first. The claimant ranked third. The claimant contends that that was surprisingly low and further points to the fact that the ranking was in order of age with the successful candidate being the youngest and her being the oldest. That is factually inaccurate since it omits from the account the lowest scoring candidate, who is younger than the claimant. The claimant also points to the manner in which Mrs Broadest and Mrs Stothard describe their response to the successful candidate. The language used-Mrs Stothard saying that the candidate's performance "blew me away"-is she suggests, evidence of a preference for youthful enthusiasm over experience and knowledge. That stands as proxy for an age discriminatory approach. There might be something in that if dynamism, enthusiasm and commitment were the exclusive preserve of 30 year olds. At best, however, a preference for a candidate exhibiting desirable characteristics for this post which are most often associated with younger people would be evidence of an indirectly discriminatory approach. At any rate this is too tenuous a matter upon which to hang an inference of possible direct age discrimination.

24. Finally, the claimant invites the Tribunal to draw an inference from what she regards as an incomplete response to her questionnaire email sent to Mrs Broadest on 6 March. In fact, Mrs Broadest was not cross-examined at all on whether or not her response was complete or otherwise, simply the process by which it was arrived at. Mrs Broadest sought advice from human resources and was given help from the team dealing with recruitment and appointments in

supplying the answers to some of the answers asked. The response is at E37 to E39 and it is true, as the claimant states in paragraph 51 of her witness statement, that some of the questions are not answered. The reason given in the response itself, as indeed the response to the claimant's second questionnaire sent to the Chief Executive on 8 April, is that some details could not be supplied because of data protection. Since that explanation was never tested in cross-examination and not challenged as to its adequacy as an explanation, the Tribunal is left to conclude that there was a genuine concern on the part of Mrs Broadest and the human resources department that the supplying of certain of the answers would breach their data protection obligations. That, of course, provides an entirely neutral explanation for the failure to answer all of the questions.

25. In fact, the Tribunal could only see one matter in this process which gave us cause for any concern at all and that was the lack of completeness of Mrs Stothard's notes when recording the answers of the claimant to certain questions. Mrs Stothard frankly admitted that her notes did not contain all of the details of the answers supplied by the claimant. It should be observed that we did not carry out a comparative exercise with her recording of other candidates' answers and were not invited to. We do not know therefore, other than what Ms Stothard told us, how typical that lack of details was of Ms Stothard's style generally. In some cases, Mrs Stothard says, the lack of a full note is explained by the fact that she had asked the question herself. In other cases, Mrs Stothard said that the notes were no more than an aide memoire, to assist her to recall the answers when she came to contribute to the discussion at the end. The Tribunal would make two observations. The first is that we do not make any similar criticism of Mrs Broadest's notes and we find on the basis of the evidence before us that they appear to be a fuller record of the answers supplied by the claimant albeit not verbatim. We would secondly observe that the purpose of adopting an interview process which requires the recording of the answers in this way is to ensure that there is transparency and that the respondent can provide evidence to establish that the selection was done on a robust, evidenced, basis and not on impression. It therefore follows that it is important that as full a note as possible is made by each interviewer of the answers given by candidates, so that, if necessary, they can later on be compared one with the other to provide a basis for objective selection and again, if necessary, at a later date to explain that selection to an outside body such as an Employment Tribunal. This would have been one matter that would have gone into the scale in deciding whether or not to draw sufficient inferences against the respondent to shift the burden of proof to the respondent to provide an explanation. As we have pointed out however, it is the only matter that has given us cause for concern and is outweighed by our views on the other matters relied on by Dr Hubbard such that we take the view that the burden of proof does not shift. Since we do not consider that Dr Hubbard has shown such facts as would allow the Tribunal to presume that discrimination had taken place absent an explanation by the respondent (see section 136 Equality Act 2010) it follows that the claim must fail.

26. However, had we been in a position of having to consider the explanations provided by the respondent we would have accepted the explanations advanced by Mrs Broadest and Mrs Stothard for the selection. It is certainly the case that the successful candidate is younger and less experienced in overall terms than the claimant. As we have already said, that is not a basis on its own to have inherent suspicions about the decision to appoint the successful candidate. The Tribunal has been particularly impressed by the evidence of Mrs Broadest on this point. Mrs Broadest gave evidence, backed up by her notes, to explain why, in particular, two

of the claimant's answers to two questions gave her significant anxiety and led to low scores. Of those, the most significant was the question of management style. The question asked of the claimant and all other candidates was what management style they had used in the past in order to motivate staff. The reason why that question was being asked was that it was understood that the Project post would require significant management skills. It was to be a difficult task, carried out in isolated and isolating circumstances, where keeping a small team motivated and task-focused would be at a premium. The claimant gave an answer to that which referred to the use of "a metaphorical stick". This was noted both by Mrs Broadest and by Mrs Stothard and both of them commented adversely on it in their witness statements. It was also reflected by a lower score than the successful candidate. Both felt that it revealed a poor attitude to management and that it was not an approach that either of them would consider themselves. Implicit in Mrs Broadest's statement was the fact that it was a particularly inappropriate method in the context of this job. The claimant's case was that that emphasis was unfair and indeed suspicious since the question had been asked about management styles used *in the past*. Here the Tribunal considers that the claimant is perhaps being deliberately obtuse. She must have known that even though the question was about past management styles, she was being tested against the job and person specification for the current job. She must have known that her answers given to questions were going to be used in considering whether or not she could provide evidence of her suitability for the current post. In the circumstances, the Tribunal can readily understand why the interview panel regarded her choice of motivating method, even if she had used it in the past with success, to be singularly inappropriate example to give in the context of this interview.

27. In general terms, Mrs Broadest's evidence about the claimant's responses to questions was to agree that the claimant often gave very full answers to questions but these tended to be a supplying of a long list of headlines rather than providing detailed explanation of involvement. An example was the question of budget handling. True it is that the claimant had been involved in the senior management team of an institution which had a budget of £1.2 million. That was significantly higher than any budget that the successful candidate had been involved in and the claimant pointed to that as evidence which should have told against the successful candidate and in her favour. However, a convincing explanation was given by Mrs Broadest about why that was not the case. The successful candidate had gone into great detail as to her exact involvement with the budget detailing exactly what she had been required to do in her management of the relevant budget. The claimant had only said that she had been part of a senior management team which collectively had responsibility for this very large budget, without supplying any detail as to what her personal responsibility and job role had been in relation to the use of that budget. The notes bear out the truth of that evidence. Since the respondent was looking for evidence of an ability to control a budget overall, and to take all the steps necessary to ensure that that budget was appropriately used and accounted for, a detailed explanation of previous involvement trumped a broad assertion of some involvement in a bigger budget.

28. By sheer accident, Mrs Stothard was not present for the bulk of Mrs Broadest's cross-examination. That lent greater weight to her answers, as corroborative of Mrs Broadest, when she too was cross-examined on the adequacy of the claimant's answers. She gave extremely similar answers to Mrs Broadest, characterising many of the claimant's responses as lacking in detail. Neither of the two witness statements contained that point or certainly not in the depth called for

by the claimant's cross-examination. That, the Tribunal, considered was powerful corroboration for the truth of Mrs Broadest's generalised explanation about the claimant's lack of success in the interview.

29. Finally, it is necessary for the Tribunal to raise two significant factors. If Mrs Broadest was prejudiced against the claimant because of her age it is surprising that Mrs Broadest was involved in an interview process, as one of only two panellists, in which the claimant had been appointed, only a few months earlier, to the post of Collections Manager. That post is at the same level (albeit only at 30 hours a week) as the Project manager's post. The claimant could give no adequate explanation for her appointment by a panel that included someone biased against older people, other than the fact that she had been appointed because she was the best candidate. That, of course, is exactly the basis on which any candidate should be appointed to a job and has nothing to do with age. It certainly makes it more likely that Mrs Broadest was interested in finding the best candidate for the Project Manager's post, again regardless of age. Furthermore, Dr Hubbard cannot explain why, if Mrs Broadest was determined that Dr Hubbard should not get the Project Manager's post, she was intimately involved in a process by which Dr Hubbard was permitted to reinstate her application for the post having withdrawn it over what she saw as Mrs Broadest's bullying behaviour (see earlier in our Judgment). The documentary evidence clearly shows that Mrs Broadest agreed to that reinstatement and need not have. It would have been entirely possible for Mrs Broadest to have refused the late reinstatement of the claimant because of the disruption it would cause to the interview process and because the deadline for applications had been passed. In that way she could have ensured that Dr Hubbard was shut out from the job. Again, Dr Hubbard can supply no adequate explanation for why, if Mrs Broadest was biased against her, she was permitted even to get to the stage of interview.

30. For all of the reasons outlined above, the Tribunal finds that the claim of direct discrimination fails.

The claim of victimisation

31. The focus now shifts to the decision making of Mr Hollsworth. The evidence clearly establishes that, by the start of the final part of the probation review process, Mrs Broadest had asked that she not be involved, such was the breakdown in her relationship with Dr Hubbard. That breakdown is convincingly evidenced by Mrs Broadest's personal notes, which were eventually disclosed to the claimant as part of the probation review process. The claimant has, without any basis, cast doubt on the authenticity of those notes, albeit that she waited until closing submissions to do so. She certainly never put to Mrs Broadest the suggestion that Mrs Broadest had concocted those notes in order to bolster a process designed to dismiss the claimant. In fact, the contemporaneous evidence points away from such an idea. First, meta data establishes that the document on which those notes appears was started on 23 January 2018, the date of the first private note and the date of the three-month probation meeting. Secondly, even without the note, it is evident that, by 2 March, Mrs Broadest was seriously concerned about the claimant's attitude. On that day she emailed Mr Crutchley seeking an opportunity to talk to him and shortly thereafter at a meeting revealed her concerns about the claimant's conduct which culminated in the claimant's behaviour in a meeting of 2 March, at which, Mrs Broadest said, the claimant had told her to "grow up" and had put her head on the table and pretended to snore. It is this behaviour, which the claimant denies, that the claimant in cross-examination accepted would have

crossed the line had it occurred. In the Tribunal's additional file of documents at page 23 to 24, we see an email from Mrs Broadest to Mr Crutchley of 5 March. That email contains examples which were evidenced by the notes when eventually revealed to the claimant. Those examples were designed to illustrate Mrs Broadest's concerns about the claimant's behaviour. It is also uncontroversial evidence that Mrs Broadest rang Mr Crutchley as early as February to raise her anxieties about the claimant's behaviour. The Tribunal therefore takes the view that those notes are to be treated as being what they purport to be, namely contemporaneous notes made by Mrs Broadest starting on 23 January, to record her gathering concern about the claimant's approach and attitude to her. On that basis, we find that they are corroboration for Mrs Broadest's evidence about the claimant's behaviour and we do not accept the claimant's assertion in closing and when being cross-examined, that the behaviour alleged against her is an invention of Mrs Broadest.

32. Based on the corroboration of her contemporaneous notes and on our concerns generally about the credibility of the claimant, coupled with the fact that we could find no reason to doubt Mrs Broadest's evidence in the way it was given or its contents, we are satisfied Mrs Broadest was telling us the truth.

33. It is important however to point out that even if the claimant's conduct was an invention of Mrs Broadest, the complaint in this case is not that Mrs Broadest provided poisoned evidence which tainted Mr Hollsworth's decision making process, but that Mr Hollsworth himself decided to dismiss the claimant on the basis of that evidence *only because she had done a protected act*.

Did the claimant do a protected act?

34. The dispute before this Tribunal was whether or not the email of 6 March constituted a protected act. The Tribunal finds that it did. Whilst it does not contain an allegation of discrimination, it was clearly something done "in connection with" the Equality Act. The claimant, whatever her motivation for so doing, was seeking to gather evidence that would bolster the possibility of a claim against the respondent for direct discrimination. Mr Fender's submission to the Tribunal was that since the claimant's true motivation in sending this email was to deflect concern about a performance away from her, we should regard this as an exercise in bad faith. The Tribunal considered the definition of bad faith in section 27(3) and do not consider that it can apply here. Even if the claimant's primary motivation, which we suspect it was, was to provide a distraction and a counter attack to what she suspected was coming her way, there is no false information provided here and even if the purpose was not to pursue a legitimate concern about discrimination, as we have already said, it was certainly action taken in connection with the Act. We therefore are satisfied that the 6 March email can be treated as a protected act.

Causation

35. There is no dispute between the parties that the email sent to the Chief Executive of 8 April constitutes a protected act. It undoubtedly concerns an allegation of discrimination. However, we spent very little time on that email since there was no evidence that Mr Hollsworth was even aware of it. Mr Crutchley knew of its existence but not of its detailed content. In any case, most of our reasoning applies with just as much force, even if that email was known of by Mr Hollsworth and Mr Crutchley.

36. The key question is whether or not the claimant's dismissal can be causally linked to the doing of the protected act. The Tribunal must decide whether the claimant's dismissal happened because she had done a protected act and that entails a consideration of Mr Hollsworth's mindset. There is no actual comparator here so we are entitled to approach this on the basis of examining the reason why Mr Hollsworth terminated the claimant's employment but it is nevertheless useful to consider material which might permit the drawing of adverse inferences.

37. We are satisfied that the evidence establishes, on the balance of probabilities, that Mr Hollsworth was not aware of the existence of the protected act until it was disclosed to him in a second tranche of information supplied by Mrs Broadest on 4 April. We are further satisfied that Mr Hollsworth must have viewed the document, since he gave evidence that he had excluded it from his considerations with the claimant because it did not appear to him to be evidence to support the generalised management concerns raised by Mrs Broadest. That certainly involves a thought process on the part of Mr Hollsworth that demonstrates that he read the contents of the email and considered their relevance (or otherwise) to the other matters that he was dealing with. Mr Hollsworth did not deny that he had seen the protected act email but was vague as to when he had seen it and in what circumstances. That vagueness might have been a genuine expression of the state of his memory or might have been designed to cover up a deeper relationship with that document than he was prepared to admit. That part of the evidence might have been the basis for the drawing of an adverse inference but we did not consider that it was for the following reasons.

38. The process which resulted in the claimant's dismissal had already started by the time the protected act came to Mr Hollswoth's attention. It started in the meeting between Mrs Broadest and Mr Crutchley on 5 March, even before the protected act had been sent to Mrs Broadest, let alone had been forwarded to Mr Hollsworth. The evidence which already existed by 5 March, if accepted by the person carrying out the review process, was damaging to the claimant and would provide ample explanation for a decision not to confirm her in her employment. It evinces a disrespectful and dismissive attitude by Dr Hubbard towards Mrs Broadest and a reluctance on Dr Hubbard's part to engage with anything that might amount to criticism of her performance on the part of her line manager. It also showed a refusal to accept responsibility for poor performance, namely the handling of the Anne Frank Trust workshop and its aftermath and, much more significantly, what everybody in the Tribunal seemed to settle on describing as "the Wallinger debacle".

39. For the purposes of context, it is useful to know that this concerned a project that the claimant had responsibility for delivering. It involved the staging of an exhibition, the centrepiece of which was a loan from the Wallinger collection. The loan was a large light box. It was a co-project with Sheffield Museums and any failure would result in significant reputational damage both in the context of the public and within the museum world. A meeting of 23 February, designed to review progress, revealed that at that stage the claimant could not even satisfy Mrs Broadest that the wall chosen to mount the light box was sufficiently strong to hold it. The meeting broke up in disarray and Dr Hubbard's colleagues were so upset that they remained and subsequently individually met Mrs Broadest to discuss solutions and to raise further concerns, including the fact that it was evident that the light box was too big to go through the door of the room selected to mount it. Whilst all this distress and upset was going on, Dr Hubbard had left the building

and gone home, displaying, in Mrs Broadest's view, a marked difference in attitude to the situation as compared to the other people involved in the project who had remained to discuss solutions. This attitude and Dr Hubbard's response on 2 March to the criticisms arising out of it, appear to have been the straw that broke the back of Mrs Broadest's tolerance and prompted a phone call to Mr Crutchley and the subsequent meeting and the email of 5 March. There were, however, a variety of other matters of greater or lesser import that were already troubling Mrs Broadest and it is obvious from her contemporaneous notes and her evidence given to the Tribunal that she found her relationship with the claimant to be extremely distressing and upsetting to the point where she was not prepared to manage the final part of the process, so that the matter was handed over to Mr Hollsworth.

40. We were particularly struck during the course of this hearing with the fact that the claimant, although cross-examined on the point and denying the behaviour alleged against her, failed to cross-examine Mrs Broadest on it. Mr Fender invited us to take the view that we were therefore bound to accept the truth of Mrs Broadest's evidence on that point. We would have agreed had the claimant not been a litigant in person. We take the view that a rather less legalistic approach is required in such circumstances. The Employment Judge did stress to Dr Hubbard that she would be required to challenge all areas of material factual dispute in the evidence of the witnesses that she was cross-examining, but we nevertheless take the view that it may have been a matter of oversight rather than choice that meant that Dr Hubbard did not cross-examine Mrs Broadest on the matter of her conduct. It is, nevertheless, a telling oversight. It is as if Dr Hubbard did not really regard the allegations against her as a serious matter. That approach is of a piece with Mrs Broadest's evidence of the way in which Dr Hubbard responded to concerns when first raised with her.

41. It was evident from the structure of her cross-examination that the claimant had also failed to consider the key issue of causation. Her approach to the case, at least initially, was simply to assume that anything bad that had happened to her after 6 March could be explained by the fact of the 6 March email. That, of course, is to confuse coincidence of time with causation. Since the evidence shows that Mr Hollsworth could not have seen the protected act until 4 April, it is only matters that happened after 4 April that could have been caused by it. As we have already pointed out, by 4 April the process which resulted in the claimant's dismissal was already well underway and indeed had started even before the protected act had been done. The main planks of the respondent's case against the claimant had already been assembled by 5 March, albeit that the detailed evidence which was eventually revealed had not been fully gathered together. Nevertheless, until this was pointed out to her, the claimant's cross-examination adopted an approach which was to put to Mr Hollsworth that the whole of the process, beginning on or about 5 March, or at the latest 14 March, was designed to get rid of her. In that context, she even suggested that the wording of the respondent's own probation policy meant that the formal letter sent to her on 14 March was itself evidence of a pre-determination of the issue of her continued employment and thus victimisation. Mr Hollsworth denied any such predetermination and we found that his careful and thorough approach over the ensuing meetings is evidence of someone genuinely attempting to give the claimant a chance to state her case. Had he agreed with the proposition however, the claimant's case on victimisation would have been dead in the water. Once the illogic of her approach was drawn to her attention, the claimant shifted tack to assert that only the process after 4 April was victimisation.

She was not, however, able to provide a convincing explanation of what had changed from that date

42. The claimant complains that the respondent failed to comply with its own procedures and that the Tribunal can infer victimisation from that fact. Her complaint is that the meetings that she had on 28 March and 13 April were meetings in which she was expected to meet a case against her which she had not had disclosed to her in advance. It is certainly the case that both meetings were postponed in order to allow further evidence to be sent to the claimant. In fact, there is no evidence that the respondent was breaching its own procedure in relation to probation. The respondent's witnesses pointed out that this was not a disciplinary meeting, it was a probation review meeting. Significantly less formality is required by the respondent's procedure in such a case and there is no provision, in fact, under that procedure, for the sending out of evidence to the employee in advance of those meetings. The meetings are designed to discuss the concerns set out in summary in a letter in advance of the first meeting. The claimant did receive that letter and an attempt was made to discuss the concerns set out therein, only to be derailed by the claimant's understandable desire to see the documents being referred to in the discussions. In the end, and in advance of the third meeting, Mr Hollsworth acceded to the claimant's desire to have the whole of the management's case in documentary form set out in advance of the meeting, in a process much closer to a disciplinary hearing, and supplied a detailed set of notes and supporting documents. This is evidence not of the respondent failing to follow its own procedure but of the respondent going above and beyond what its procedure required. It is not, in the context of this case, for the Tribunal to consider whether the probation procedure accords with the general requirements of any ACAS code

43. The claimant was not in a position to refute the most seriously damaging parts of the respondent's case against her because they were not reached until the third meeting. By that meeting, the claimant had submitted a grievance about the handling of the previous two meetings. That fact was not known to Mr Crutchley and Mr Hollsworth as they started the last meeting. The grievance had been sent to the Chief Executive and had been dealt with by another human resources officer who had, on the day of the last meeting, written to the claimant to say that since her concerns were about the nature of the probation process itself, they could be raised in the course of the continuing probation process. Coincidentally, that was precisely the attitude adopted by Mr Crutchley, albeit in ignorance of his colleague's letter. Once Mr Crutchley had established with the claimant's Trade Union representative that the grievance, which he had not seen, was about the probation itself, he pointed out that since all concerned were present, those concerns could be ventilated as part of the process. The claimant's Trade Union representative advised the claimant not to remain in attendance at the meeting, but instead insisted that the meeting should not proceed until the grievance had been dealt with. Mr Crutchley made it plain that if the claimant chose to absent herself he could see no grounds for postponing the meeting and stopping the process whilst the grievance was investigated and he asserted that the hearing would continue. To the extent that that approach is relied upon as evidence of an unreasonable or unfair approach to the process, indicative of victimisation the Tribunal rejects any such criticism. Mr Crutchley's approach was sensible and reasonable and one which could not have disadvantaged the claimant had she chosen to stay and make her case. Nevertheless, the claimant chose to leave and that meant that she was not in a position to challenge the second half of the

respondent's case against her, which had yet to be dealt with at any meeting and which involved the most damaging allegations against her. It is, therefore, hardly surprising that Mr Hollsworth took the view that those allegations were proven. Given the nature of those allegations, it is entirely unsurprising that he took the view that it was appropriate not to confirm the claimant in her employment and the decision that her employment should end on one month's notice was made.

44. The narrative set out above does not support any conclusion that the claimant's dismissal was caused by the fact that she did either of the two protected acts. Rather it much better supports a conclusion that the claimant was dismissed because of the concerns raised by Mrs Broadest, supported by evidence and largely unchallenged by the claimant. We find therefore that the claim of victimisation is not made out.

45. Had we approached the matter in the conventional manner, we would say that we could find no grounds to require an explanation from the respondent and even if there were, the explanation given was, on balance the true one and in no sense connected to the protected act.

46. For all the reasons outlined above these claims are dismissed.

Employment Judge Rostant
Date: 13 March 2019