Case No: 2302887/2017
2302452/2018

EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**V**	**RESPONDENT**
Ms A Borkett		**(1) MacMillan Cancer Support** **(2) Michael Collins** **(3) Craig Fordham** **(4) Jennifer Daws**

Heard at: London South Employment Tribunal
On: 19, 20, 22, 23, 26, 27, 28, 29 July, 2 & 3 August 2021

Before: Employment Judge Hyams-Parish
Members: Mr P Adkins and Ms H Carter

Representation:
For the Claimant: In person
For the Respondent: Mr N Roberts (Counsel)

JUDGMENT

It is the **unanimous** Judgment of the Employment Tribunal that:

(a) The claims of direct discrimination pursuant to s.13 Equality Act 2010 ("EQA") fail and are dismissed.

(b) The claims of sex related harassment pursuant to s.26 EQA fail and are dismissed.

(c) The claims of victimisation pursuant to s.27 EQA fail and are dismissed.

(d) The claims of whistleblowing detriment pursuant to s.48 Employment Rights Act 1996 ("ERA") fail and are dismissed.

REASONS

CLAIMS AND ISSUES

1. By two claim forms presented to the Tribunal on 13 October 2017 and 29 June 2018, the Claimant brings the following claims against the Respondent:

    - Direct discrimination pursuant to s.13 EQA.
    - Harassment pursuant to s.26 EQA.
    - Victimisation pursuant to s.27 EQA.
    - Whistleblowing detriment pursuant to s.48 ERA.

2. The Tribunal was provided, at the outset of the hearing, with a very clear and comprehensive list of issues, which was referred to constantly during the hearing, and has been used by the Tribunal as a structure for its decision. References to numbers and letters in square brackets from paragraph 95 onwards in this Judgment, are references to paragraphs in the agreed list of issues.

THE HEARING

3. The parties had agreed a timetable which the Tribunal was happy to adopt. The first day, and the morning of the second, was reserved for Tribunal reading. The Claimant's evidence began on the afternoon of the second day. Unfortunately, due to a member of the Tribunal having to self-isolate for COVID19 reasons, the hearing continued by CVP from the third to the sixth day. During this period, the Claimant opted to attend the Tribunal in person and join the hearing remotely from there. The hearing resumed "in person" with the consent of the parties on the seventh day when the evidence concluded.

4. During the hearing, the Tribunal heard evidence from the Claimant, and the following witnesses on behalf of the Respondent:

    (a) Michael Collins (Department head)
    (b) Craig Fordham (Grievance appeal)
    (c) Gwyneth Tyler (Grievance)
    (d) James Byrne (line manager)
    (e) Andy Cruickshank
    (f) Charmaine Goddard (HR)

(g) Jennifer Daws (HR/grievance appeal)

5. The Respondent served a witness statement for Steve Mecrow, but he could not attend the hearing. His witness statement was part of the bundle of witness statements, but the Tribunal did not need to refer to it.

6. The Tribunal was presented with a number of different bundles at the beginning of the hearing:

Bundle	Pages
Respondent bundle	2693
Claimant bundle	91
Respondent pleadings bundle	233
Claimant pleadings bundle	549

7. Whilst never satisfactory, the Tribunal took a pragmatic approach and allowed the parties to refer to any of the bundles, in the interests of avoiding long protracted arguments about who was responsible for failing to agree one consolidated bundle.

8. The parties made their closing submissions on the morning of the eighth day. Both parties had supplied written submissions in advance. These submissions were considered very carefully by the Tribunal before reaching its decision.

9. The Tribunal spent the remainder of the eighth, and the ninth day, deliberating. The hearing had originally been scheduled for 12 days but two days were taken out of the listing.

10. A decision with detailed reasons was given orally on the afternoon of the tenth day. These written reasons are provided at the request of the Claimant. This request was made at the conclusion of the hearing and followed up the same day in writing.

BACKGROUND FINDINGS OF FACT AND CHRONOLOGY

11. The following findings of fact were reached on the balance of probabilities, having considered all of the evidence given by witnesses during the hearing, together with documents referred to by them. The Tribunal has only made those findings of fact that are necessary to determine the claims. It has not been necessary to determine every fact in dispute where it is not relevant to the issues between the parties.

12. The First Respondent is a large charity which provides people diagnosed with cancer, and their families, with much needed support during what is a very difficult period for them.

13. The Claimant commenced her employment with the First Respondent on 1 September 2006. At all material times, she was employed in the role of system support analyst, based in the server team.

14. Michael Collins joined the First Respondent on 7 July 2016 as head of IT operations and governance. His role changed to head of technology operations on 26 March 2018, following a strategic review within the technology directorate, which created a new department called governance, risk, and compliance. His role involved management of the technology infrastructure and network functions, together with management of the service operations, including service delivery and support. One of the teams ultimately under the management of Mr Collins, was the server team.

15. During the period which is the subject of the complaints brought by the Claimant, she was line managed by James Byrne. He was her line manager until July 2017.

16. Between 2016 and 2018 there were eleven people employed in the server team, including the Claimant. The Claimant was the only female member of the team.

17. There is a practice within the technology department, including the server team, of having a "lessons learned" debrief after the completion of a project. The purpose of such a debrief is to discuss what can be learned from a project and to record any improvements that can be made for future projects. They are intended to be carried out at the end of every project, but that does not always happen, due to work pressures and other demands.

18. Mr Collins first met the Claimant in his first few weeks of employment with the First Respondent during a period when he sat down with each member of the department to get to know them and discuss what they were working on. Mr Collins' first impressions of the Claimant were that she was very keen on Data Management, and he recalled in evidence that she told him about the work she had been doing surrounding data management. On 21 July 2016, the Claimant sent Mr Collins a document she had produced, and they agreed to meet at some point to discuss making progress on it. At the same time, Mr Collins had had a directive from his manager, Declan Hunt, to progress some of the data risks highlighted to the First Respondent by an external IT Security consultant the previous year. Mr Collins considered the Claimant an ideal candidate to progress some of that work given her interests and experience. Mr Collins' initial impression of the Claimant was that she was someone who was passionate about data management and frustrated that the recommendations she had made from the work she had done, were not being implemented.

19. When Mr Collins joined the First Respondent, he quickly became aware of issues of poor performance in the technology department as a whole, which included the server team. In order to get a sense of relative performance across the department, he discussed with his direct reports the performance of their teams. As part of these discussions, he asked them to do a skills matrix on individuals in their teams. Mr Byrne completed such a matrix on the server team for Mr Collins.

20. A few months into his role, in early December 2016, Mr Collins put together what he said was a rough diagram of the capabilities and motivations of the technology department, including the server team, for Mr Hunt. He used a template which he found on the internet which was intended to show where different employees ranked in terms of aptitude/ability and attitude/commitment to their jobs. The document was divided into four quadrants: the 'Star' quadrant was for people who showed good aptitude/ability and good attitude/commitment; the 'Below Standard' quadrant was for people who showed poor or average aptitude/ability and poor or average attitude/commitment; the 'Problem Child' quadrant was for people who showed good aptitude/ability but poor or average attitude/commitment; and the 'Workhorse' quadrant was for people who showed good attitude/commitment but poor or average aptitude and ability.

21. Mr Collins said he completed this template to understand the strengths and weaknesses of the people in the department. Using this template, Mr Collins ranked the Claimant as having average to low aptitude/ability and poor to average attitude/commitment, so she was placed in the 'Below Standard' quadrant. His assessment of the Claimant was informed by his experiences of the Claimant prior to that point, which included behaviours he had observed in meetings, feedback from her manager, and issues he had encountered himself, namely with the Greenrooms project and PCI Data discovery project (see below).

22. The complaints made by the Claimant, and which have resulted in the claims before this Tribunal, arose from an assessment made by Mr Collins of the Claimant's performance as part of her annual performance and development review ("PDR"). Mr Collins assessed the Claimant as "needs development". This category is the next step below "good". This is further dealt with below but the reason for raising the point now is because Mr Collins' assessment of the Claimant was, on his evidence, particularly informed by his experiences of her on two projects.

23. The first of those was the Greenrooms Project. Mr Collins described the Greenrooms project as the name given to a project to update the First Respondent's intranet. The Claimant said this was an inaccurate description of the project because she was only tasked to work on one component of that. She referred to the project as the Interim AD User

project. For the avoidance of doubt, references to either project in this judgment are references to the same project.

24. At the time Mr Collins became aware of the Greenrooms project, he was still fairly new and therefore did not have a formal role in it, but was ultimately responsible for the technical delivery of it by virtue of his position. Mr Collins was accountable for ensuring that the technology department delivered the project on time. Cheryl Davis was the project manager and as such, the Claimant had a reporting line into her in so far as her work on that project was concerned.

25. Mr Collins said in evidence that when he started to be invited to the meetings on the Greenrooms project, it was within weeks of the go-live date. It was apparent to Mr Collins that, on the technical side, there was still much to be done, but it was unclear to him where the slippage had occurred because he had only just started to become involved. Importantly, he had no reason to believe that the project had underestimated the time required to deliver, so he therefore assumed that there had been technical challenges along the way which hindered the Claimant's progress.

26. Mr Collins said that the meetings he was involved in did not seem very constructive and the pressure was on the entire team to deliver. There was a strong resolve by the project sponsor that the project would be delivered on time. This was important because the technology directorate had a poor track record for delivering technology projects within agreed timescales. Mr Collins found the meetings somewhat chaotic and were, in his view, taken over by the Claimant, which resulted in the meetings not being very effective. Mr Collins recalled attending at least two project group meetings with the Claimant and others when he witnessed this behaviour. In his witness statement Mr Collins said the following:

> ***My observation was that Ashley became highly animated in the meetings and took control to the extent that discussion centred on the points Ashley wanted to discuss. Cheryl was not really controlling these meetings and Ashley came across as argumentative and overbearing and tended to cut across people and force her points through by raising her voice. I observed that the other attendees did not challenge her, and my feeling was that those present did not wish to get into a conflict or argument with her. Ashley was raising concerns with technical elements of the project and specifically, problems with some of the work which fed into the work that she was doing. I cannot recall the specific problems she was raising, but they seemed addressable, technical issues which did not need to be complained about, but rather addressed logically and worked through calmly. I was not used to seeing technical meetings done in this way.***

27. The Claimant was due to go on holiday for two weeks beginning Friday 19 August 2016. Part of the project involved migration of HR data into

Greenrooms. Mr Collins had a meeting with the Claimant and Rob Littlecott (HR) on the data migration on 17 August 2016, before she went on annual leave, and Mr Collins said it became clear to him that a lot of the work that the Claimant had been assigned to do had been left undone in relation to completing the migration of staff profiles to Peoplebank, the HR system.

28. On the morning of 18 August 2016, the Claimant sent an email to the team members that were involved in the data upload that she was responsible for, saying that she had reservations about whether it would be possible to complete the project on time.

29. In his witness statement, Mr Collins said the following about the Claimant:

> ***I was very disappointed with the state in which Ashley had left the project when she went on holiday. I appreciated that the deadlines for migration of the data and launch of the intranet were quite restricted, but these were set by the organisation's business sponsors and it was our job to provide the technical support to make it happen. It seemed to me that the last-minute rush that Ashley had in fixing these issues were more to do with her own management of her workload and her failure to fix these issues before she left, rather than an inherent issue with the deadlines that had been set.***
>
> ***This was my perception at the time based on my own involvement in the project. She had deadlines to deliver work for the Greenrooms project and my understanding was that the project had been ongoing for a number of months and the timelines were clearly known. I felt that Ashley had slipped, albeit with contributing factors in other areas of the same project and started to write emails raising concerns as she was about to go on leave instead of spending her time ensuring that the work was handed over properly. Ashley had not planned ahead in advance of her annual leave to make sure there was a smooth transition of this work. Ashley and I agreed that she would hand her work over to Dominic. I was unaware of it at the time, but it transpired that Dominic did not have the skills to manage the work, which Ashley should have been aware of when she decided to hand over to him. Although Cheryl was the project manager appointed to this project and I believe Cheryl knew that Ashley was going to go on holiday, it was still Ashley's responsibility to make sure that she had appropriate cover for her work while she was away, and that she carried out a complete handover beforehand. As it worked out, Dominic got very panicked about it because he did not have the skills and so we passed the work to Tom Steven, who was more experienced.***

30. When the Claimant returned from holiday and started to perform the upload of the HR data, Mr Collins said it was halted by the Claimant without any reason. Mr Collins said he discovered that the problem was that employee details were being uploaded by reference to their surnames, rather than a unique employee ID. This could therefore have resulted in employees seeing the personal data of other employees with the same surname.

31. The Claimant had to leave work in order to pick up her son and therefore the problem identified had to be worked on urgently by Tom Steven and Mr Collins, who worked through into the early hours to resolve the problem.

32. Mr Collins summed up his feelings about this by saying the following in his witness statement:

> ***The issue that I had with Ashley's performance on the Greenrooms project was not the fact that she had made a mistake, but rather her reaction to it. She knew that she had made a mistake because the upload was not working properly and, when it came to handing over the project while she was on holiday or at the end of the day on 6 September 2016, she did not keep people properly informed of what had happened or help to put a plan in place to resolve it. In addition, when she was told there were issues and when the project wrapped up, rather than thanking those who had helped resolve the issues and ask what she could do to further assist, she wrote emails questioning why certain fixes had been put in place, objecting to those fixes, or complaining about how the project was run more generally. While I understood the issues that she was raising about how the project was being managed, I did not think it was productive to raise matters that we were all aware of.***

33. After the data upload for the Greenrooms project had been resolved, Mr Collins said they did not have a full debrief but could not recall the reasons why not.

34. Another project in which Mr Collins worked more closely with the Claimant and was able to gain experience of her capabilities, was the unstructured data project. Unstructured data was a big concern for the Respondent, including credit card information held on their systems in files and folders, as this risk had been explicitly raised following a report produced by an external security consultant following a data security incident in 2015. The Respondent had also decided to implement processes in order to achieve compliance with the Payment Card Industry Data Security Standard ("PCI DSS"). PCI DSS is an information security standard for organisations that handle credit card information. Compliance with the standard was seen as best practice to protect the cardholder data of customers.

35. Mr Collins worked closely with the Claimant on the project, and he asked her to write a report for the Data Programme Board on the issues with PCI data that had been identified and how they were going to be resolved. At the outset, the Claimant said to Mr Collins that there was not a clear enough scope for the project.

36. The Claimant had previously identified a service provider who could provide a tool to identify personal data (including PCI data). This service

provider was called Varonis. The Claimant was tasked with doing the searches and producing the report once the Varonis tool was in place.

37. When carrying out the PCI unstructured data discovery in October 2016, the Claimant experienced a problem setting up the Varonis tool due to a technical issue with the load balancer. A load balancer is a device that manages the workload between multiple servers. The issue held up progress for ten days between 20 October and 1 November 2016. Mr Collins said he learned that the problem was still persisting when he returned from holiday and he therefore asked one of the Claimant's colleagues, Harish Vekaria, to look at the issue, and discovered that the problem was related to cookie settings on the load balancer. Mr Collins recalls that he was able to resolve the issue within a few minutes of investigating it. He said it was frustrating that the work was held up for such a period, particularly with such a tight deadline, and when the solution was sitting within the same team as the Claimant.

38. Mr Collins said that the Claimant continued to experience problems with the load balancer preventing Varonis running the scans and that the Claimant seemed to struggle with the technology. On 6 December 2016, the Claimant again announced that there was an issue with the load balancer. By this point, the deadline for extracting the information had been missed, and Mr Collins recalled that the Claimant seemed to be spending a lot of time discussing the problems with Varonis, but not getting very far. It became apparent to Mr Collins, in his view, that the Claimant's technical skills in that particular area were not strong, therefore Mr Byrne asked Mr Vekaria to see if the load balancer could be bypassed. It could, and configuration was made to allow this to happen. This resolved the problem and the Varonis tool was able to work.

39. The Claimant went on annual leave from 16 December 2016 until 4 January 2017. At this point Mr Collins said that the issue with the primary balancer was resolved but there were problems running the searches, taking two to three weeks to run throughout the Christmas period.

40. Mr Collins said the following in his witness statement

> ***As a result, I assumed that Ashley would check in once or twice during her annual leave simply to confirm the search was still running because the project was already late and we wanted to avoid further delay, and she was aware of the risk of the search failing. Connecting remotely and checking the search would have taken two to three minutes at the most and I believe restarting the search would not have taken more than a couple of additional minutes, if that was what was required. Ashley worked from home one day a week as part of her flexible working arrangement so she would have been able to check this very quickly and conveniently.***

> ***When Ashley came in on 4 January 2017, I asked her how the searches had gone. Ashley's response was that she did not know as she had not checked since she went on leave on 15 December 2016 and said she did not commit herself to working on the project while she was on annual leave, so she said she did not know where my expectation for her to do the work came from. While I understood Ashley was on annual leave, I had hoped a conscientious member of staff would have taken a couple of minutes to do a simple check like this, in circumstances when the work was already overdue, without having to be explicitly asked to do so.***

41. It is appreciated that thus far there has been a concentration solely on the problems with the above projects from Mr Collins' perspective. That is primarily because Mr Collins is the focus of the majority of the claims being brought by the Claimant. The Claimant disputes the picture painted by Mr Collins, particularly the problems identified, the cause of them, and the part played by the Claimant. The later grievance process brought by the Claimant (see below) was critical of certain aspects of the management of the Claimant which suggests that, in some respects, her criticisms were justified. Of course, the Claimant goes further than that and has accused Mr Collins and other witnesses of creating what she referred to as a "*false narrative*" about her performance which ultimately led to a PDR score which she was unhappy about.

42. It is important to make clear at this stage, however, that it is not necessary for this Tribunal to delve into the rights or wrongs of what happened or to make findings as to who was responsible for what. At points in the evidence, the questioning by the Claimant descended into such technical detail about the projects that the Tribunal had to step in and bring the questioning back to the issues which the Tribunal needed to determine. Mr Collins and the Claimant clearly have different views about the cause of the problems referred to above and the Claimant's performance in those projects.

43. What the Tribunal can say at this point is that it was satisfied that Mr Collins' beliefs and opinions about the performance of the Claimant were genuinely held, and to a large extent supported by the evidence of Mr Byrne and other witnesses. The Tribunal was satisfied that Mr Collins gave truthful evidence on this issue and on all other aspects of his evidence. That does not mean that the evidence provided by the Claimant was not true; what was clear from this case in relation to certain matters witnesses were questioned about, was that it was not easily possible to say that one person was right, and the other was wrong. Even on the Respondent's side, the Tribunal heard that Ms Tyler took a different view to Mr Collins on the PDR assessment (see further below).

44. The other criticism of the Claimant's performance by Mr Collins which it is worth dealing with at this point, is the PCI Unstructured Data Report. He

was sent the report by the Claimant on 19 January 2017 and said in evidence that the quality was very poor and not suitable to send to the Data Programme Board. The report included a lot of superfluous details on the origins and background of the PCI standard and looked as though it had simply been copied from online publications. On 25 January 2017, Mr Collins sent the Claimant some feedback on the first draft of the report, including further guidance on what people sat on the Data Programme Board, and the fact that the report would need to include a brief summary explaining the purpose of it and its relevance. He said that the quality of the second draft of the report was so poor that he ended up having to rewrite the report himself.

45. In January 2017, performance ratings were given to employees in the server team relating to their performance in 2016. Mr Collins was concerned that there had been a history of line managers not challenging poor performance and awarding a "good" rating rather than a more appropriate rating of "needs development" where performance needed to be improved.

46. Prior to finalising the PDR ratings for that year, Mr Byrne and Mr Collins had a one to one in mid-January 2017 to discuss the ratings of the server team and the grades he was proposing to give them. Mr Collins said in evidence that his view of Mr Byrne was that he was a very good technical resource and a strong strategic manager; he was very good at the day-to-day job of working with the Server Team, but his personality was not well suited to the tough stance sometimes needed in management. Mr Collins said Mr Byrne knew well the underlying issues with the performance of the Claimant, and had previously commented on the negative impact of the Claimant in team meetings, but he had not dealt with it previously and her behaviour and performance issues had gone unchecked and unaddressed. Mr Collins said he had the same issues with some of the line managers of the other teams in the technology department, whom he felt were not working hard to improve their team's performance.

47. When Mr Byrne therefore gave the Claimant an initial rating of "good" for her PDR, Mr Collins challenged Mr Byrne about this, noting his own experiences of the Claimant's performance, and told Mr Byrne that he should not give her that grade, given there were areas of improvement which she needed to make.

48. The Claimant and Mr Byrne met on 26 January 2017. The Claimant was disappointed with the grading. Mr Vekaria was the only other person in the team who was not happy with his grade; he was graded as "good" but believes he should have been graded "strong". There were also two other members of the wider department whose performance was graded "Needs Development".

49. Mr Byrne and Mr Collins met with the Claimant on 8 February 2017 to discuss the areas for development that they had identified.

50. Under the PDR policy, employees had a right to appeal against the rating given to them. The Claimant appealed against her "needs development" rating. On 14 February 2017, the Claimant sent an email to the server team with a link to a shared drive which contained her PDR appeal. She was later asked to remove this. Mr Byrne and Mr Collins did not think the Claimant had sent the email maliciously, but rather because she thought it would make her seem like a better team player.

51. The Claimant's appeal against her grading was conducted by Steve Mecrow. Prior to his meeting with the Claimant, Mr Mecrow met with Mr Collins to discuss his rationale for awarding the Claimant a "needs development" rating. The appeal meeting took place on 9 March 2017. Mr Mecrow was supported by Kirstie Pottle from HR. By letter dated 22 March 2017, the Claimant was informed by Mr Mecrow that the original rating was to be upheld.

52. When the PDR appeal process concluded, Mr Byrne drafted an informal performance Action Plan for the Claimant to follow to demonstrate that she was developing. In the informal action plan, Mr Byrne outlined four areas in particular for the Claimant to develop, three of which were aimed at improving her communication skills and interactions with colleagues. When the Claimant returned from her annual leave in May 2017, Mr Byrne arranged a meeting with her and Mr Collins to discuss the plan, together with any outstanding questions she had about her "Needs Development" rating. Mr Collins attended this meeting to support Mr Byrne, because Mr Byrne was struggling to manage the Claimant's questions relating to the PDR rating. It was a difficult meeting, during which the Claimant alleged that Mr Collins and Mr Byrne had changed their view of the areas the Claimant needed development in. Ms Pottle sat in the meeting to provide HR support.

53. On 30 July 2017, the Claimant raised a formal grievance which said as follows:

> ***Dear Mrs Dawn Wilde***
>
> ***Formal Grievance against Michael Collins and Macmillan Cancer Support***
>
> ***I am writing to raise a formal grievance against Michael Collins and Macmillan Cancer Support.***
>
> ***Over the last 12 months I have been subjected to sustained campaign of bullying by Michael Collins Head of IT Operations and Governance and IT management, including Andy Cruikshank. The bullying has taken the form of***

a. Denigrating and demeaning me, picking on me and setting me up to fail

b. Deliberately excluding me

c. Subjecting me to unfair treatment

d. Subjecting me to overbearing supervision

e. Misusing their power or position

f. Making threats or comments about my job security without foundation

g. Deliberately undermining me by overloading me and constantly criticising me in front of my peers

h. Preventing me from progressing by intentionally blocking me from progression and denying me training

2. I have been discriminated against on grounds of my sex by Michael Collins and IT management and I consider this behaviour to be ongoing.

3. I have been denied training contrary to S39 2(b) of the Equality Act 2010

4. I have been subjected to ongoing harassment by Michael Collins and IT management on the grounds of my sex which has had and is having the purpose or effect of violating my dignity and creating an intimidating, hostile, degrading, humiliating and offensive environment for me.

5. I contend that Macmillan has failed in its duty of care:

a. To provide reasonable support

b. To provide a safe system of work and a safe workplace

c. To take reasonable care to ensure the safety of employees at work which extends to their mental as well as physical health

6. I contend that HR have been complicit in permitting the bullying to continue, whilst they have been aware of the treatment I have been subjected to, they have been completely passive and let the behaviour continue.

7. I have suffered a significant injury to feelings and my physical and mental well-being has been and is being adversely affected

I cordially request that due to the seniority of Michael Collins and the IT Managements apparent collusion, this hearing is held by a senior manager outside of IT.

I understand that you will confirm the details of the Grievance Hearing with reasonable notice so that I can make arrangements to be accompanied by my Community representative. When arranging the meetings, please also be aware that that due to childcare requirements I have annual leave over August and if more time is required I am happy to do this post my annual leave.

Yours sincerely

Ashley Borkett

54. The Claimant's grievance was considered by Gwyneth Tyler. The grievance meeting took place on 12 September 2017. It was not possible to meet before then due to general availability and because the Claimant was on annual leave between 15-31 August 2017.

55. Prior to the grievance meeting, the Claimant had been asked to provide supporting evidence for her grievance but refused to do so before the hearing. This resulted in Ms Tyler being able to do little in terms of preparation and investigation before the grievance meeting.

56. At the grievance meeting, the Claimant was emotional and read from a script. She said as an outcome that she wanted Mr Collins to be accountable. She followed up the meeting by sending Ms Tyler a number of documents in support of her grievance. Ms Tyler also met with Mr Collins, Mr Steven, Mr Byrne, Cheryl Davis, Mr Vekaria and Andy Cruickshank during a series of meetings on 18 and 22 September 2017. Mr Collins and Mr Cruickshank also sent Ms Tyler supporting documents.

57. On 6 November 2017, Ms Tyler met with the Claimant to deliver her outcome. A number of the complaints were upheld, which largely related to the process leading to the Claimant's grading which Ms Tyler concluded was unfair in certain respects and could have been better. However, she said that she found no evidence of "malicious intent" in the incidents the Claimant referred to and, importantly, she found no evidence of discrimination or sexism by Mr Collins, HR or any other manager in the Technology directorate.

58. Ms Tyler said that she would give the Claimant a further ten days to provide any further feedback before finalising the outcome. She said that she would send a draft written outcome reflecting what was said during the meeting. Unfortunately Ms Tyler then became seriously ill in the period shortly following that meeting and the draft outcome was not sent to the Claimant.

59. When Ms Tyler returned to work on 20 December 2017, she learned that the draft outcome letter, intended for the Claimant's further comments, had not been sent out. She therefore sent out the draft letter on 21 December

2017 and the Claimant was given until 12 January 2018 to comment on it. No comments were provided by the Claimant and a final outcome letter was issued on 16 January 2018. The Claimant was sent a covering letter and a detailed investigation report containing her findings.

60. The Claimant appealed against Ms Tyler's outcome by letter dated 24 January 2018. The Respondent's grievance provides limited grounds for an appeal against a grievance outcome. These are:

> ***Macmillan procedure was not fairly or correctly implemented***
>
> ***The Grievance was inadequately investigated***
> ***The investigation findings do not support the outcome***
>
> ***New evidence has come to light since the outcome was issue that could potentially change the outcome***

61. The appeal meeting was held on 5 March 2018 when the Claimant was accompanied by her trade union representative, Grant Williams. The appeal was heard by Craig Fordham and HR support was provided by Jennifer Daws. At the start of the meeting, after the introductions, the Claimant raised the fact that she had not received witness statements from the grievance investigation. The Respondent's grievance policy expressly states that there is no entitlement to such witness statements. However, Mr Fordham and Ms Daws paused the meeting and they discussed together whether or not it was possible to share the witness statements.

62. The appeal meeting was postponed pending a decision in relation to the witness statements as the Claimant and Mr Williams were not prepared to proceed without them. They were eventually disclosed in a redacted format since they contained personal information which the Respondent's data governance team had advised Ms Daws should not be shared.

63. The appeal meeting resumed on 22 March 2018. Mr Fordham found it a challenging and difficult meeting. It lasted more than two hours. Following the meeting, Mr Fordham met with Ms Tyler to understand more about how she had conducted the grievance investigation. Mr Fordham specifically asked Ms Tyler to explain how she had investigated the complaints of sex discrimination as it was not clear to Mr Fordham from the outcome how Ms Tyler had clearly ruled out that the Claimant had not been subject to sex discrimination. Ms Tyler said she was confident this was not the case but accepted that this was the one area she could have asked more questions about.

64. Mr Fordham decided to conduct further interviews before making a decision on the Claimant's appeal. He wanted to test whether particular actions were specifically directed at the Claimant or whether there were similar complaints raised by other members of the team. He spoke to Mr

Steven who had the same job as the Claimant and was at the same level in terms of seniority. He also spoke to Mr Byrne to find out more about how the team was run. Mr Fordham also wrote to the Claimant to inform her that these further interviews were to be conducted and what the time frame would be for giving an outcome.

65. The Claimant was informed of the outcome of her appeal by letter dated 26 April 2018. Mr Fordham partially upheld two grounds of appeal. The first was that she was not provided with reasonable support and the second related to the Claimant being denied training.

LAW

Direct discrimination

66. The EQA sets out provisions prohibiting direct discrimination. Section 13 EQA states:

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

67. The focus in direct discrimination cases must always be on the primary question "*Why did the Respondent treat the Claimant in this way?*" Put another way, "*What was the Respondent's conscious or subconscious reason for treating the Claimant less favourably?*" It is well established law that a Respondent's motive is irrelevant and that the protected characteristic need not be the sole or even principal reason for the treatment as long as it is a significant influence or an effective cause of the treatment. In ***R v Nagarajan v London Regional Transport [1999] IRLR 572*** it was said that "*an employer may genuinely believe that the reason why he rejected the applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim, members of an Employment Tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, that race was the reason why he acted as he did*".

68. The provisions relating to the burden of proof are set out at Section 136(2) and (3) of EQA which state:

> ***(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.***
>
> ***(3) But subsection (2) does not apply if A shows that A did not contravene the provision.***

69. It is for the Claimant to prove facts from which the Tribunal could conclude, in the absence of any evidence from the Respondent, that the Respondent committed an act of discrimination. Only if that burden is discharged would it then be for the Respondent to prove that the reason it dismissed the Claimant was not because of a protected characteristic. Therefore, it is clear that the burden of proof shifts onto the Respondent only if the Claimant satisfies the Tribunal that there is a 'prima facie' case of discrimination. This will usually be based upon inferences of discrimination drawn from the primary facts and circumstances found by the Tribunal to have been proved on the balance of probabilities. Such inferences are crucial in discrimination cases given the unlikelihood of there being direct, overt and decisive evidence that a Claimant has been treated less favourably because of a protected characteristic.

70. When looking at whether the burden shifts, something more than less favourable treatment than a comparator is required. The test is whether the Tribunal "could conclude", not whether it is "possible to conclude". In ***Madarassy v Nomura International plc 2007 ICR 867 CA*** it was said that the bare facts of a difference in treatment only indicates a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal "could conclude" that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination. However, the "more" that is needed to create a claim requiring an answer need not be a great deal. In some instances, it can be furnished by non-responses, an evasive or untruthful answer to questions, failing to follow procedures etc. Importantly, it is also clear from case law that the fact that an employee may have been subjected to unreasonable treatment is not necessarily, of itself, sufficient as a basis for an inference of discrimination so as to cause the burden of proof to shift.

71. Notwithstanding what is said above, in ***Laing v Manchester City Council and another 2006 ICR 1519, EAT***, the point was made that it might be sensible for a tribunal to go straight to the second stage… where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question where there is such a comparator — whether there is a prima facie case — is in practice often inextricably linked to the issue of what is the explanation for the treatment.

Sex related harassment

72. Section 26 EQA defines harassment 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.

73. There are three essential elements of a harassment claim under s.26(1):

- unwanted conduct
- related to sex
- which had the *purpose* or *effect* of (i) violating the Claimant's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant (the "proscribed environment").

74. When considering "effect", the Tribunal must consider the Claimant's perception; the circumstances of the case; and whether it is reasonable for the conduct to have that effect: s.26(4). Establishing reasonableness is essential: ***Pemberton v Inwood [2018] EWCA Civ 564.***

75. In a case called ***Land Registry v Grant [2011] EWCA Civ 769***, it was said that a tribunal should be careful not to cheapen the significance of the statutory wording; it must consider carefully whether the matters above can violate the Claimant's dignity or create the proscribed environment for her.

76. The term "related to" means there must still be some feature or features of the factual matrix identified by the tribunal which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged in the claim. A tribunal considering the question posed by S.26(1)(a) must evaluate the evidence in the round, recognising that witnesses will not readily volunteer that a remark was related to a protected characteristic. The alleged harasser's knowledge or perception of the victim's protected characteristic is relevant but should not be viewed as in any way conclusive. Likewise, the alleged harasser's perception of whether his or her conduct relates to the protected characteristic cannot be conclusive of that question.

Victimisation

77. Section 27 of EQA provides 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.***

78. The test to be applied here is threefold:

- Did the Claimant do a protected act?
- Did the Respondent subject the Claimant to a detriment?
- If so, was the Claimant subjected to that detriment because he or she had done a protected act, or because the employer believed that he or she had done, or might do, a protected act?

79. Here the most important decision to be made by the Tribunal is the "*reason why*" the Respondent subjected the Claimant to a detriment. Was it because of the complaint alleged to be a protected act – or was it something different? Even if the reason for the detriment is related to the protected act, it may still be quite separable from the complaint alleged to be a protected act.

80. A person claiming victimisation need not show that the detriment meted out was *solely* by reason of the protected act. As Lord Nicholls indicated in ***Nagarajan v London Regional Transport 1999 ICR 877, HL***, if protected acts have a '*significant influence*' on the employer's decision making, discrimination will be made out. ***Nagarajan*** was considered by the

Court of Appeal in ***Igen Ltd & ors v Wong and other cases 2005 ICR 931, CA,*** a sex discrimination case. In that case Lord Justice Peter Gibson clarified that for an influence to be 'significant' it does not have to be of great importance. A significant influence is rather "*an influence which is more than trivial. We find it hard to believe that the principle of equal treatment would be breached by the merely trivial*. *The crucial issue for the Tribunal to determine is the reason for the treatment — i.e. what motivated the employer to act as it did? But it is not necessary for the protected act to be the primary cause of a detriment, so long as it is a significant factor"*.

81. Whilst the same burden of proof applies in such cases, namely that the Claimant must prove sufficient facts from which the Tribunal could conclude, in the absence of hearing from the Respondent, that the Claimant has suffered an act of discrimination, it is also perfectly acceptable to go straight to the "*reason why*" because that is the central question that the Tribunal needs to answer.

Whistleblowing

82. The term "*protected disclosure*" is defined in section 43 of the ERA as follows:

> ***43A. Meaning of "protected disclosure"***
>
> ***In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.***
>
> ***43B. Disclosures qualifying for protection***
>
> ***(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—***
>
> ***(a) that a criminal offence has been committed, is being committed or is likely to be committed,***
>
> ***(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,***
>
> ***(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,***
>
> ***(d) that the health or safety of any individual has been, is being or is likely to be endangered,***
>
> ***(e) that the environment has been, is being or is likely to be damaged, or***
>
> ***(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be***

deliberately concealed.

83. A disclosure of information must be one that conveys facts rather than simply makes an "*allegation*" or "*mere assertion*". That said, it is important not to draw a rigid distinction between them as they are not mutually exclusive concepts. Importantly, the disclosure of information has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in s.43(B)(1).

84. It is important to emphasise that s.43(B)(1) ERA requires that the disclosure of information must "*in the reasonable belief of the worker*……*tend to show*" one of those matters at s.43(B)(1)(a)-(f). The worker is not required to show that the information disclosed led him or her to believe that the relevant failure was established, and that the belief was reasonable — rather, the worker must establish only reasonable belief that the information tended to show the relevant failure. It is a subtle but important distinction.

85. A worker does not therefore have to prove that the facts or allegations disclosed are true, or that they are capable in law of amounting to one of the categories of wrongdoing listed in the legislation. The wording of S.43B(1) ERA indicates that some account is to be taken of the worker's individual circumstances when deciding whether his or her belief was reasonable. Thus, the focus is on what the worker in question believed rather than on what a hypothetical reasonable worker might have believed in the same circumstances. This introduces a requirement that there should be some objective basis for the worker's belief. As long as the worker subjectively believes that the relevant failure has occurred or is likely to occur and their belief is, in the Tribunal's view, objectively reasonable, it does not matter that the belief subsequently turns out to be wrong, or that the facts alleged would not amount in law to the relevant failure.

86. In determining public interest, a tribunal has to determine (a) whether the worker subjectively believed at the time that the disclosure was in the public interest and (b) if so, whether that belief was objectively reasonable. There might be more than one reasonable view as to whether a particular disclosure was in the public interest, and the Tribunal should not substitute its own view. The reasons why a worker believes disclosure is in the public interest are not of the essence, although the lack of any credible reason might cast doubt on whether the belief was genuine. However, since reasonableness is judged objectively, it is open to a Tribunal to find that a worker's belief was reasonable on grounds which the worker did not have in mind at the time.

87. Section 47B ERA states the following: -

> ***(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.***
>
> ***(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—***
>
> ***(a) by another worker of W's employer in the course of that other worker's employment, or***
>
> ***(b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.***

88. The burden of proof in a s.47B claim is different and is expressly provided for in the ERA. Here, it is for the employer to show the ground on which any act, or deliberate failure to act, was done (S.48(2) ERA). Where a claim is brought against a fellow worker or agent of the employer under S.47B(1A), then that fellow worker or agent is treated as the employer for the purposes of the enforcement provisions in s.48 and s.49, and accordingly bears the same burden of proof as the employer. It does not of course mean that, once the Claimant asserts that he or she has been subjected to a detriment, the Respondent must disprove the claim. Rather, it means that once all the other necessary elements of a claim have been proved on the balance of probabilities by the Claimant — i.e., that there was a protected disclosure, there was a detriment, and the Respondent subjected the Claimant to that detriment — the burden will shift to the Respondent to prove that the worker was not subjected to the detriment *on the ground that he or she had made the protected disclosure*. In other words, the Respondent must show, if it is to avoid liability, that the detrimental treatment was "*in no sense whatsoever*" on the ground of the protected disclosure.

ANALYSIS, CONCLUSIONS AND ASSOCIATED FINDINGS OF FACT

89. Before turning to each of the 37 complaints, the Tribunal considered it important to make some general comments.

90. This case lasted ten days, and the Tribunal heard evidence from eight witnesses. The first claim was presented in 2017 and there have been a number of different hearings before this one. As part of what the Tribunal understands to have been a long and drawn-out process, a very clear list of issues was eventually agreed which set out very clearly the questions the Tribunal needed to answer in order to determine the claims, and what matters therefore needed to be addressed in the witness statements. The Claimant was legally represented for all but one of the preliminary hearings and therefore will have received advice during a large part of this Tribunal process.

91. These cases are costly, time consuming and mentally draining. The effect, on the Claimant, was all too clear to see when she gave her closing submissions, and at other points in the hearing, when she became very emotional. The Respondent witnesses too will no doubt have found the process of coming to the Tribunal to give evidence difficult and challenging and the Tribunal does not underestimate that. Quite clearly, the Claimant was genuinely aggrieved about what happened to her at work. However, being unhappy about something that has happened at work, even with justification, does not always lead to a meritorious claim before the Tribunal.

92. Looking at the allegations in this case, the Tribunal was of the view that the evidence was a long way from proving the necessary ingredients for discrimination claims, in particular whether the conduct was related to, or because of, the Claimant's sex, depending on the particular claim. In most, if not all, of the claims of harassment, the evidence was a very long way from proving that what happened to the Claimant, even if unwanted, had the proscribed effect.

93. For a significant number of the claims, the Tribunal simply struggled to find the evidence such that the claims could even get off the ground. To approach a whistleblowing claim without even setting out clearly the necessary evidence, even just basic facts, from which a protected disclosure could be identified, is really quite unsatisfactory. Even taking into account that the Claimant was representing herself, she is an intelligent lady, who was able to follow the legal issues, and had received legal advice for a large part of the process. The Tribunal made such allowances as it considered appropriate to ensure the parties were on a level footing, but to fill in the rather large gaps would have given the Claimant too much assistance such that it would have been unfair to the Respondents.

94. Turning then to the conclusions reached by the Tribunal, These are grouped together under the following headings and refer to the allegations contained in the agreed list of issues:

    (a) Protected disclosures

    (b) Protected acts

    (c) Project work (including communicating expectations)

    (d) PDR

    (e) PDR appeal

    (f) Training and career development

(g) Grievance process

(a) Protected disclosures

95. There were nine protected disclosures alleged by the Claimant. These are as follows [sic]: -

(a) Disclosure of the Unstructured Data Project Overview document in 2014 [16(a)].

(b) Disclosure of the Unstructured Data Project Overview document initiated by the Claimant due to Access Control List issues, which was published on TeamSpace, in May 2015 [16(b)].

(c) Disclosure of the Varonis Risk Assessment Report for Unstructured Data to Declan Hunt and the IT Management Team in May 2015, May 2016, and June 2016 [16(c)].

(d) Disclosing to the First Respondent and Mr Collins, Robin Vaughan, and the Varonis support team the high risk of data non-compliance at a Varonis Product Meeting on 16 August 2016 [16(d)].

(e) Disclosure of Payment Card Industry Data Security Standard ("PCI DSS") compliance issues, to Andy Cruikshank, Cheryl Davis, and the First Respondent's Server Team in January 2017 via emails and risk management team meetings [16(e)].

(f) Disclosure of the Varonis Risk Assessment Report (Unstructured Data) to Mr Collins and Cheryl Davis in June 2017 [16(f)].

(g) Disclosure of the risk of non-compliance around Unstructured Data in Data Discovery Project meetings to Cheryl Davis, Terrence Furlong, Mr Collins and Andy Cruikshank during the course of 2017 [16(g)].

(h) Disclosure of the Unstructured Data Discovery Report on the request of Andrew Rogers (IT Head of Operations before the Second Respondent) from May 2016 to Declan Hunt, Michael Collins, Paul Bayliss, Melanie Strickland, Andy Cruikshank, Terrance Furlong, Thomas Sewell, Cheryl David, Andrew Rogers, Steve Mecrow, Robin Vaughan, James Byrne, Kirstie Pottle and Gwyneth Tyler [16(h)].

(i) Disclosure of concerns about data in the Claimant's Grievance documents to Gwyneth Tyler, Sam Tayler, Grant Williams, and a Human Resources notetaker on 02 November 2017 [16(i)]

96. The Tribunal concluded that the Claimant did not make any protected disclosures within the meaning of s.43 ERA. In her evidence she pointed to paragraphs 109 and 110 of her witness statement. She also attempted to point the Tribunal in the direction of reports which she said contained the disclosures. However, there was a complete lack of evidence enabling the Tribunal to be satisfied that the necessary ingredients of a protected disclosure were present. In relation to each alleged protected disclosure, there was a lack of evidence as to what specific disclosure was made, when it was made and to whom. There was also a lack of evidence as to how the disclosure, in the Claimant's reasonable belief, tended to show one of those matters at s.43B(1), or how such disclosures were in the public interest. As a general point, certain disclosures were about matters which the Claimant had been tasked to report on as part of her duties and which the Respondent was already concerned about.

(b) Protected acts

97. There were five protected acts alleged by the Claimant as follows [sic]: -

97.1. Asserting her right not to suffer unlawful discrimination under the Equality Act 2010 in her grievance.

97.2. Asserting her right not to suffer unlawful discrimination under the Equality Act 2010 in her grievance meeting.

97.3. Her claim of direct sex discrimination, harassment, victimisation and whistleblowing detriment in ET claim.

97.4. Asserting her right not to suffer unlawful discrimination under the Equality Act 2010 in her grievance appeal.

97.5. Asserting her right not to suffer unlawful discrimination under the Equality Act 2010 in her grievance appeal meeting.

98. The Tribunal was satisfied that the Claimant did the protected acts (within the meaning of s.27 EQA) as alleged by the Claimant. This is admitted by the Respondent.

(c) Project work (including communicating expectations)

[2(a)] Mr Collins removed the Claimant from the Interim AD User Project (Greenrooms project) replacing her with male colleagues Mr Byrne and Mr Steven.

99. This is alleged as an act of direct sex discrimination. The project was largely complete by 7 September 2016 albeit there was further work to do concerning the upload of HR data onto the system. When the Claimant came back from holiday, she continued to pick up work outstanding on the project. The Tribunal found no evidence to prove that the Claimant was removed from the project. On that basis alone, the claim fails. The Tribunal could find no less favourable treatment, and still less any evidence that the Claimant had been treated less favourably because of her sex. Accordingly this claim fails.

[2(b)] Mr Collins and Mr Cruickshank removed the Claimant from tasks in the Unstructured Data Project, replacing her with a male colleague Vinny Periasamy.

100. This is alleged as an act of direct sex discrimination. Mr Cruikshank gave clear and credible evidence on this issue. The only reason that Mr Periasamy was asked to step in was because the Claimant could not perform the encryption necessary – and Mr Periasamy could. There is no evidence whatsoever that the First Respondent's actions were driven by the fact that the Claimant is a woman and Mr Periasamy is a man. It was driven purely by who could perform the encryption. Accordingly this claim fails.

[2(d)] Mr Collins and Tom Sewell removed the Claimant from the Unstructured Data to Cloud project, replacing her with male colleagues Mr Steven and James MacGregor-Johnson.

101. This is alleged as an act of direct sex discrimination. Mr Collins gave clear and credible evidence on this issue. The Claimant had not even been allocated to the project and what Mr Collins wanted to do was reduce the risk of a single point of failure, thereby spreading the expertise and experience beyond the Claimant. Firstly, therefore, there was no removal. Secondly, the Respondent had reasons for what it did which had nothing to do with the Claimant's sex. Accordingly this claim fails.

[2(g)] Mr Collins reduced (only) the Claimant's technical work remit from 14 tasks in 2016 to a single task from 2017 onwards, as evidenced by the task list of 17 July 2017.

102. This is alleged as an act of direct sex discrimination. The task tracker was a spreadsheet Mr Byrne created and used to track the tasks the team were working on. It was not regularly reviewed by Mr Collins but on occasions Mr Byrne discussed it with Mr Collins when he needed guidance on prioritisation of work activity. The spreadsheet was not maintained stringently, and the information contained in it was not always kept up to date. The spreadsheet was used by Mr Byrne as a task allocation tool

rather than a precise tracker of the progress of projects/tasks. During the period to which the Claimant refers, she was allocated as technical resource to the Data Programme due to the prior work that she had done in this area and because there was an expectation of a large volume of work on the programme that year. The Claimant was told that she would be expected to work on the project full time. She was not removed from other day to day or ad hoc tasks. There was no deliberate reduction of work. There was no evidence of less favourable treatment and the Respondent's actions in relation to assigning the Claimant the one full time task, had nothing to do with her sex. Accordingly this claim fails.

[2(h)] Mr Collins excluded the Claimant from relevant communications, meetings, 'lessons learn' sessions and decisions about the Claimant's work remit since September 2016.

103. This is alleged as an act of direct sex discrimination. The Tribunal found it difficult to identify any evidence that suggested that the Claimant was excluded from communications. There was no "lessons learned" debrief following the Greenrooms project. Accordingly as the Tribunal could find no less favourable treatment, let alone any that was because of her sex, this claim fails.

[6(b)] Mr Collins did not communicate expectations that the Claimant should work through her pre-planned approved leave taken on 16 December 2016 for childcare needs. This was raised in meetings on 4 January 2017, 24 March 2017 and 31 May 2017, which have letters or meeting notes.

104. This is an alleged act of harassment. The worst that Mr Collins could be criticised for in respect of this allegation, was assuming or expecting the Claimant to check in once or twice during her annual leave to confirm the search, referred to at paragraph 40 above, was still running, but not expressly asking the Claimant to do this. This was because the project was already late and there was a need to try to avoid any delay.

105. The Tribunal was satisfied that this was something, rightly or wrongly, that Mr Collins would have expected any member in the team to have done. It was not pleaded as an act of indirect discrimination, which appeared to be what this claim may have been aimed at. As far as the allegation of harassment is concerned, whilst it may have been unwanted conduct, it did not have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. Even if it did have that effect, the Tribunal concluded that it was not reasonable for it to have done so, and neither was the conduct related to the Claimant's sex. For the above reasons, this claim fails.

[6(m)] Mr Collins using the Claimant's pre-approved leave for childcare requirements, as a reason to move her from the Unstructured Data to Cloud Project with no communication to the Claimant; the Claimant was informed by the project manager Terry Furlong on 5 September 2017 on return from leave.

106. This is an alleged act of harassment. The Tribunal refers to its findings of fact at paragraph 101 above. The Tribunal was not satisfied that the Claimant's pre-approved leave had anything to do with this decision. Whilst not allocating the Claimant to the project may have been unwanted conduct, it did not have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. Even if it did have that effect, the Tribunal concluded that it was not reasonable for it to have done so, and neither was the conduct related to the Claimant's sex. For the above reasons, this claim fails.

[6(d)] Mr Collins expressing his disappointment that the Claimant had to leave work (at the appropriate time) to collect her son from childcare on several occasions in September 2016, 31st May 2017.

107. This is an alleged act of harassment. The Tribunal concluded that Mr Collins did not express his disappointment, or indeed, disapproval, at the Claimant needing to collect her son from childcare. This claim of harassment therefore fails.

[6(f)] Mr Collins and IT management created a hostile perception that due to the Claimant's family status (working mother and only parent) and flexible working she was less productive than her colleagues on an ongoing basis from January 2017, as a result of the events referred to in paragraphs 6(b), 6(c), 6(d), and 6(m).

108. This is alleged as an act of harassment. There is not a single piece of evidence from which the Tribunal could conclude this allegation was factually correct. For the avoidance of doubt, the Tribunal concluded that this did not happen, and this allegation of harassment must therefore fail.

[13(d)] The Claimant was denied transparent and open communications on projects and processes in September 2016, December 2016, July 2017, and September 2017, affecting her morale and ability to do her job properly, these being meetings, communications, and skills development around new technology like, but not restricted to, Azure.

109. This is an allegation of victimisation. The Tribunal accepted that this related to permission rights to edit using two pieces of software called VMWare and Azure. Permission rights were not managed by Mr Collins. There is no record of whether and when the Claimant had permission rights and whether and when they were changed. The Claimant had the same level of access as some of her colleagues as at the end of 2017. The Claimant accepted that the Respondent was generally trying to ensure that permissions were limited to a "need to use" basis. When the Claimant asked for VMWare access, it was given to her. The Tribunal was not convinced that this alleged detriment was suffered after any of the protected acts. In any event, there was a perfectly reasonable explanation for what had occurred which had nothing at all to do with any protected acts done by the Claimant. Accordingly this claim of victimisation must fail.

(d) PDR

[6(a)] Mr Collins grading the Claimant as "ND" or "Needs Development" in her 2016 PDR.

110. This is an alleged act of harassment. The Tribunal was satisfied that Mr Collins decided on the appropriate grading for the Claimant based on his direct experience of her. The Tribunal concluded that he genuinely believed that she needed to improve certain areas of her performance and behaviour, therefore the grading was appropriate. Whilst the allocation of the grading may have been unwanted conduct, the Tribunal concluded that it did not have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. Even if it did have that effect, the Tribunal concluded that it was not reasonable for it to have done so, and neither was the conduct related to the Claimant's sex. For the above reasons, this claim fails.

[2(j) and 6(j)] In meeting on 31 May 2017 and followed up by email on 3 July 2017, Mr Collins changed the rationale for the 'Needs Development' PDR 2016 a second time from that described in point 2(i), to "behaviours that did not align to Macmillan's Behaviours Framework, which was only introduced in early 2017", without providing recourse for the Claimant to adjust her appeal.

111. This is an alleged act of direct sex discrimination and harassment. The Tribunal concluded that the fundamental reasons why the Claimant had been graded as she was, did not change as alleged or at all. It may well have been explained in a different way, in an attempt to better convey to the Claimant what needed to be improved. There was no evidence of less favourable treatment, and still less, any evidence that what the

Respondent did was because of her sex. If it was unwanted conduct, the Tribunal concluded that it did not have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. Even if it did have that effect, the Tribunal concluded that it was not reasonable for it to have done so, and neither was the conduct related to the Claimant's sex. For the above reasons, this claim fails.

[6(e)] Mr Collins bullying of the Claimant through his "observations" about her relationships with her colleagues during the PDR appeals process in meetings or letters on 8 February 2017, 24 March 2017 and 31 May 2017, as evidenced in notes of these meetings.

112. This is an alleged act of harassment. The Tribunal rejected any suggestion that Mr Collins' observations about the Claimant's relationships or interactions with colleagues constituted bullying. It did not have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. Even if it did have that effect, the Tribunal concluded that it was not reasonable for it to have done so, and neither was the conduct related to the Claimant's sex. For the above reasons, this claim of harassment fails.

[6(g)] Mr Collins and James Byrne, on instruction from HR, informing the Claimant that she was not allowed to share information raised in her PDR with colleagues.

113. This is an alleged act of harassment. The Tribunal concluded that Mr Collins and Mr Byrne took a more generous and kinder view of this conduct than others might have done in the circumstances. It was perfectly reasonable to ask the Claimant to take the link down and not share the content of her appeal. It certainly did not have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. Even if it did have that effect, the Tribunal concluded that it was not reasonable for it to have done so, and neither was the conduct related to the Claimant's sex. For the above reasons, this claim of harassment fails.

[6(n)] HR applying pressure on the Claimant to sign the 'Needs Development' letter.

114. This is an alleged act of harassment. The Tribunal rejected the Claimant's suggestion that she was placed under pressure. The Tribunal read the letter from HR and all that happened was that HR asked for a signed copy to be returned. There was nothing wrong with that request. It is absolutely not harassment, and not related to the Claimant's sex.

(e) PDR appeal

[2(i) and 6(i)] Steve Mecrow, on Mr Collins's input, changed the original rationale for the 'Needs Development' PDR 2016 (which was discussed in the meeting with James Byrne and the Claimant on 8 February 2017 and in which Mr Collins said the Claimant's 'Needs Development' rating was due to "failing on Interim AD update and the PCI part of the Unstructured Data project, not working well with colleagues and being aggressive") to "Overall approach to work, overly assertive manner and leave taken at in-opportune times' in the PDR appeal outcome letter and without providing recourse for the Claimant to adjust her appeal.

115. This is an alleged act of direct sex discrimination and harassment. The Tribunal was not satisfied that there was any input by Mr Collins to Mr Mecrow's outcome letter beyond the minor amendments Mr Collins referred to in his evidence. The Tribunal accepted the evidence of Mr Collins that he did not influence that outcome at all, save that he was questioned by Mr Mecrow as part of the appeal. The Tribunal did not accept that the reasons for the grading had fundamentally changed. There was no less favourable treatment from which the Tribunal could even begin to conclude that there had been an act of direct sex discrimination. That claim therefore fails.

116. Neither did Mr Mecrow's letter constitute, in the Tribunal's view, unwanted conduct which had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. Even if it did have that effect, the Tribunal concluded that it was not reasonable for it to have done so, and neither was the conduct related to the Claimant's sex. For the above reasons, the claim of harassment also fails.

[6(c)] Mr Collins claims, and Mr Mecrow's collusion, including in the upheld PDR Appeal Outcome letter, stating that such leave which was taken by the Claimant for childcare requirements, was "in-opportune" and this being used to inform the 'Needs Development' rating in her 2016 PDR:

i. In a conversation between the Claimant and Mr Collins on 4 January 2017;

ii. In her PDR appeal outcome letter received by the Claimant on 24 March 2017; and

iii. In her PDR 2016 mediation meeting on 31 May 2017.

117. This is an alleged act of harassment. The Tribunal concluded that there was no collusion as is alleged. The Tribunal concluded that the reference to "inopportune" meant no more than the timing of the leave being unfortunate. It was certainly no criticism, in the Tribunal's view, of the fact that the Claimant had taken leave for childcare reasons. The Tribunal concluded that this was not unwanted conduct which had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. Even if it did have that effect, the Tribunal concluded that it was not reasonable for it to have done so, and neither was the conduct related to the Claimant's sex. For the above reasons, the claim of harassment also fails.

[13(a) and 20(a)] Mr Collins labelled the Claimant as "challenging" and "aggressive" in her PDR appeals meetings and communications.

[13(b) and 20(b)] Mr Collins used inappropriate labels about the Claimant describing her as being "challenging" and "aggressive" to inform her 'Needs Development' 2016 PDR review in her PDR appeals meetings and communications.

118. These are alleged acts of victimisation and whistleblowing detriment. The Tribunal accepted that it was Mr Collins' genuine perception that the Claimant's behaviour in meetings came across as aggressive. That was his opinion. The Claimant conceded at one point in her evidence that her style could come across as aggressive but preferred to refer to herself as being assertive. The difficulty for the Tribunal is that these are subjective terms and one person's aggressive is another person's assertive. Mr Collins was entitled to his view having observed the Claimant during meetings and he was entitled to refer to such behaviours as part of the PDR process. The Tribunal concluded that there was nothing from which they could conclude that these terms were used because the Claimant had made protected disclosures or done a protected act. In any event these events took place before the protected acts and so cannot be acts of victimisation in any event. As the Tribunal has also found, the Claimant did not make protected disclosures. For these reasons, the claims of victimisation and whistleblowing detriment must fail.

[6(h)] Mr Collins's response to complaints about his treatment of the Claimant by purporting to have forgotten the matter being raised and making comments about the Claimant "always blaming others when things went wrong" and labelling the Claimant as being "aggressive" in the PDR appeals meetings on 8 February 2017 and 31 May 2017.

119. This is an alleged act of harassment. The Tribunal heard no evidence from which it could be satisfied such events took place or fell within the definition of harassment. For this reason, the claim of harassment fails.

(f) Training, skills and career development

[2(c)] Mr Collins denied the Claimant access to cross skills training.

120. This is alleged as an act of direct sex discrimination. The Tribunal accepted the evidence of Mr Collins and Mr Byrne that the Claimant was not generally denied access to training and in fact received more training than her peers generally. The Tribunal heard that in March 2017, Mr Collins forwarded a training/networking event to the Claimant, who accepted this was an example of Mr Collins taking an interest in the Claimant's professional development. The Tribunal accepted that a number of members of the server team complained about a lack of training. For example, Mr Vekaria complained to Mr Byrne that he had requested training on the Microsoft Azure and Amazon Web Services systems, but nothing had happened. It was Mr Vekaria's perception that the Claimant had more training than the rest of the team. During the grievance investigation, Tom Steven said that training had stopped when he joined the Server Team and that he recalled only doing one course in his time in the team.

121. The First Respondent accepted that the Claimant was not provided with access to cross-skills training on a single occasion in January 2017. The background to this was that in early January 2017, Mr Byrne emailed the whole Server Team to request various members of the team provide training to new members of the team. He asked the Claimant to give training on Varonis and Citrix/VO. The following week, the Claimant emailed Mr Byrne requesting refresher training on certain systems. Before agreeing to allow the Claimant the necessary time out, he asked her if she knew what the plan was for the Data Project in the short and medium term, because he was aware that the Claimant would be busy with it once underway. His concern was that by agreeing for her to do training at that point, when she would be working on the Data Project full time, she would not have the opportunity to use the new skills she would have acquired through training and would likely have forgotten most of what she had learned. At that time, he was also planning to run the same programme six months later when the Claimant would have the opportunity to do the training then.

122. For the above reasons, the Tribunal was not satisfied, neither did it have sufficient evidence to conclude, that the Claimant had been treated less favourably than her male colleagues. Furthermore, the Respondent put

forward credible reasons for denying her the training, which was not in any way related to the Claimant's sex.

[2(f) and 6(k)] Preventing the Claimant's career progression, Mr Collins and IT Management denying the Claimant cross skills training referred to in paragraph 2(b), the ability to upskill to new technologies being introduced and denying the Claimant access to resources to enable progress of her career and to be efficient in her job, while providing this for her male colleagues as evidenced by the events and dates at paragraphs 2(c), 2(d), 2(g), 2(h).

123. This is an alleged act of direct sex discrimination and harassment. The Tribunal concluded that this was not an act of direct sex discrimination for the same reasons as provided in paragraphs 120 and 121 above. It could also not be said to be unwanted conduct which had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. Even if it did have that effect, the Tribunal concluded that it was not reasonable for it to have done so, and neither was the conduct related to the Claimant's sex. For the above reasons, the claim of harassment also fails.

[6(o)] Mr Collins and Mr Cruikshank excluding the Claimant from necessary information and then denigrating her technical skills in relation to the PCI remediation work on 26 June 2017 in correspondence.

124. This is an alleged act of harassment. The Tribunal heard no evidence from which it could be satisfied that such events took place or fell within the definition of harassment. For this reason, the claim of harassment fails.

[13(c)] Mr Collins and IT management denying the Claimant access to IT resources affecting her productivity, like 'lessons learnt' post the Interim AD User project 2016, removal of her Azure permissions which she become aware of on 29 November 2017 and removal of her permissions to VMWare which she became aware was on 6 February 2018.

125. This is an alleged act of victimisation. This has already been dealt with above. Aside from the findings of fact already made, there is no evidence whatsoever that would even suggest that actions taken by Mr Collins, or the IT team, were because the Claimant complained about sex discrimination.

(g) Grievance process

[6(l)] Ms Tyler failure to deal with the Claimant's grievance in a timeous manner contrary to the grievance policy and implied term that they would do so.

126. This is an alleged act of harassment. Ms Tyler dealt with the grievance as timeously as she could in the circumstances and given the complexity of the case. The timeline was clearly extended because Ms Tyler fell ill. The Tribunal concluded that even if the delay in providing a grievance outcome represented unwanted conduct, it did not have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. Even if it did have that effect, the Tribunal concluded that it was not reasonable for it to have done so, and neither was the conduct related to the Claimant's sex. For the above reasons, the claim of harassment fails.

[6(p) and 13(e)] Ms Daws withholding of the grievance investigation notes from the Claimant prior to the 5 March 2018 grievance appeal hearing.

127. These are alleged acts of harassment and victimisation. They refer to the notes of interviews with the Claimant's colleagues as part of Ms Tyler's investigation. The Respondent was under no obligation to disclose the interview notes under the Respondent's policies which existed at the time. The reason for the refusal to disclose the interview notes related to preserving confidentiality of those interviewed. The Tribunal concluded that even if the refusal to disclose the interview notes was unwanted conduct, it did not have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. Even if it did have that effect, the Tribunal concluded that it was not reasonable for it to have done so, and neither was the conduct related to the Claimant's sex. For the above reasons, the claim of harassment fails. There is also no evidence whatsoever to suggest, neither is the Tribunal satisfied, that this decision was in any way whatsoever connected with the fact that the Claimant had complained about sex discrimination.

[6(q) and 13(f)] The redaction of the investigation notes by Ms Daws, both per se and in terms of the extent of the redaction.

128. This is alleged as an act of harassment and victimisation. Ms Daws gave an explanation for the redaction of the interviews which the Tribunal accepted. She was guided very much by those in the governance team who were concerned about disclosing personal sensitive data. This was the only reason for the redaction. It had nothing to do with the fact that the Claimant had previously raised a complaint of sex discrimination and

therefore the claim of victimisation fails. The Tribunal concluded that even if the decision to redact the notes was unwanted conduct, it did not have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. Even if it did have that effect, the Tribunal concluded that it was not reasonable for it to have done so, and neither was the conduct related to the Claimant's sex. For the above reason, the claim of harassment fails.

> ***[6(r)] Mr Fordham's findings in the Claimant's grievance appeal outcome in respect of:***
>
> ***i. His comments about the Claimant not being discriminated against in respect of the expectation that people would work their annual leave***
>
> ***ii. His failure to uphold the Claimant's grievance appeal in respect of misuse of power or position when he had, himself, found that Mr Collins' justification of his actions was not based upon robust facts***
>
> ***iii. His finding not to uphold the complaint of sex discrimination by Mr Collins and IT Management, when he had already found that Mr Byrne, a member of IT Management, had denied the Claimant access to training that was offered to everyone else in the team, all of whom were male***
>
> ***iv. His disregarding of evidence in respect of the complaint that the First Respondent had not failed to provide a safe system of work or to take reasonable care to ensure the safety of employees in the light of his finding that the First Respondent had failed in their duty of care, the evidence adduced at the grievance and appeal hearings, medical evidence and the fact that the Claimant had a claim at the Employment Tribunal which included a claim for personal injury arising from unlawful harassment.***

129. This is an alleged act of harassment and has no merit whatsoever. The Tribunal concluded that the grievance and appeal processes were thorough and fair. Both partially upheld complaints raised by the Claimant. Whilst the outcome by Mr Fordham may have been unwanted, it did not have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. Even if it did have that effect, the Tribunal concluded that it was not reasonable for it to have done so, and neither was the conduct related to the Claimant's sex. For the above reason, the claim of harassment fails.

[6(s)] Mr Fordham's failure to provide the Claimant with information from his additional grievance appeal interviews and afford her the opportunity to comment on them prior to his making findings.

130. This is an alleged act of harassment. There was no obligation on Mr Fordham to re-interview the Claimant or allow her to comment on the interviews conducted by him. It was certainly not conduct which had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. Even if it did have that effect, the Tribunal concluded that it was not reasonable for it to have done so, and neither was the conduct related to the Claimant's sex. For the above reason, the claim of harassment fails.

[13(g)] Mr Fordham failure to uphold her complaint that she had been discriminated against by the Mr Collins and IT Management which has constantly changed for since January 2017 (Tom Sewell, Andy Cruikshank, James Byrne, Harish Vekaria, Jamie Scott).

131. This is an alleged act of victimisation. However, there was no evidence whatsoever which came close to enabling the Tribunal to conclude that the reason for failing to uphold all of the Claimant's complaints was because she had complained of sex discrimination.

132. Given the above conclusions, the Tribunal did not need to go on to determine the time limit issues.

……
Employment Judge Hyams-Parish
4 August 2021

SENT TO THE PARTIES ON
6 August 2021

FOR THE TRIBUNAL OFFICE

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.