EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Dalbir Ahluwalia	**v**	**Network Rail Infrastructure Limited**

Heard at: London Central
Between: 8 – 17 May 2024 and chambers 10 – 12 June 2024

Before: EJ G Hodgson
Ms R Rosemary
Ms J Holgate

Representation

For the claimant: Mr D Renton, counsel
For the respondent: Mr P Gorasia, counsel

JUDGMENT

1. **All claims of direct discrimination fails and are dismissed.**
2. **All claims of indirect discrimination fails and are dismissed.**
3. **All claims of victimisation fails and are dismissed.**
4. **All claims of breach of the equality clause fail and are dismissed.**

REASONS

Introduction

1.1 The claim was filed on 25 August 2022. The claimant brought various claims. He alleged the respondent had breached the equality clause. He

also alleged that he had suffered direct discrimination, indirect discrimination and victimisation.

The Issues

2.1 The specific issues were discussed at the start of the hearing; the agreed list of issues is set out as appendix 1.

2.2 During the discussion, the claimant sought to clarify a detriment which referred to the action of Ms Lisa Modeste. The respondent stated the alleged clarification constituted a new claim. The claimant was invited to consider the matter. No application to amend was received.

Evidence

3.1 The claimant gave evidence.

3.2 For the respondent, we heard evidence from Mr James Rogan, former financial controller, Mr Martin Paul Bastiani, former programme manager HR. Ms Suzanne Pangbourne, head of human resources, and Ms Lisa Modeste, head of industrial relations; and Ms Rakhi Jethwa, strategic HR lead.

3.3 We received a bundle of documents, a supplementary bundle of documents, a cast list, and a chronology.

3.4 Both parties gave written submissions.

Concessions/Applications

4.1 On day one we considered the issues. They could not be finalised. This led to several orders for clarification. The respondent had conceded the claimant's role and that of the comparator, Ms Taylor, were work of equal value. The respondent was ordered to clarify the basis for the concession.

4.2 On day two, the respondent gave the following clarification:

> **It is accepted that both the Claimant and the comparator held the role of Senior Finance Business Partner, at the material times and until 4 April 2022 (when the comparator was seconded to a different and more senior role). The role of Senior Finance Business Partner within the Respondent's organisation is a Band 3C role.**

4.3 Following further discussion, the respondent agreed that the claimant and the comparator, Ms Taylor, undertook like work, and as their work was like work, it was also equal value.

4.4 On day one, the claim was ordered to set out details of the following: the PCPs for the purpose of indirect discrimination claim; the particular disadvantage suffered by the group and the claimant; and the detriments said to be victimisation.

4.5 The claimant provided some information on the morning of day two, and some further information thereafter. The issues were agreed. The relevant details are included in the issues, as set out by the tribunal at appendix 1.

4.6 The respondent alleged the claimant was attempting to introduce a new claim of victimisation. The tribunal noted that only claims that are pleaded, in the particulars of claim, can be adjudicated. The tribunal confirmed that the claimant should consider the respondent's objections, and the claimant should consider applying to amend.

4.7 We agreed that remedy would not be considered during the hearing.

The Facts

The respondent

5.1 The respondent is responsible for rail infrastructure.

5.2 Spending is broadly divided into 'CAPEX' which deals with investment and 'OPEX' which deals with spending. It needs financial control. At the material time, Mr James Rogan had overview of both areas for business services and IT function. Each had in the region of a thousand employees. The majority of the business service function focused on internal training. Mr Rogan left in January 2022, and CAPEX and OPEX received separate finance controllers.

5.3 The claimant joined Mr Rogan's team in November 2018. Mr Rogan was the direct line manager for four employees. Each of his reports, including the claimant, was a senior finance business partner. A few months after the claimant joined, Mr Rogan reorganised the team. This left the claimant focusing on cost centres for three areas.

5.4 Ms Paula Taylor, a senior finance business partner, had been on secondment and maternity leave. In April 2019, prior to her returning, Mr Rogan and the claimant had discussions about the distribution of work. The claimant made a number of proposals which Mr Rogan reviewed and accepted, as sensible, on 11 March 2019. This led to further reorganisation. Ms Taylor became responsible for delivery and training modernisation. The claimant perceived himself as keeping "the more complex cost centres which required a higher degree of business partnering."[1]

5.5 The claimant and Ms Taylor had the same job title and did similar work. When she returned, she received a salary of £51,605 and the claimant £51,156.

[1] Paragraph 31, claimant's statement.

The new role

5.6 In October 2019 the respondent advertised a vacant senior finance business partner role. It was at level C3, the same grade as the current roles of both the claimant and Ms Taylor.

5.7 Mr Rogan applied for the role. It was an existing, budgeted role the formalities were minimal. The advert concerned route services. It gave details of the role, including the accountabilities, and skills and experience. It encouraged internal applicants. It stated:

> **Network Rail adheres to a structured pay framework, any salary offered will be within the pay range advertised…**

It continued -

> **This is a band 3C vacancy and is paying the following salary: £51,156 – £57,551.**

5.8 The advert contained a link, under "your pay," to further information which took the applicant to the relevant policy.

5.9 The claimant was aware of the role and of its being advertised. He was content with his work, and decided not to apply. Ms Taylor decided to apply. The claimant was aware of her application.

5.10 Mr Rogan, together with a senior colleague, undertook the interviews. Ms Taylor was successful and she was appointed.

5.11 We have not heard from Ms Taylor. We have been referred to various documents gathered during the claimant's grievance process where she suggests she did not raise the issue of pay. We have heard from Mr Rogan who states that Ms Taylor raised the issue of pay, arguing she was worth more than her current salary. The new role was at the same grade as her previous role, and the appointment was a lateral move. Ms Taylor has since been promoted into a new, band 2, role, but we are not concerned with this. It is not unusual for an employee to raise the question of pay, or to use the change of position as an opportunity to request a pay rise. On the balance of probability, we accept the Mr Rogan understood Ms Taylor to be seeking a pay rise.

5.12 Mr Rogan considered Ms Taylor's request for a pay rise to be reasonable. He describes her as a strong performer. She had experience of both CAPEX and OPEX. He viewed her as reliable. He viewed her as knowledgeable and easy to work with. She had an ability to work to tight deadlines. At the time of the promotion, there had been an interim appraisal, and it was expected she would be shown as "exceeding expectations" at the end of year appraisal, albeit her previous grade had been "good."

5.13 Mr Rogan gained HR approval for the pay increase. By email of 12 December 2019 he confirmed his proposal to increase her pay to £56,000, and that was agreed. In his statement, Mr Rogan says, "The increase was agreed because of her ability, skills and experience."

5.14 The increase in salary applied from January 2020.

Others' pay

5.15 Between September 2019 on January 2020, the business recruited two new senior finance business partners at band C3, both male. Both received a rate of pay higher than the claimant's (£55,355.50 and £53,604).

Pay structure

5.16 In 2011, a project started, which included the unions, to consider and address inconsistencies and pay across brands 1 – 4. This led to a formal policy being agreed with the Transport Salaried Staffs Association (TSSA). Part of the rationale was to promote greater transparency and equality. The agreed principles included appropriate market alignment the salary ranges, provision of clear management guidelines for setting base pay and salary progression, transparency, and consistency. The new structure maintained the current bands. Each of the four bands had three pay ranges – A to C. Within each, there were three zones starting with a minimum in zone one, leading to maximum in zone three. Zone one was the starting point for new entrants, and where appropriate, internal moves. Provision was made to continue to link performance management and pay at the annual review. The structure was to be supported by a new set of "remuneration rules."

5.17 The remuneration rules record that zone one is the starting zone for new entrants and, where necessary, internal moves. There is reference to a pay for performance matrix and it is stated "the pay zones will be used to award employees appropriately at the annual pay review." It states "the pay reviews occur only annually and there will be no out of cycle pay awards. Pay for external hires is stated to be between the starting salary and the maximum for zone one.

5.18 The pay guidance considers lateral moves at the same band. The guidance provides:

> **If the employee's current salary is within zone 1 of the new pay range the new role, the salary can be increased to higher point within zone 1 and no higher than the maximum of zone 1."**

Regrading

5.19 In August 2019, there was a regrading exercise affecting the whole global finance team. This was led by Mr Paul Marshall, group controller. The aim was to ensure pay consistency across the global team. It considered whether business partners were receiving the market rate of pay, as there was a perceived difficulty recruiting. Mr Rogan was not involved in those decisions.

5.20 The regrading exercise led to senior finance business partners moving from band 3B to band 3C. This led to their receiving a higher rate of pay. Each pay range was split into zones. The pay range zones were agreed with the unions. Those in band 3C who were paid less than the starting point of zone one would receive a pay rise. Anyone paid more, would maintain their current salary. The starting point for zone one was £51,156. The claimant had earned £48,410 and he received a pay rise. Other colleagues paid less than the claimant, whom the claimant saw as less experienced and less valuable than him, benefited more significantly.

5.21 The previous pay gap between those individuals whom the claimant saw as less experienced was eliminated. This equalisation of pay, in part, led to the claimant being disgruntled. The claimant believed he had more experience than Ms Taylor, but perceived her as being experienced. The claimant believed that he and Ms Taylor should both be paid more than less experienced colleagues.

Statistics

5.22 We have received limited statistical evidence. The evidence we have received relates only to race and ethnicity. We have received no statistical evidence concerning any gender pay differences.

5.23 The respondent publishes an ethnicity pay gap report. We have been referred to the report from 31 March 2021, which was the third annual report. It is a snapshot of data from April 2020 to March 2021. It is said to mirror the methodology for “gender pay gap regulations.”

5.24 The report states:

> **Our ethnicity pay gap increased by 1.7 per cent to 6.7 per cent in 2021 and it remains above the latest national ethnicity pay gap average of 2.3 per cent. This gap tells us that there is still an underrepresentation of black, Asian and minority ethnic employees in higher paid roles.**

5.25 The report goes on to say-

> **Attracting, retaining and developing our talent from these backgrounds remains a priority. We know that it will take time for this to have a positive impact on ethnicity our pay gap and that it will fluctuate.**

5.26 The report notes that one in ten employees had not given ethnicity information.

5.27 It records there were 35,582 “white” employees. There were 826 “Asian or Asian British – Indian” employees. There were 285 “Asian or Asian British – any other Asian background” employees.

5.28 The report considers the average pay gap and applies both mean and median. The median pay gap for the year 2021 increased by 1.7 per cent from 5 per cent to 6.7 per cent.

5.29 The report acknowledges that black and Asian “minority ethnic colleagues make less than 1/10 of our population due to the relatively smaller sample size.”

5.30 The report indicates that the “Asian population” make up the largest proportion of employees from an ethnic minority. The pay gap between white and Asian employees had increased over three years.

5.31 The ethnicity pay gap was summarised as follows:

> **Though our overall pay gap refers to black, Asian and minority ethnic employees collectively, we know that there are greater differences for some groups. For example, when looking at specific ethnic groups:**
> **• Chinese colleagues have a negative pay gap, meaning on average they earn more than the average white employee**
> **• Indian colleagues are almost equal with our white colleagues**
> **• Bangladeshi and Pakistani employees appear to have a significant pay gap.**

5.32 There is a section on “ethnicity bonus gap.” This refers to two bonus schemes: the annual performance related pay (which applied to those in management), and the general performance related pay (for those in other positions, including clerical and technical). It states -

> **Our average median bonus gap is 5 per cent and mean bonus gap is 3.7 per cent in favour of white employees. 38 per cent of our black, Asian and minority ethnic employees sit in management grades compared to 31 per cent of white employees. This means a higher proportion of our black, Asian and minority ethnic workforce would have received slightly lower bonus payments due to the adjustments in the scheme pay outs compared to white employees. This will have contributed to the bonus gap in 2020. However, both APRP and GPRP schemes were also linked to regional and performance which can cause variations in payments to individuals in the same scheme**

5.33 On 25 September 2023, a senior reward business partner prepared some information for the period from August 2018 to July 2019 concerning employees who changed role, but stayed in the same band (a lateral move), about and how many received pay rises. The findings were summarised as follows:

> **In summary, in comparing the two data points:**

- **791 employees in a band 1-4 roles in August 2018 changed UPNs but kept the same band and pay range in July 2019, i.e. a lateral move.**
- **Of these, 276 employees were already above zone 1 maximum therefore no opportunity to increase the salary without a business case being submitted to Reward team for approval.**
- **The remaining 515 employees were below zone 1 maximum therefore there was discretion for hiring manager to increase salary anywhere within zone 1. Note: some employees may already be close to the top of zone 1.**
- **Of the 515, 100 (19.4%) had higher salary in July 2019 versus August 2018 even though they were in the same band but different UPN. 413 (80.2%) had no change in salary and 2 (0.4%) had a decrease in salary – possibly anomalies in the data or one-off adjustments.**

5.34 The report confirmed that of those who moved laterally, but were below the maximum zone 1, 19.4% received a salary increase.

Grievance procedure

5.35 There is a grievance policy and procedure. There is no formal definition of a grievance. It says this at 1.2.1 of the procedure:

> **The purpose of the individual grievance procedure is to provide a framework for dealing promptly and fairly with problems relating to work or the work environment which have not been resolved through the normal working relationship.**

5.36 The procedure records that the emphasis is on informality (1.2.1). It provides that the manager hearing the grievance will have authority to resolve the grievance (1.2.3). The procedure is set out in section 2. It provides that the employee should speak to the immediate line manager in an attempt to resolve the matter informally, unless the complaint is about the line manager, when the grievance should go to the next managerial level.

5.37 The employee is expected to put any formal grievance in writing giving details of the complaint and the reasons. The hearing should be held as soon as possible within seven working days of the submission of the grievance. It is envisaged that witnesses may be interviewed. The manager will make a decision. There will be a written communication. The outcome is normally sent within eight days.

5.38 Section 2.4 states, “There should be commitment from all parties concerned to make sure that the grievance is dealt with without unreasonable delay.”

5.39 Any appeal should be made within ten working days. This leads to an appeal hearing. The outcome of the appeal hearing should be given within eight days.

5.40 Collective grievances should normally be handled through the collective bargaining procedure.

Importance of the appraisal rating

5.41 Appraisal ratings are important as they may trigger an annual pay award under the "pay for performance matrix". Employees may progress through the pay range on an annual basis until they reach the maximum for zone three.

The claimant's initial grievance

5.42 On 13 May 2020, the claimant submitted a grievance. It is a lengthy grievance. The main grievance is summarised at the start as follows;

> **I was put at the lowest end of my banding pay range which is not in line with my experience level and qualifications. Colleagues who are fairly put at the lower end of the pay bracket of the senior finance business partner role would be building their experience level to my level and if studying, working towards chartered status; which I have.**

5.43 The grievance focused on his qualifications compared to others. He stated his desired outcome as follows:

> **The outcome I would like from the pay grievance procedure is to have my pay instated at the same level as my equivalent more experienced and qualified colleagues, such as Paula Taylor. A positive and fair outcome would be for my pay to be roughly the same (minimal difference) as my colleague, Paula Taylor.**

5.44 On 3 June 2020, the claimant stated the salary grade itself was flawed.

5.45 The initial grievance was described in the claimant's witness statement as follows:

> **19. Between September 2019 and May 2020, I raised my concerns that other individuals who were re-graded when I was were now receiving the same rate of pay as me even though they were less experienced. I was arguing that I should be towards the top of the pay bracket because of my qualifications and my multiyear post-qualification experience. I asked that my pay be benchmarked to Paula Taylor.**

5.46 We note that being benchmarked against Mr Taylor was something he raised later when he became aware that she was paid significantly more, but he did not know initially the extent of the discrepancy.

5.47 On 23 July 2020, Mr Howells invited the claimant to a grievance meeting. On 11 August 2020, the claimant confirmed there were five elements to his grievance; he did not mention any form of discrimination on grounds of gender or race, or otherwise.

> **I would like to confirm that the 5 points below from your letter are the basis of my pay grievance.**

> **1) The reclassification of your role as Senior Finance Business Partner from a Band 3B to a Band 3C without any prior consultation.**
> **2) Undervaluing of your experience, qualifications and support to provided to other members of your direct and indirect team(s).**
> **3) Subjective and unfair decision making by your line manager and other managers with respect to the classification of employees to their allocated zone.**
> **4) Perceived unfair allocation of zone because of your challenging attitude towards senior managers.**
> **5) Adverse impact on your mental health and motivation at work linked to all the above items**

5.48 The grievance meeting took place on 14 August 2020. Mr Howells sent his outcome on 14 September 2020.

5.49 On 23 September 2020, the claimant appealed. The appeal referred to Ms Taylor's pay. It referred to her salary increase when she moved laterally. He stated:

> **After reading your report on outcome letter: I would now like to know in my appeal, what mechanism (system framework) was used to award them the increase in their base pay, when they moved laterally.[2]**

5.50 The claimant went on to say that Ms Taylor's pay rise did not "comply with the equality and human rights guidelines." The claimant became aware of her actual salary during the grievance.

5.51 In October 2020, Ms Furniss was appointed as the grievance appeal manager. She wrote to the claimant on 2 November 2020. On 5 November the claimant objected to her appointment, as he wanted someone who worked outside route services. The respondent acceded to his request.

5.52 The claimant's letter of 5 November 2020, shows his concern now focused on why Ms Taylor received a pay rise when she moved laterally, and why it was authorised by Mr Rogan. This was a development of his initial grievance.

5.53 Mr Minall noted that the nature and focus of the claimant's grievance had developed. In her email of 21 December 2020, she stated she was confused. The claimant appeared to be introducing a new complaint relating to Ms McLeod. She asked why he was raising this matter when it was not part of the original grievance.

5.54 On 26 November 2020, the respondent appointed Ms Harper to deal with the grievance.

---

[2] The appeal does not refer directly to Ms Taylor, but it is common ground that it is her lateral movement her salary which is being cited.

5.55 On 22 December 2020, Ms Harper suggested a grievance appeal meeting in the week commencing 7 January 2021.

5.56 On 7 January 2021, the claimant requested the appeal meeting, scheduled for 11 January 2021, be postponed and that a new appeal officer be appointed. The claimant requested the appeal officer be at director level. This request is for someone more senior than envisaged by the grievance policy.

5.57 At that time, England entered into a Covid lockdown.

5.58 On 3 March 2021, Ms Harper conducted a grievance appeal meeting. The notes were sent to the claimant on 17 March 2021, and the claimant raised issues about their accuracy. This led to a postponement of the hearing scheduled for 22 March 2021.

5.59 On 19 March 2021, the claimant raised a second grievance. This triggered concerns about the claimant's welfare. On 31 March 2021, there was a meeting with the claimant and his union rep.

5.60 On 22 March 2021, Ms Harper went on sick leave. The claimant expressed a preference to await her return on 4 May 2021.

5.61 The claimant was absent from work because of sickness from 7 April 2021 to 1 June 2021. In his absence, on 27 May 2021, the respondent met with his trade union representative to discuss what support could be offered.

5.62 On 24 June 2021, the respondent informed the claimant Ms Harper could not continue to deal with grievance because of her continuing illness.

5.63 On 30 June 2021, Mr Fisher was appointed to consider the claimant's grievance. He wrote to the claimant on 20 July 2021.

5.64 On 15 July 2021, the respondent proposed that Ms Boot be appointed as an independent investigator. (We will consider the role of Ms Boot below.)

5.65 On 26 July 2021, the grievance appeal hearing took place.

5.66 On 30 July 2021, Ms Boot wrote to the claimant and informed him she had heavy work commitments until the end of September 2021. On 2 August 2021, the claimant confirmed he did not mind waiting until October 2021. Ms Pangbourne wrote the claimant to confirm that Ms Boot would assist in a quality assurance role for his first grievance and that his second grievance would be revisited once Ms Boot had more capacity.

5.67 Ms Boot issued her own terms of reference for the quality assurance process on 23 September 2021.

5.68 The introduction of Ms Boot, and the process she ultimately proposed, which has been described as "a quality assurance process," led to delays. At the same time, Ms Pangbourne, head of human resources, was involved in an overview capacity. Ms Pangbourne underwent a medical procedure, which reduced to her ability to work.

5.69 Mr Fisher issued a draft outcome of the grievance appeal on 17 November 2021, after discussions with Ms Boot. On 17 November 2021, the claimant raised concerns about Ms Fisher's impartiality, and requested Ms Boot investigate the second grievance.

5.70 On 22 November 2021, the claimant was informed Ms Boot was having surgery. He agreed to await her return.

5.71 Mr Fisher contracted Covid and then was on leave from 11 to 22 December 2021. A meeting was arranged between Mr Fisher and Ms Boot on 7 January 2022.

5.72 On 7 January 2022, a meeting between Ms Pangbourne, Ms Zukowski (HR director, route services) and Ms Boot proposed that Ms Modeste review the claimant's appeal, given her background in dealing with equal pay issues. Ms Boot was to prepare an interim quality assurance report based on Mr Fisher's draft appeal outcome report.

5.73 On 12 January 2021, Ms Pangbourne confirmed that Ms Modeste would be appointed to review the appeal outcome of Mr Fisher. This was to ensure the claimant had trust and confidence in the outcome.

5.74 On 23 February 2022, Ms Modeste reported to the claimant. Her report was critical of the grievance appeal process. She stated-

> **On review of the papers [limited in content], it appears the investigation was superficial and narrow in nature and leaves too many unanswered questions to leave the employee dissatisfied with the outcome and draw inferences of unfair treatment.**

5.75 In her oral evidence before the tribunal, Ms Modeste stated she concluded that there was no evidence to support the equal pay claim. That conclusion was not included in her report.

5.76 As a result, Ms Pangbourne, identified two fresh appeal managers who would undertake the grievance appeal again. Mr Bastiani was appointed, and he was approved by the claimant's union representative on 9 March 2022. His appointment was formally confirmed in May 2022.

5.77 Mr Bastiani was made aware of the quality assurance report prepared by Ms Boot, which was not delivered until 12 April 2022. The claimant commented on it on 11 April 2022. Mr Bastiani was on annual leave until 24 April 2022. On reviewing the report, he was surprised by the proposed detailed level of investigation it suggested. The report recommended the respondent's business was reviewed as a whole in relation to ethnicity and

gender. He thought this went beyond the scope of a normal appeal and was outside his experience. He had significant documentation to review and he met with Ms Boot on 12 June 2022. He had further concerns and says this at paragraph 15 of his statement:

> **I was somewhat concerned about Ms Boot's involvement in the process at that stage. I was uncomfortable with having an external party involved in an internal process, particularly as it was evident, in my view, that Ms Boot had already reached a view that the respondent internal investigation processes were, in her opinion, failing to meet what she believed to be the required standard.**

5.78 Mr Bastiani sent an email to claimant on 21 June 22 to seek his availability for a hearing. A hearing was arranged 21 July 22, but could not take place because no notetaker was available. The claimant's representative was not available until 3 August 2022. On 3 August 2022, the grievance appeal hearing proceeded. On 5 September 2022, there was a second appeal hearing. On 12 October 2022, there was a third appeal hearing.

5.79 During his first appeal meeting, Mr Bastiani discussed with the claimant his second grievance, which alleged institutional racism. He confirmed it was not within his remit and would be dealt with as a separate grievance. The claimant agreed to this.

5.80 Mr Bastiani, following the appeal hearings, interviewed Paula Taylor, Mr James Rogan, Mr James Wood, Mr Rogan's line manager (head of finance operations, route services), and Ms Louise Kavanagh (financial director, route services).

5.81 On 7 December 2022, Mr Bastiani confirmed by email that his workload was causing delays. He drafted the appeal outcome report in February 2023 and then finalised the draft and shared it with Ms Boot on 23 March 2023. In April 2023, he discussed the report with Ms Boot. Her view was the report did not meet the framework required by her quality assurance process. She raised a number of concerns including the failure to compare pay disparities by gender and race across the entire business. Mr Bastiani believed that such a wide investigation was not within his remit or capability.

5.82 Mr Bastiani delivered his outcome on 27 June 2023; he upheld the claimant's grievance in part. He considered six specific appeal points. The matters considered on appeal went significantly beyond those included in the original grievance. Point 1 concerned the claimant's pay. It was not upheld. Point 2, concerned the removal of the claimant's direct report, Ms McLeod. This was a new grievance. It was upheld. Point 3 concerned the alleged detrimental effect of the claimant absorbing some of Ms McLeod's work. This was partly upheld. Point 5 concerned the impact of working excess duties/hours. This was partly upheld. Point 6 concerned alleged undue delay in resolving grievances using a fair and transparent procedure. This was partly upheld, it being accepted the

delay had been caused by both the claimant and the respondent. We do not need to set out the detail of his reasoning.

Grievance two

5.83 The issues identify the claimant's email of 19 March 2021 as being his second grievance. It is common ground that the second grievance was treated as containing an allegation of institutional racism.

5.84 The claimant's email of 19 March 2021 does not state it as a grievance. It concerns, primarily, meeting notes of the previous grievance appeal hearing. Within this email, the claimant appears to quote another email in which she states "It's reached a very very serious point where it has become bigger issue on potential race issues and definitely unfair treatment of me during the grievance process." It is this reference to race which led to the respondent conceding the email was a protected act. The email does not refer to institutional racism.

5.85 At the time, there were a number of meetings at which there were various discussions and the concept of institutional racism was, at some point, raised.

5.86 There are a number of relevant emails. On 16 June 2021, the claimant wrote to Ms Pangbourne. The email was concerned with resolving the documented grievance. In this email the claimant says:

> **… I will withdraw grievance; NR will independently investigate issues raised and look into institutional racism matters within route services. I am happy to be approached by independent investigator.**

5.87 It is clear, therefore, that the concept of institutional racism had been raised.

5.88 On 24 June 2021, the claimant wrote to Ms Zukowski. The email included the following:

> **I am now in a position where either (a) I need to raise a grievance of institutional racism against network Rail, in addition to my original grievance or (B) we follow through my proposal (including an internal investigation chaired independently, outside of route services).**

5.89 It is implicit the claimant accepts he has not raised a grievance of institutional racism previously. It is unclear what he envisages, but one possibility appears to be some form of independent investigation, which, implicitly, may sit outside the grievance procedure.

5.90 On 29 June 2021, the claimant wrote to Ms Zukowski following, it appears, a conversation that day with Ms Lorraine Martins. He says:

> **From Lorraine's understanding, I have already raised grievance of institutional racism and this will be investigator of my original grievance. Can you please clarify that this is the case or do I need to raise a new**

> **separate grievance formally of institutional racism enacted on me, the impact it had on me and my observation of institutional racism enacted on others within route services, RS finance team?**

5.91 On 2 July 2021, Ms Zukowski responded she states:

> **I believe it would be most appropriate to consider your grievance in relation to allegations of institutional racism as a second grievance, and it be heard separately to your current grievance which is at appeal stage…**
>
> **… I have appointed Jacqueline Jardine, of Jardine-White Consulting Ltd, to act as the independent external investigator for this matter. Jacqueline's remit is to conduct a confidential investigation into your second grievance which focuses on your allegation of institutional racism.**

5.92 Ms Zukowski went on to give a number of proposals. She confirmed that Mr Fisher would be appointed in place of Ms Harper to include the appeal from the original grievance. As for the new grievance of institutional racism she stated that it would be "conducted in accordance with network Rail's grievance policy." She confirmed that Ms Jardine had been appointed as an independent external investigator. She envisaged that the claimant could raise any other relevant matters with her.

5.93 On 5 July 2021, the claimant wrote to Ms Zukowski. He objected to the use of Ms Jardine. He stated:

> **You need someone who has gravitas in this subject matter, someone who black employees will be willing to open up to and not scared will lose either jobs or get a target on their back.**

5.94 This was seen as an objection to Ms Jardine. Ms Zukowski suggested a second independent investigator to be appointed to investigate the institutional racism concerns. This process was outside the grievance procedure; it was not envisaged in the response procedures. Ms Pangbourne discussed the matter with Ms Martins and this led to Ms Zukowski approaching Ms Boot, who was a director of an organisation called "Respect at Work."

5.95 On 9 July 2021, Ms Zukowski approached Ms Boot stating the respondent was "looking for someone to undertake an investigation into allegations of institutional racism." She referred to needing an "independent body expert in diversity and inclusion."

5.96 On 15 July 2021, Ms Zukowski proposed to the claimant that Ms Boot be appointed as an external investigator.

5.97 On 16 July 2021, the claimant described her attached profile document as "wow."

5.98 Consideration of the second grievance was suspended, with the claimant's agreement, pending the outcome of the further appeal, as conducted by Mr Bastiani.

5.99 The second grievance has now been addressed. We have limited information on this.

The role of Ms Boot

5.100 We have received no evidence from Ms Boot. She produced a number of reports and became involved in a number of aspects of the claimant's grievances. She was involved in the continuing appeal process. We have considered Mr Bastiani's understanding of Ms Boots' role above and noted his concerns.

5.101 As noted, she was initially appointed to consider the second grievance concerning institutional racism.

5.102 Ms Boot was not employed by the respondent. The documents demonstrate considerable confusion as to the basis on which she was appointed, her role within the grievance procedure, and her role generally. In her own email of 10 July 2021, her proposal was said to concern "confidential workplace neutral assessment – proposal." At no time did the respondent set out clear terms of reference. Ms Boot, ultimately, set out her own terms of reference on 1 October 2021. Those terms were was said to be approved by the claimant and by HR. We do not need to set out the detail of this lengthy document. Ms Boot's document is critical of the respondent's approach in general. One specific criticism was the failure to explain the reason for giving Ms Taylor a pay rise. Ms Boot appears to be addressing the claimant's concerns and his "lived experience." She stated that the "quality assurance" process is designed "to contribute towards restoring [the claimant's] trust and confidence by attending to three elements of his perceived injustices, namely past and present and future based on a model of organisational justice." It sets out a number of principles including "principles of organisational justice model," and includes the following statement:

> **Principles of Organisational Justice Model**
>
> **Network Rail's Grievance Policy will be benchmarked against (a) organisational justice model which adheres to the key principles, cross referenced to (b) the complainant's actual lived experience of the grievance process so far that has allegedly led to a break down in trust and confidence. A preliminary discussions was held with DA and SB on 30 July 2021 by way of a 'neutral assessment' to explore options for SB's involvement in relation to resolution of grievance 1 and separate discussions with Suzanne Pangbourne (S) – Head of HR to agree DA's preferred option was to utilise SB to provide QA oversight of the appeal process and SB to draft the terms of reference following a further meeting with him and his meeting with 12 August with his union representative (DW – Unite Union) to obtain their input to their key concerns and expectations of a fair process.**

5.103 The terms of reference go on to set out a procedure which sits outside the respondent grievance procedure. Paragraph 4.2 of Ms Boot document refers to the process by which the respondent agreed to appoint her as "non-disclosable." The process she envisaged is confused and unclear. At 4.2, the document says this:

> **Following a non-disclosable 'neutral assessment' process the parties have agreed to appoint Safia Boot, as an independent/external QA assessor establish the terms of reference for a Quality Assurance Process which helps to ensure a transparent, fair process and outcome with through involvement and oversight of SB at key stages of the appeal procedure whilst enabling the internally appointed Hearing Manager to remain accountable for setting out the terms of his approach and the delivering his outcome decision, with access to appropriate HR and legal advice.**

5.104 We do not need to record all of Ms Boot's involvement. We note that she produced a report on 7 April 2022. Her own summary states that it is a report on the quality assurance (QA) process she instigated which concerned the grievance appeal carried out by Mr Fisher. In broad terms, it is a highly critical commentary on the approach of Mr Fisher and of the subsequent appeal. The analysis is based on the terms of reference defined by Ms Boot as identified in her own quality assurance document. It is unclear to what extent, if at all, Ms Boot was seeking to engage with the respondent's policies, and she seems to envisage herself having some form of overview.

<u>Ms Modeste</u>

5.105 On 7 January 2022, Ms Pangbourne and Ms Zukowski discussed with Ms Boot a proposal to appoint Ms Lisa Modeste to review the claimant's appeal in relation to the equal pay elements of the complaint.

5.106 Ms Modeste had prior experience of equal pay and was employed by the respondent. It was envisaged that she may be helpful in considering whether the claimant's appeal was symptomatic of wider issues. It was envisaged her remit was to review whether, in her opinion, the appeal methodology had been sufficiently robust, in the context of equal pay, given there was a difference of opinion between Ms Boot and Mr Fisher.

5.107 It is apparent there was some confusion about the nature and purpose of her appointment. Ms Boot appears to believe that Ms Modeste was appointed to replace Mr Fisher. We do not need to consider her role in detail. Ms Modeste reviewed the relevant documents and issued a report. Her report of 31 January 2022 concluded that "the investigation was superficial and narrow in nature and leaves too many unanswered questions to leave the employee dissatisfied with the outcome and draw inferences of unfair treatment." She refers to the investigation into the formal grievance and criticises the manager for taking a narrow interpretation of the grievance, albeit she understood the approach to have been agreed by the claimant. She speculates that there were a number of other matters which could have been considered. She is

critical of the appeal stage. She states that she would expect to see a broader examination of the pay of the comparator and of the claimant. The document is lengthy and critical of the approach to the grievance and the appeal.

The law

6.1 Direct discrimination is defined in section 13 of the Equality Act 2010.

> **13 (1) 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**.

6.2 **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 is authority for the proposition that the question of whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as he was. Accordingly:

> **employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. (para 10)**

6.3 **Anya v University of Oxford** CA 2001 IRLR 377 is authority for the proposition that we must consider whether the act complained of actually occurred (see Sedley LJ at paragraph 9). If the tribunal does not accept the there is proof on the balance of probabilities that the act complained of in fact occurred, the case will fail at that point. This applies equally to victimisation.

6.4 Victimisation is defined in section 27 of the Equality Act 2010.

> **(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.**
>
> **…**
>
> **(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.**

6.5 Prior to the Equality Act 2010 the language of victimisation referred to less favourable treatment by reason of the protected act. Under the Equality

Act 2010, victimisation occurs when the claimant is subject to a detriment because the claimant has done a protected act or the respondent believes that he has done or may do the protected act.

6.6 We have to exercise some caution in considering the cases decided before the Equality Act 2010. However, those cases may still be helpful. It is not in our view necessary to consider the second question, as posed in **Derbyshire** below, which focuses on how others were or would be treated. It is not necessary to construct a comparator at all because one is focusing on the reason for the treatment.

6.7 When considering victimisation, it may be appropriate to consider the questions derived from Baroness Hale's analysis in **Derbyshire and Others v St Helens Metropolitan Borough Council and others 2007 ICR 841**. However as noted above there is no requirement now to specifically consider the treatment of others.

> **37. The first question concentrates upon the effect of what the employer has done upon the alleged victim. Is it a 'detriment' or, in the terms of the Directive, 'adverse treatment'? But this has to be treatment which a reasonable employee would or might consider detrimental… Lord Hope of Craighead, observed in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285 at 292, paragraph 35, 'An unjustified sense of grievance cannot amount to "detriment"'.**
>
> **40. The second question focuses upon how the employer treats other people…**
>
> **41. The third question focuses upon the employers' reasons for their behaviour. Why did they do it? Was it, in the terms of the Directives, a 'reaction to' the women's claims? As Lord Nicholls of Birkenhead explained in *Khan*'s case [2001] IRLR 830, 833, paragraph 29, this**
>
> > **'does not raise a question of causation as that expression is usually understood ... The phrases "on racial grounds" and "by reason that" denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.'**

6.8 Detriment can take many forms. It could simply be general hostility. It may be dismissal or some other detriment. Omissions to act may constitute unfavourable treatment. It is, however, not enough for the employee to say he or she has suffered a disadvantage. We note an unjustified sense of grievance is not a detriment.

6.9 The need to show that any alleged detriment must be capable of being objectively regarded as such was emphasised in **St Helens Metropolitan Borough Council v Derbyshire 2007 IRLR 540**. **Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 IRLR 285** was cited and it was confirmed an unjustified sense of grievance cannot amount to detriment. That in our view remains good law. In **Derbyshire**, Lord Neuberger confirmed the detriment should be viewed from the point of

view of the alleged victim. Rather than considering the 'honest and reasonable test as suggested in Khan' the focus should be on what constitutes a detriment. It is arguable therefore that whether an action amounts to victimisation will depend at least partly on the perception of the employee provided that perception is reasonable. It is this reasonable perception that the employer must have regard to when taking action and when considering whether that action could be construed as victimisation. Detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his detriment. The detriment cannot be made out simply by an individual exhibiting mental distress, it would also have to be objectively reasonable in all the circumstances. The stress and worry induced by the employer's honest and reasonable conduct in the course of his defence cannot, except in the most unusual circumstances, constitute a detriment. The focus should be on the question of detriment.

Reasons for unfavourable treatment.

6.10 When the protected act and detriment have been established, the tribunal must still examine the reason for that treatment. Of course, the questions of reason and detriment are often linked. It must be shown that the unfavourable treatment of a person alleging victimisation was because of the protected act. A simple 'but for' test is not appropriate.

6.11 It is not necessary to show conscious motivation. However, there must be a necessary link in the mind of the discriminator between the doing of the protected act and the treatment. If the treatment was due to another reason such as absenteeism or misconduct the victimisation claim will fail. The protected act must be a reason for the treatment complained. It is a question of fact for the tribunal. **Chief Constable of West Yorkshire police v Khan 2001 IRLR 830 HL** is authority for the proposition that the language used in the Sex Discrimination Act 1975 is not the language of strict causation. The words by reason that suggest that what is to be considered, as Lord Scott put it, is "the real reason, the core reason, the causa causans, the motive, for the treatment complained of that must be identified." This in our view remains good law.

6.12 It is not necessary for a person claiming victimisation to show that unfavourable treatment was meted out solely by reason of his or her having done a protected act.

6.13 Lord Nicholls found in **Najarajan v London Regional Transport 1999 ICR 877**, HL, that if the protected act has a significant influence on the outcome of an employer's decision, discrimination will be made out. It was clarified by Lord Justice Gibson in Court of Appeal in **Igen and others v Wong and others 2005 ICR 931** that in order to be significant it does not have to be of great importance. A significant influence is an influence which is more than trivial.

Subconscious motivation

6.14 The House of Lords in **Nagarajan** rejected the notion that there must be a conscious motivation in order to establish victimisation claims. Victimisation may be by reason of an earlier protected act if the discriminator consciously used that act to determine or influences the treatment of the complainant. Equally the influence may be unconscious. The key question is why the complainant received the treatment.

6.15 Section 23 refers to comparators in the case of direct discrimination.

> **(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.**

6.16 Section 136 Equality Act 2010 refers to the reverse burden of proof.

> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**
>
> **(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.**
>
> **(5) This section does not apply to proceedings for an offence under this Act.**
>
> **(6) A reference to the court includes a reference to--**
>
> **(a) an employment tribunal;**
> **(b) …**

6.17 In considering the burden of proof the suggested approach to this shifting burden is set out initially in **Barton v Investec Securities Ltd [**2003] IRLR 323 which was approved and slightly modified by the Court of Appeal in **Igen Ltd & Others v Wong** [2005] IRLR 258**.** We have particular regard to the amended guidance which is set out at the Appendix of **Igen**. We also have regard to the Court of Appeal decision in **Madarassy v Nomura International plc [**2007] IRLR 246**.** The approach in **Igen** has been affirmed in **Hewage v Grampian Health Board** 2012 UKSC 37**.**

6.18 The classic 'justification' test was set out in **Bilka-Kaufhas GmbH v Weber Von Hartz** (Case 170/84) [1984] IRLR 317 in the context of indirect sex discrimination. The ECJ said that the court or tribunal must be satisfied that the measures must "correspond to a real need … are appropriate with a view to achieving the objectives pursued and are necessary to that end" (para 36). This involves the application of the proportionality principle. It has subsequently been emphasised that the

reference to “necessary” means “reasonably necessary”: see **Rainey v Greater Glasgow Health Board (HL)** [1987] ICR 129 per Lord Keith of Kinkel at pp 142-143.

6.19 The principle of proportionality requires an objective balance to be struck between the discriminatory effect of the measure and the needs of the undertaking. The more serious the disparate adverse impact, the more cogent must be the justification for it: **Hardys & Hansons plc v Lax** [2005] IRLR 726 per Pill LJ at paras 19-34, Thomas LJ at 54-55 and Gage LJ at 60.

6.20 It is for the employment tribunal to weigh the reasonable needs of the undertaking against the discriminatory effect of the employer’s measure and to make its own assessment of whether the former outweigh the latter. There is no ‘range of reasonable response’ test in this context: **Hardys & Hansons plc v Lax** [2005] IRLR 726, CA.

6.21 The claimant refers to **Bank Mellat v Her Majesty's Treasury** (No. 2) [2013] UKSC 39 at paragraph 20 (Lord Sumpton) who suggested some guidance when considering proportionality, albeit not in the context of equal pay. We note the following:

> **20 …(i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community. These four requirements are logically separate, but in practice they inevitably overlap because the same facts are likely to be relevant to more than one of them. Before us, the only issue about them concerned (iii), since it was suggested that a measure would be disproportionate if any more limited measure was capable of achieving the objective. For my part, I agree with the view expressed in this case by Maurice Kay LJ that this debate is sterile in the normal case where the effectiveness of the measure and the degree of interference are not absolute values but questions of degree, inversely related to each other. The question is whether a less intrusive measure could have been used without unacceptably compromising the objective…**

6.22 The sex equality clause is found at section 66 Equality Act 2010

> **66(1) If the terms of A's work do not (by whatever means) include a sex equality clause, they are to be treated as including one.**
> **(2) A sex equality clause is a provision that has the following effect—**
>
> **(a) if a term of A's is less favourable to A than a corresponding term of B's is to B, A's term is modified so as not to be less favourable;**
> **(b) if A does not have a term which corresponds to a term of B's that benefits B, A's terms are modified so as to include such a term.**
> **..**

6.23 The material factor defence is found at section 69 Equality Act 2010

> **69(1) The sex equality clause in A's terms has no effect in relation to a difference between A's terms and B's terms if the responsible person shows that the difference is because of a material factor reliance on which—**
>
> **(a) does not involve treating A less favourably because of A's sex than the responsible per-son treats B, and**
> **(b) if the factor is within subsection (2), is a proportionate means of achieving a legitimate aim.**
>
> **(2) A factor is within this subsection if A shows that, as a result of the factor, A and persons of the same sex doing work equal to A's are put at a particular disadvantage when compared with persons of the oppo-site sex doing work equal to A's.**
> **….**
> **(6) For the purposes of this section, a factor is not material unless it is a material difference between A's case and B's.**

6.24 If there is evidence that the factor, while not directly discriminatory, would have an indirectly discriminatory effect, the employer must show that it is a proportionate means of meeting a legitimate aim; if not, the normal equality clause applies. In **McNeil v Revenue and Customs Commissioners** [2018] IRLR 398, EAT (Similar P), it was held that the decision in **Armstrong v Newcastle-upon-Tyne NHS Hospital Trust** [2006] EWCA Civ 1608, [2006] IRLR 124, is no longer good law, being inconsistent with the Supreme Court's restatement of the law on indirect discrimination generally in **Essop v Home Office**; **Naeem v Secretary of State for Justice** [2017] UKSC 2. At paragraph, the EAT put it as follows:

> **69… the judgment of the Supreme Court in *Essop/Naeem* holds that in a claim based on unlawful indirect discrimination,**
>
> > **(i) once it has been established (whether by statistical evidence or otherwise) that a PCP places people with relevant protected characteristics at a particular disadvantage compared with others, that is sufficient to require objective justification by a respondent of its use of the PCP;**
> > **(ii) it is irrelevant whether or not the reason why the PCP puts that group at a particular disadvantage is itself related to the protected characteristic;**
> > **(iii) the only required causal link is between the PCP and the particular disadvantage.**
>
> **70. It is common ground that those principles apply equally to an equal pay claim based on indirect discrimination under s.69 EA 2010."**

6.25 We note that the case law may refer to direct and indirect discrimination. In the context of section 69, the reference to direct and indirect discrimination is used as a shorthand. When considering section 69 Langstaff P in **Calmac Ferries Ltd v Wallace** UKEATS/004/13 Langstaff P suggested that the previous use of the terminology of direct and indirect discrimination may now be less appropriate. We must have in mind, and apply, the statutory provision of section 69.

Conclusions

Victimisation

7.1 The claimant relies on two alleged protected acts.

7.2 The respondent alleges that the written grievance of 13 May 2020 is not a protected act. The respondent alleges it is a general grievance about pay as a result of the claimant's role being rebranded. The respondent says the grievance makes no reference to equal pay issues, or gender. In general, it does not satisfy section 27 Equality Act 2010.

7.3 The claimant relies on **Waters v Metropolitan Police Commissioner** 1997 IRLR 589 in support of the proposition that what is required is the allegation relied on should have asserted facts capable of amounting in law to an act of discrimination.

7.4 The claimant's submissions do nothing to explain why it is said that the grievance of 13 May 2020 satisfies the relevant test. The claimant fails to identify what are the alleged facts within that grievance which could be interpreted as a complaint about discrimination. Instead, the submissions allege the claimant clarified his grievance at a later date.

7.5 In oral submissions it was conceded the clarification was alleged to have taken place on 3 March 2021 as part of the grievance appeal process. The events of 3 March 2021 are not, in themselves, relied on as a protected act. It appears to be the claimant's position that the allege protected act should be read in conjunction with, or enlarged upon, by reference to the later events.

7.6 We find the written grievance of 13 May 2020 was not a protected act. The claimant's submissions rely on section 27(2)(d). We accept the wording is designed to catch a broad range of complaints, but it is not without its boundaries. The written grievance of 13 May 2020 does not set out facts which could be interpreted as a discrimination claim, and it is not a protected act under section 27(2)(d).

7.7 It is conceded that the claimant's email of 19 March 2021 was protected act. That email refer to race discrimination and that reference was something done in connected with the Equality Act 2010.

7.8 The claimant alleges he suffered four detriments, each of which was an act of victimisation.[3]

7.8.1 Allegation one – The fact that the grievance procedure to date has taken over nearly two and a half years." [*This refers to the grievance dated 13 May 2020. The Claimant was not given a final*

[3] The four allegations, as agreed by the parties in the issues, are set out below.

outcome until 23 June 2023. A reasonable period would have been 3-6 months for the grievance process as a whole rather than the 37 months taken.]

7.8.2 Allegation two – That the grievance has still not had an outcome." [*This refers to the grievance dated 13 May 2020*.]

7.8.3 Allegation three – The fact that the respondent's own employee Lisa Modeste has confirmed as at 31 January 2021 the investigation was superficial and narrow and that the investigation did not satisfy the ACAS standards of being fair and reasonable. [*The complaint is that the grievance investigation up to that point had been so superficial and narrow as to be an act of victimisation*.][4]

7.8.4 Allegation four – The fact that the claimant's second grievance where he alleges institutionalised racism has been wholly ignored" [*This refers to the grievance dated 19 March 2021.The claimant was not given a final outcome until 3 May 2024. A reasonable period would have been 3-6 months for the grievance process as a whole rather than the 38 months taken.*]

7.9 Detriments 1 to 3 fail as they are contingent on finding that the first written grievance was a protected act. It was not. The claimant does not base the victimisation claim on an allegation that the respondent believed he may do a protected act. It follows these three allegations fail.

7.10 Lest we be wrong about that, we will consider each.

7.11 The first allegation of victimisation concerns delay. Any delay in concluding a process could be seen as detrimental treatment. It is necessary to consider whether a reasonable employee, apprised of all the relevant facts, would consider it to be a detriment.

7.12 We have set out in some detail the way in which the claimant's grievances were dealt with. The grievance procedure envisages two broad processes. The first is the initial investigation which leads to an initial decision. The second is a process of appeal, when the initial decision may be reconsidered or reviewed and further evidence may be obtained which will lead to a further decision.

7.13 It is the claimant's grievance that is to be considered under the grievance process. The respondent's procedure has no specific definition of grievance. The respondent's procedure provides the "grievance procedure is to provide a framework for dealing promptly and fairly with problems relating to work or the work environment which have not been resolved through the normal working relationships." This is consistent with the ACAS code of practice on discipline and grievance procedures 2015 (the Code) which provides grievances are concerns, problems or complaints that employees raise with their employers.

[4] It is the respondent's position that the additional wording constitutes a new allegation which is not set out in the claim form. It is respondent's position that the tribunal cannot determine the additional allegation, absent an application to amend.

7.14 The focus of a grievance, therefore, is normally on the work or work environment. Grievances normally concern matters which can potentially be resolved by line management, albeit we do not read this a precluding more serious complaints.

7.15 The claimant's initial grievance concerned pay. That grievance was investigated and a decision given. The appeal took place, and a decision was given. The time periods for those two actions may have been outside those envisaged by the procedure. Grievances about pay are serious issues and may involve complexity. It is common for grievances of this nature to take time.

7.16 The claimant relies on three specific periods of delay, as confirmed at paragraph 56 of the submissions. These periods concern the actin of Mr Bastiani. The claimant identifies the following periods: following the first interview (16 May to 3 August 2022); after concluding the last interview with the claimant before interviewing other witnesses (12 October 2022 – 31 January 23); and three months between the final interview and the actual grievance appeal report (13 March to 21 June 2023).

7.17 The claimant points to a number of alleged facts from which he submits victimisation could be found.

7.18 The claimant's alleges the initial investigation and decision, and the initial appeal decision, were so fundamentally flawed that they should be seen as both unreasonable and unexplained.

7.19 It is said Mr Bastiani unreasonably delayed.

7.20 It is said Mr Bastiani refused to comply with guidance given by Ms Modeste and Ms Boot.

7.21 It is accepted that Mr Bastiani addressed equal pay in his final report, and said there was no evidence of discrimination, but the scope of his investigation is criticised. It is said that the investigation was superficial.

7.22 The claimant accepts that Mr Bastiani has given non-discriminatory explanations during the course of the evidence, but the claimant's submissions at paragraph 60 say there is almost no supporting evidence; we are invited to reject his evidence.

7.23 Mr Bastiani is criticised for not considering, more broadly, the allegation of institutional racism.

7.24 It is accepted the Mr Bastiani did not consider institutional racism, as that was agreed with the claimant. However, the claimant seeks to suggest that he was in some manner he was misled and had he realised there would be delay, he would not have agreed to the delay.

7.25 It is suggested that the delay demonstrates some reluctance by Mr Bastiani to investigate, and that this is evidence that the respondent did not wish to consider the allegation of institutional racism.

7.26 In broad terms, it is the claimant's position that in relation to the key individuals, Mr Howells, Mr Fisher, and Mr Basitani, each of them was swayed by his protected acts, and because of those protected acts behaved in ways which led to delay and the superficial consideration of his grievances.

7.27 It follows we need to consider whether the respondent's approach to the grievance was unreasonable and if so, whether there is a lack of explanation.

7.28 In considering that, it is necessary to consider whether the initial investigation leading to the decision by Mr Howells was either delayed, or unreasonable, in the sense that it was superficial or otherwise improper.

7.29 It is also necessary to consider whether the further action taken by the respondent when the claimant objected to Mr Fisher's appeal findings also demonstrated unreasonableness, including superficiality, which was unexplained.

7.30 It is necessary to step back and consider the claimant's grievance.

7.31 His main grievance concerned his own pay. As the grievance progressed, the focus turned to the pay of Ms Taylor who had received a pay rise following her lateral appointment. Ultimately, this became perceived as an issue of equal pay. That grievance required investigation of the claimant's pay, and why he had not received a pay rise.

7.32 Employees bring grievances for many reasons. The resolution of the grievance does not involve considering every aspect of the reason why an individual may be disgruntled. Here what was needed was a clear focus on the reasons why the claimant had not received a pay rise. The answer to this straightforward question was narrow, and the respondent was reasonable in treating it as a focussed complaint.

7.33 The claimant's pay was fixed by reference to a fixed band and a fixed zone within that band. That reflected an agreement which had been negotiated and which was set out clearly in writing.

7.34 The claimant had received a pay rise when regraded. The procedure provided, in clear terms, for when his pay could or would be increased.

7.35 The yearly increase did not apply at the material time.

7.36 Lateral moves gave rise to a degree of discretion to recommend a pay increase. Mr Rogan had acted within that discretion.

7.37 The claimant had not applied for any lateral move, and his pay did not fall to be considered following an internal appointment.

7.38 Mr Rogan did not give the claimant any more pay as the claimant had not applied for a lateral move and he had not been appointed. There was no mechanism to increase the claimant's pay applicable at the time the claimant says you should have had his pay increased.

7.39 Mr Rogan's reasons for increasing Ms Taylor's pay were not directly relevant to the claimant's pay or to his complaint. When increasing Ms Taylor's pay, Mr Rogan had acted within his ostensible authority, in accordance with the procedure, and having agreed the pay rise with HR. The grievance investigation established this.

7.40 We find the failure to interview Ms Taylor, as part of the investigation into the claimant's grievance, was not unreasonable. The focus was on Mr Rogan's reasons for not giving the claimant more pay. There was no suggestion that in his dealings with Ms Taylor he had acted outside his ostensible authority, and further investigation was unnecessary and unwarranted.

7.41 We accept that the claimant's focus, ultimately, turned from a general complaint about his pay to a focus on different treatment with Ms Taylor. Even then, the answer to why the claimant's pay wasn't increased by Mr Rogan, which ultimately was the basis of his grievance, was narrow. Mr Rogan did not increase the claimant's pay as there was no mechanism by which he could increase the claimant's pay.

7.42 We find that the approach adopted by Mr Howells and thereafter Mr Fisher was reasonable. There is no unreasonableness to explain.

7.43 Mr Howells carefully identified the points of grievance and agreed them with the claimant. He dealt with them. He did so in a manner which was reasonable and it was based on sufficient evidence. We do not accept his approach was superficial.

7.44 We are satisfied in relation to each of the matters decided by Mr Howells that he had sufficient evidence and that his decision was based upon that evidence.

7.45 Mr Fisher's approach was equally reasonable and he was entitled to reach conclusions that he did.

7.46 We are satisfied that Mr Fisher had sufficient evidence for his conclusions, and his conclusions were based on that evidence.

7.47 We are satisfied there was no unreasonable delay.

7.48 The contractual grievance process, subject to any further discretion to be applied by the respondent, concluded with Mr Fisher's outcome. The claimant does not complain of delay up to that point.

7.49 Mr Bastiani's approach was also reasonable. He was faced with an extraordinarily difficult task. It was for him to conduct a fair process in accordance with the respondent's grievance procedure. In essence he was tasked with hearing the appeal again. However, the process itself had become overlaid and distorted by the involvement of third parties whose input was unclear and not envisaged by the respondent's grievance procedure, or by the ACAS Code, or any associated guidance.

7.50 Mr Bastiani was asked to take account of the concerns of both Ms Modeste and Ms Boot. Mr Bastiani, reasonably and properly, recognised that Ms Boot had not adopted a neutral position. She had reached specific, negative conclusions on the reasonableness of the previous decisions, and the approach taken by the previous managers, which impinged on the matters he was to consider and decide. Ms Boot had sought to impose a methodology which seriously constrained his discretion. Nevertheless, he engaged with her whilst maintaining a clear focus. He sought to take into account the matters she raised. His decision was reasonable, balanced, and thorough. We accept that he has given proper reasons for any delay.

7.51 Mr Bastiani's approach was not unreasonable and there is no fact which would turn the burden.

7.52 In any event, the respondent has established an explanation that in no sense whatsoever was any action victimisation.

7.53 The decisions of Mr Howells, Mr Fisher, and Mr Bastiani were fair and reasonable decisions based on sufficient evidence appropriately obtained. Each dealt with the grievance in accordance with the respondent's procedure. In Mr Bastiani's case, he did so having regard to the further input from Miss Modeste and Ms Boot, despite the complexity and difficulty their involvement had occasioned. There was no delay which was unexplained or unreasonable. The alleged facts and criticisms identified by the claimant which are said to turn the burden, and which we are set out above, do not turn the burden. The explanation established. It follows that allegation one of victimisation would fail in any event.

7.54 Allegation two refers to the first grievance of 13 May 2020 not having an outcome. We reject that assertion. Mr Howells gave an outcome. Mr Fisher gave an outcome. Mr Bastiani gave an outcome, the reason for the delay is wholly explained, as set out above. The allegation fails factually. In addition, there is an explanation which in no sense whatsoever is victimisation, as set out above.

7.55 The nature of allegation three is in dispute. We accept the respondent's submission that the alleged clarification advanced by the claimant, when we discussed the issues, constitutes a new claim. There was no application to amend and that claim cannot proceed. The allegation of victimisation, as framed, is that by Ms Modeste stating the investigation was superficial and narrow was an act of victimisation. As acknowledged by the claimant, this is unsustainable. Her opinion that the approach had been inadequate could not be seen by a reasonable employee as a detriment to the claimant.

7.56 Even if it were possible to say the claim form, properly construed, does include a complaint that the investigation was superficial and narrow, and that the nature of the investigations was an act of victimisation, such a claim would fail . First, the investigation was not superficial or improperly narrow for the reasons set out above. Second, the approach was not victimisation, having regard to the explanation, as set out above.

7.57 Allegation four is that the second grievance of institutional racism was wholly ignored. During our discussion on the issues, the claimant sought to suggest this should be construed as being a failure to give an outcome until 3 May 2024.

7.58 We have noted that the email on 19 March 2021 does not identify itself as a grievance and it does not specifically refer to institutional racism. We have set out the relevant history. The allegation contained in the claim form is that the second grievance alleged institutional racism was wholly ignored. We do not accept this can be construed as an allegation that the final outcome was not given until 3 May 2024. The clarification contradicts the allegation. The clarification indicates that the process was undertaken and a decision given. But it is wholly inconsistent with an allegation that it was wholly ignored. If the claimant had wished to bring an allegation that the outcome was delayed, he should have put it in his claim form, or should have applied to amend. Instead, he alleged the allegation that there was institutional racism was wholly ignored.

7.59 Allegation four fails. First, the claimant did not allege institutional racism in his email of 19 March 2021. Second, despite the lack of clarity from the claimant, the respondent identified a possible grievance and took active steps. Third, the respondent sought to clarify the matter with the claimant. Fourth, It appointed an external investigator. It agreed that internal investigator with the claimant. Fifth, Mr Bastiani and others considered the grievance with the claimant who agreed to its postponement.

7.60 We doubt that a general allegation of institutional racism can properly be termed an individual grievance. Specific detrimental treatment, such as the failure to give a pay rise, could be seen as a grievance. However, a broad assertion of institutional racism is unlikely to be the individual grievance.

7.61 It is open to any employee to make broad allegations, including allegations of institutional racism. However, unless these are attached to a specific grievance, it is difficult to see how they engage the grievance procedures. An employer may decide to take action in the face of a wholly unparticularised allegation of institutional racism and that is, essentially, what happened here. That action could include a general investigation or enquiry. However, such a process may be fraught with difficulty, particularly when any underlying grievance is not identified.

7.62 This respondent did take action. It appointed two individuals Ms Boot and Ms Modeste.

7.63 It is apparent that the company wished to respond to the claimant's concerns. A decision was taken to instigate some form of ad hoc procedure which would satisfy him, and in which he could have confidence. Unfortunately, the course of action adopted by the respondent was poorly conceived and ill thought out. We have not heard from Ms Zukowski and therefore we have limited insight into her thought process or rationale. The documents we have seen suggest that her approach lacked focus. We do not have any clear documents from the respondent identifying what was being investigated or setting out the parameters of any external involvement.

7.64 It appears to be in envisaged that Ms Boot would first be involved in the claimant's grievance as some form of neutral evaluator. Later, her role appears to have expanded and embraced questions of institutional racism. It appears Ms Modeste became part of that process, but with a focus on reviewing the appropriateness of the approach of Mr Howells and Mr Fisher particularly and in the context of equal pay. Both Ms Boot and Ms Modeste became an integral part of the appeal process, Mr Bastiani was required to take account of their input.

7.65 The appointments of Ms Modeste and Ms Boot were not envisaged by the grievance procedure and were not necessary for its completion. The grievance procedure had, effectively, completed by the time they were appointed.

7.66 It is surprising that the respondent failed to set out clear terms of reference for Ms Boot. Instead, her role appears to have developed organically, and was ultimately defined by Ms Boot. Equally, no proper terms of reference were given to Ms Modeste.

7.67 What the respondent envisaged Ms Boot's role to be remains unclear to the tribunal. But it is clear the respondent was actively engaging with the allegation of institutional racism. The allegation that the complaint of institutional racism was wholly ignored is without any foundation.

<u>Indirect race discrimination</u>

7.68 We should consider each of the alleged PCPs.

PCP 1- the respondent operates a practice whereby internal vacancies, when they were advertised, although a pay grade would be advertised there was no indication given that if somebody was successful in securing that job what pay they would actually be paid …"

7.69 The respondent accepts that internal vacancies are frequently advertised with a pay range. It would be wrong to say that there was no indication what salary an individual would be paid. The salary range was set out. This reflected a structure which had been negotiated with and agreed by the unions. The policy was finalised after a prolonged period of negotiation.

PCP 2 - that there was an unadvertised manager's discretion that would be operated on the actual pay of the successful applicant.

7.70 We do not accept this is made out. Many adverts contain relevant pay bands. Inevitably the final salary requires a decision to be made as to the exact salary on appointment. This must involve a discretion which must be exercised. This is envisaged in the pay procedure. The procedure is published.

PCP 3 - the respondent operated a practice whereby manager's subjective discretion decided what position within a pay grade an individual would be paid and by the respondent's own admission the pay policy failed to define management discretion.

7.71 PCP three – We accept that managers had a discretion within that permitted by the pay procedure.

7.72 Did any of the PCPs cause the alleged substantial disadvantage?

7.73 It is the claimant's case that persons of British Asian heritage were placed at a particular disadvantage in that they would be paid less than staff doing comparable work. This disadvantage could occur at any stage of the procedure. It is helpful to set out the relevant steps of the procedure. First, there was an application. Second, there was an appointment. Third, the level of pay was fixed by a manager exercising discretion within limits provided for by a policy.

7.74 It is the claimant's case that there is statistical evidence to demonstrate disadvantage to British Asian staff. It is said the business has a growing pay gap of 6.7%. It is then asserted[5] that "a particular cause of the pay gap is the different evaluations that managers (most of whom are white) give white and British Asian staff and performance reviews. Managers assume the former have performed pay, with the results they get more

[5] See paragraph 73 of the claimant's submissions. Group

bonuses." The claimant argues that performance-related payments demonstrates the British Asians receive less pay.

7.75 What is required is evidence of a particular disadvantage affecting the group, and if that is established, evidence of a causal link between the PCP and the particular disadvantage caused to the group and the individual.

7.76 Generally, the relevant group or pool should be established. We recognise that there is not absolute obligation to identify a pool or a group, and other evidence could be given. The claimant fails to engage with any process of identifying a pool or a group.. He fails to address it at all. He fails to explain why this step has been ignored. He fails to adequately engage with how he is approaching the matter evidently.

7.77 Statistical evidence can establish the causal link. It is not necessary to establish the mechanism by which the disadvantages occurs. If there is clear evidence of a PCP favouring one racial group over another, that will suffice to establish the disadvantage . However, it is not enough to assert a disadvantage, or to argue that one is probable, there must be some evidence that shows there is a group disadvantage and that the disadvantage is caused by the PCP. That evidence will often be statistical.

7.78 When considering the potential for the PCPs to lead to group disadvantage it may be possible to consider the effect of the PCPs at various stages of the procedure. First, are British Asians prevented from, or discouraged from making the application? Second, are British Asians less successful on application? Third, when British Asians are successful in an application, does the exercise of discretion lead to a lower level of a discretionary pay increase?

7.79 The statistical evidence we have is limited. We have some statistical evidence on the business as a whole. We have no specific statistical evidence on those applying for a lateral move at band 3C. We have some statistical evidence to suggest that approximately 20% of people who apply for lateral moves receive a pay increase. We have no statistical evidence showing the racial make-up of those who do receive a pay rise on a lateral move.

7.80 The general statistical evidence also suggests that the picture is not uniform between British Asians. There appears to be no significant discrepancy in pay between those described as British Asian – Indian and those who are described as white.

7.81 Paragraph 73 of the claimant's submissions state –

> **The business has a growing pay gap: 5 percent in 2020, 6.7 percent a year later (#1132) – significantly higher than the UK average of 2.3 percent. A particular cause of the pay gap is the different evaluations that managers (most of whom are white) give white and British Asian staff in performance reviews. *Managers assume the former have performed pay, with the result, they get more bonuses* (#1135). Mr Ahluwalia's case is that performance related bonus and decision regarding pay are both examples of managerial discretion. The example of performance related pay shows that when you leave managers free to apply their discretion in relation to pay, British Asians do suffer in that they receive less pay. In relation to performance bonuses, it is accepted that the comparison is not quite exact.** [emphasis added]

7.82 However, what is at issue is the approach to a pay increase on a lateral move. The statistics quoted do not address that, but instead appear to be advanced by way of analogy.

7.83 In this case, we find that there is no statistical evidence which would demonstrate that those who applied for lateral moves from the British Asian background are less likely to receive pay increases than white employees.

7.84 We find that there is no evidence of group disadvantage.

7.85 Even if there were evidence of group disadvantage, this does not mean that the claimant would suffer a disadvantage should he apply for lateral move. Had he applied, and had he been successful, it is likely he would have sought pay rise. A decision would then have been made. If he received no pay rise, or a low pay rise, he may have argued that he suffered a particular disadvantage consistent with the alleged group disadvantage. He did not apply. As he did not apply, he could not suffer any potential group disadvantage. He suffered no disadvantage. As he suffered no disadvantage caused by any PCP, he cannot succeed on a claim of indirect discrimination.

7.86 There was some suggestion during the course of the hearing that the claimant may not have applied because he was discouraged in some manner, albeit it was not addressed in his written evidence. We do not accept that. The claimant did not apply because he was content in his work, and he did not want to apply for the new position.

7.87 It follows that the claim of indirect discrimination fails.

7.88 It is likely the respondent's justification defence would be established.

7.89 The respondent wished to recruit and retain the best candidates for the role. This is a legitimate aim. One of the means adopted is to ensure the pay is appropriate, and sufficiently attractive to discourage individuals leaving for better paid employment. Integral to the process was the provision of a salary band which allowed the appointing managers some discretion. It is likely this would lead to more internal applications, and

may encourage external applicants. Ensuring pay is appropriate and attractive is a way of achieving the legitimate aim.

7.90 Is it a proportionate means of achieving the aim? It is necessary to undertake a balancing exercise. We must understand the reasonable needs of the employer balanced against any discriminatory effect.

7.91 Here, the PCPs have demonstrated no discriminatory effect, so the balancing exercise is difficult. If we assume that there was some possibility that British Asians may be paid less on lateral transfer than white employees, that would appear to be because of unconscious bias, which could be direct discrimination. Unconscious direct race discrimination is not capable of justification. However, what is raised here is a mere possibility, and the mere possibility is speculative. That speculation could not lead to a finding that the means adopted, being a discretion to offer a salary within a reasonably narrow band was not proportionate.

7.92 We accept that this analysis is qualified, because there is no proven potential discriminatory effect that falls to be balanced. Unless the discrepancy was marked, it is very unlikely that the means adopted, would not be proportionate.

<u>Direct discrimination</u>

7.93 The claimant puts his claim as an act of direct discrimination. At the outset, we discussed with Mr Renton if it was more properly seen as an omission.

7.94 It appears to be the claimant's case that the omission was an act.

7.95 Many employees apply for promotions or lateral moves. Approximately 20% who secure lateral moves receive a pay rise. The act of giving someone who successfully applied for a job a pay rise is not a detrimental act to anyone who had not applied. Giving Ms Taylor a pay rise was not a detriment to the claimant.

7.96 This claim must be understood in the context of the claimant saying that he should have been given a pay rise, and that is more appropriately termed an omission. During the submissions the claimant advanced the argument that he could have been granted a pay rise at the same time as Ms Taylor was, but the implementation could have waited until the annual pay rise in the summer. This was not envisaged by the respondent's agreed policy.

7.97 The claimant says Ms Taylor is a comparator. She is not. For her to be a comparator, there must be no material difference in their circumstances. Here the claimant wishes to persuade us that the true material circumstance is experience, and the fact that he is as experienced as Ms

Taylor, or more experienced, means he should have been given a pay rise.

7.98 Ms Taylor was not given a pay rise because of her experience. The relevant circumstances are that Ms Taylor applied for lateral move. She was successful in securing that lateral move. This triggered the possibility of receiving more pay, as this was envisaged in the pay policy. Mr Rogan thought that Ms Taylor had requested from him a pay rise. He considered that request. He considered his discretion. He proposed a pay rise, which was within his discretion to grant. He confirmed that with HR. Part of Mr Rogan's consideration revolved around Ms Taylor's contribution and her skills. He did not consider her experience in isolation, although no doubt her skills were founded, in part, on experience. In considering the pay rise, he gave no consideration to the claimant who did not apply. We accept his explanation that he gave Ms Taylor a pay rise because he perceived her as having strong abilities, skills, and experience. He considered her to be a strong performer, and he wished to retain his services.

7.99 The claimant received no pay rise because he did not apply, he was not appointed, and there was no trigger for a consideration of a pay rise. There was no basis on which he could be given a pay rise at that time, as this was precluded by the relevant policy. His circumstances were materially different from Ms Taylor. The claimant would need to compare himself to a colleague paid at the same level who also did not apply. There were several of them, and there is no suggestion that they received any pay rise.

7.100 For the sake of completeness, we should add that we accept Mr Rogan had reservations about the claimant's overall performance. Whilst he saw the claimant as strong technically, he considered he was disruptive and lacked people skills. Mr Rogan has been critical of the claimant's approach in a number of emails. We accept that his criticism was reasonable. However, Mr Rogan's view of the claimant was not relevant to his increasing Ms Taylor's pay and not increasing the claimant's pay.

<u>Breach of the equality clause</u>

7.101 It is accepted there is a difference between the claimant's pay and the pay of his chosen comparator Ms Taylor. Like work and work of equal value are admitted. It follows that there is implied into the claimant's contact a clause that equalises their pay. However, this is subject to section 69 Equality Act 2010 which renders that clause of no effect in certain circumstances.

7.102 The respondent relies on section 69(1)(a). It is the respondent's position that that the difference in pay is explained by a material factor which does not involve treating the claimant less favourably than his comparator because of sex. It is for the respondent to prove this material factor.

7.103 It is first necessary to identify the explanation for the difference.

7.104 The respondent says the difference is explained by the discretion exercised in favour of Ms Taylor. Ms Taylor applied for a lateral move and was successful. This permitted Mr Rogan to recommend an increase of salary pursuant to the respondent's remuneration rules in doing so he took account of her performance, ability, skill, and broad experience. Further, she was within band 3C and paid at the lower end of zone one. He was permitted to increase the salary to the upper end of zone one. He did so. His discretion was approved.

7.105 We accept this explanation. This explanation is the material factor.

7.106 We have considered, in the context of race discrimination, whether the pay increase constituted direct race discrimination either by way of act or omission. We found that it did not. The analysis is not materially different in the context of sex discrimination. Ms Taylor's sex played no part in her receiving a pay increase. The claimant sex played no part in his not receiving an increase.

7.107 There was some suggestion that Mr Rogan favoured Ms Taylor. He believed the claimant had poor communication skills and was disruptive. The person Mr Rogan got on best with was a man. He got on reasonably with Ms Taylor and saw that she had potential. There was some evidence that she wrote inappropriate emails. (There was evidence of an isolated incident.) However, the claimant correspondence was consistently inappropriate. One of his emails was described as a rant, albeit Mr Rogan accepted in his evidence that perhaps the description was harsh. We find that Mr Rogan genuinely thought the claimant's behaver was challenging and at times inappropriate. We find that he had ample grounds to sustain that belief. We do not accept there is any evidence of favouritism. Mr Rogan's analysis was objective and based on evidence.

7.108 The explanation advanced is a material factor which does not involve treating the claimant less favourably because of sex.

7.109 However, the defence will fail if the claimant shows as a result of the material factor persons of the same sex as the claimant are put at a particular disadvantage when compared with persons of the opposite sex when dong wok that is equal (section 69(1)(b)).

7.110 If the claimant can establish the particular disadvantage, it is open to the respondent to argues that the material factor is a proportionate means of achieving a legitimate aim.

7.111 We have considered the question of particular disadvantage in the context of the indirect race discrimination. The question is not entirely the same, but it is recognised that the tribunal should have regard to the principles established in **Essop**.

7.112 It is not necessary to establish a mechanism explaining why the factor causes a particular disadvantage to the opposite sex. What is required is evidence that demonstrates causation, whether explained or not. But there must be evidence. Statistical evidence can establish the disadvantage caused to the opposite sex. There may be other evidence that could be relevant, but statistical evidence is likely to be helpful.

7.113 The first question is whether there is statistical evidence identifying the relevant disadvantage.

7.114 The analysis is essential the same as for the claim of indirect race discrimination.

7.115 There are broadly three ways in which the factor could lead to a particular disadvantage First, are men prevented from, or discouraged from making the application? Second, are men less successful on application? Third, when men are successful in an application, does the exercise of discretion lead to a lower level of the discretionary pay increase? It would not matter why any of these may disadvantage men, but there must be evidence of actual disadvantage.

7.116 There is no statistical evidence that would demonstrate that being a man would have any effect at all. The claimant recognises that and does not seek to advance the case on the basis of statistical evidence showing any particular disadvantage suffered by men.

7.117 The basis on which the claimant seeks to establish particular disadvantage is set out most clearly at paragraph 41 of the claimant's submissions. It is helpful to set it out:

> **Mr Rogan's live evidence was that "naturally I got on better with Ms Taylor." Asked to clarify the strengths of Mr Ahluwalia and Ms Taylor he said the former was "tenacious" and "investigative" and the latter had "people's skills". He said it was right to prioritise the latter set of skills over the former since "70% of our business is getting on with people." But *this figure is arbitrary, and not an accurate description of the business but rather an excuse to justify stereotypical and discriminatory thinking. Mr Rogan's language shows that he thought about the workplace in gendered terms, his statement that "people skills" are more valuable than investigative skills or tenancy[6] is his way of saying that he valued more highly those skills stereotypically seen as feminine and associated with kindness, caring and other maternal roles. He was rewarding stereotypically female skills over male ones.* Paying workers with people-skills more highly than those with investigating skills is likely to have indirectly discriminatory consequences. 1 By section 69(1)(a) a material factor defence, if it is itself tainted by sex discrimination, can only be lawful if proportionate.**
> [emphasis added]

[6] Presumably 'tenacity.'

7.118 It is asserted Mr Rogan's language shows he thought about the workplace in gender specific terms. The evidence for this is that he referred to people skills being more valuable than investigative skills. This in itself is wrong. He valued both. In his evidence he said that 70% of the job was communication involving people skills. Further, the claimant does not accept that he lacks people skills although he does accept that he can be challenging.

7.119 As to the connection between people skills and sex, there is a bare assertion in paragraph 41. It is said that reference to people skills is really a reference to "skills stereotypically seen as feminine and associated with kindness, caring and other maternal roles." There is then an assertion Mr Rogan was " rewarding stereotypical female skills over male ones." This involves asserting first that there is a stereotype of women as kind, caring and maternal. Second that a reference to people skills is a reference to the first stereotype. It is asserted that he would naturally favour women over men because he perceived women as having more of those people skills.

7.120 This assertion is not sustainable. First, the stereotype is not established and to the extent it can be inferred, there is no evidence that Mr Rogan held the stereotyped view. Second, there is no established connection between the stereotype and people skills. Third, there is no evidence that he thought women had more people skills than men. Fourth, he had ample evidence to demonstrate the claimant lacked people skills. We note that two men who later applied, as external candidates, received high salaries. The person Mr Rogan thought was the best, and with whom we got on best, was a man. Proposing a pay rise for Ms Taylor demonstrates objectivity.

7.121 In any event it is the PCP that must be causative of the disadvantage. On the claimant's case he argues Mr Rogan's approach was distorted by Mr Rogan's alleged stereotyped views. It is arguable that this, if correct, could be some form of unconscious bias. If such a bias existed and influenced Mr Rogan that may defeat the defence under section 69 (1)(a).

7.122 We do not accept that Mr Rogan applied a stereotype as alleged by the claimant, whether consciously or subconsciously.

7.123 There is no evidential basis on which we could find that the factor falls within section 69(2). Had it done so, we would have to consider if the factor was a proportionate means of achieving a legitimate aim.

7.124 When considering proportionality, it is necessary to balance the discriminatory effect against the importance of the means in the context of the respondent's business. Here, the particular disadvantage has not been established. In that sense, there is no discriminatory effect.

7.125 It is difficult to see how the material factor could be seen as disproportionate. In principle, discretion to pay within a salary band may

help attract new employees and encourage existing employees to stay by providing a mechanism whereby they may apply for lateral moves to achieve a pay rise. We accept that the means adopted, which involves a discretion within the band, is likely to achieve the aim of retention and recruitment. The band is relatively narrow and discretion quite small. It is likely to be seen as proportionate.

7.126 Finally, we should note that the claimant has not sought to suggest any means to achieve a legitimate aim which are less discriminatory, whether in the context of race or sex.

7.127 It follows that the claimant's allegation that there has been a breach the sex equality clause fails.

_____
Employment Judge G Hodgson

Dated: 18 June 2024

Sent to the parties on:

25 June 2024
.....

.....
For the Tribunal Office

Appendix 1

Issues

1. There are claims of victimisation, direct race discrimination, indirect race discrimination, and equal pay.

Victimisation

2. The claimant relies on two alleged protected acts:

a. protected act one – the written grievance of 13 May 2020
b. protected act two – the written grievance 19 March 2021.

3. The respondent concedes the grievance of 19 March 2021 was a protected act, but denies the grievance of 13 May 2020 was a protected act.

4. The claimant alleges the following acts are detriments and constitute victimisation:[7]

    a. The fact that the grievance procedure to date has taken over nearly two and a half years." [*This refers to the grievance dated 13 May 2020. The Claimant was not given a final outcome until 23 June 2023. A reasonable period would have been 3-6 months for the grievance process as a whole rather than the 37 months taken.*]

    b. That the grievance has still not had an outcome." [*This refers to the grievance dated 13 May 2020*.]

    c. The fact that the respondent's own employee Lisa Modeste has confirmed as at 31 January 2021 the investigation was superficial and narrow and that the investigation did not satisfy the ACAS standards of being fair and reasonable. [*The complaint is that the grievance investigation up to that point had been so superficial and narrow as to be an act of victimisation*.][8]

    d. The fact that the claimant's second grievance where he alleges institutionalised racism has been wholly ignored" [*This refers to the grievance dated 19 March 2021.The claimant was not given a final outcome until 3 May 2024. A reasonable period would have been 3-6 months for the grievance process as a whole rather than the 38 months taken.*]

<u>Indirect race discrimination</u>

5. The claimant relies on the following PCPs.[9]

    a. PCP 1- the respondent operates a practice whereby internal vacancies, when they were advertised, although a pay grade would be advertised there was no indication given that if somebody was

[7] The tribunal has recorded the wording used in the claimant's clarification note of 8 May 2024. The note sets out wording in the original draft list of issues. The tribunal has set out the additional words of clarification given pursuant to the order of 8 May 2024 in italics.
[8] It is the respondent's position that the additional wording constitutes a new allegation which is not set out in the claim form. It is respondent's position that the tribunal cannot determine the additional allegation, absent an application to amend.
[9] The alleged PCPs have been recorded verbatim, as taken from the respondent's clarification document.

successful in securing that job what pay they would actually be paid …"

b. PCP 2 - that there was an unadvertised manager's discretion that would be operated on the actual pay of the successful applicant.

c. PCP 3 - the respondent operated a practice whereby manager's subjective discretion decided what position within a pay grade an individual would be paid and by the respondent's own admission the pay policy failed to define management discretion.

6. The claimant states the group and individual disadvantage is as follows:

a. The claimant confirms that the practices set out at paras 44 and 45 of the particulars of claim put, or would put, persons with whom the claimant shares the characteristic of being a man of British Asian heritage at a particular disadvantage in that they would lead to such persons being paid less than white staff doing comparable work.

b. The claimant was put to that disadvantage by being paid £5,000 less than his comparator, Paula Taylor.

Direct race discrimination

7. The claimant alleges that he was treated less favourably than a comparator, Ms Paula Taylor.

8. It is the claimant's case that by Miss Taylor being given a pay rise on or about 23 December 2019 of £5,000 (approximately) and no equivalent pay rise being given to the claimant this was an act of discrimination being a detriment to the claimant.

Equal pay

9. The claimant relies on one comparator, Ms Paula Taylor.

10. The respondent concedes that the claimant and his comparator undertook like work, and the work was, therefore, of equal value.

11. The respondent alleges that the difference in pay was because of a material factor and reliance on that material factor did not involve treating the claimant less favourably than the comparator because of sex, and in any event any treatment was a proportionate means of achieving a legitimate aim. In its clarification of 9 May 2023 the respondent states: "The respondent relies on a material factor defence, in respect of the claimant's equal pay claim, namely that the comparator applied for a

lateral role, and had strong performance, ability and skill and broad experience."

12. In the draft list of issues, the material factor defence is identified as follows: "(1) Paula Taylor strong performance, ability and skill, and her broader experience; and (2) that Paula Taylor applied for a lateral move."

Time

13. It is respondent's case that some or all of the claims are out of time and it is not just and equitable to extend time.