EMPLOYMENT TRIBUNALS

SITTING AT: **LONDON CENTRAL**

BEFORE: **EMPLOYMENT JUDGE F SPENCER**
MEMBERS: **MR A ADOLPHUS**
MS S COLES

CLAIMANT: **MS O GBERBO**

RESPONDENT : **PROFESSIONAL STANDARDS AUTHORITY FOR HEALTH AND SOCIAL CARE**

<u>ON:</u> **5-13 NOVEMBER 2024**

<u>Appearances:</u>

For the Claimant: **In person**
For the Respondent: **Mr D McKinnon, solicitor**

RESERVED JUDGMENT

The Judgment of the Tribunal is that the Claimant's claims of race discrimination and victimisation do not succeed.

REASONS

<u>Introduction and Issues</u>

1. The Claimant was employed by the Respondent as a lawyer within the Respondent's section 29 team from 27 July 2012 until 22 February 2024, following her resignation, with notice, on 11 January 2024.

2. She brings claims of direct race discrimination and victimisation stemming from her unsuccessful application to be appointed to a newly created role of Lead Lawyer.

3. The Claimant describes her race as black British of African descent.

4. The issues were agreed and identified at a case management hearing on 16 February 2024. In essence it is the Claimant's case that the Respondent directly discriminated against her because of race and/ or victimised her when they:

    (i) failed to appoint her to the position of Lead Lawyer;
    (ii) failed or refused to undertake an appropriate investigation into her grievance;
    (iii) failed or refused to undertake an appropriate investigation into her grievance appeal.

5. It is the Claimant's case that by reason of those failures the Claimant was constructively dismissed.

6. The protected acts relied upon by the Claimant are (i) raising a grievance about pay in 2017 and (ii) supporting a colleague by providing a witness statement for him in a race discrimination claim. The Respondent accepts that the Claimant did protected acts in 2017 and 2019.

7. It is common ground that the Respondent did not appoint the Claimant to the role of Lead Lawyer, but the Respondent denies that it failed or refused to undertake an appropriate investigation into the Claimant's grievance and/or appeal.

<u>Evidence</u>

8. The Tribunal heard evidence from the Claimant and, on her behalf, from Mr Gomez (DG), formerly Assistant Director of Scrutiny and Quality (Legal). She also provided witness statements from two former colleagues Mr Siddiqui, and Ms Gustave, whose evidence was not challenged by the Respondent.

9. For the Respondent to the Tribunal evidence from:

    a. Simon Wiklund, the Claimant's line manager
    b. Suzanne Dodds, Head of HR and Governance
    c. Juliet Oliver, Non-Executive Board member of the Respondent;
    d. Graham Mockler, Director of Regulation and Accreditation
    e. Alan Clamp, Chief Executive.

10. We had a bundle of documents with some additional documents added during the course of the hearing at the Tribunal's request.

The legal principles

11. Section 39 of the Equality Act 2010 prohibits an employer discriminating against or victimising its employees by dismissing them or subjecting them to any other detriment.

12. Section 13 defines direct discrimination as follows:-

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

    Race is a protected characteristic.

13. Section 13 focuses on "less favourable" treatment. A claimant must compare his or her treatment with that of another, actual or hypothetical, person who does not share the same protected characteristic. In comparing whether the employee has been treated less favourably than another, section 23 of the Equality Act provides that "on a comparison of cases for the purposes of section 13… there must be no material difference between the circumstances relating to each case." Is not necessary for all the circumstances to be the same provided that the circumstances are materially similar. In other words, for the comparison to be valid, like must be compared with like.

14. As to victimisation section 27 provides that

    "(1) A person (A) victimises another person (B) if A subjects B to a detriment because–

    (a) B does a protected act, or

    (b) A believes that B has done, or may do, a protected act.

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

    (a) bringing proceedings under this Act;

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

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

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

    (3) Giving information or making a false allegation is not a protected act if the evidence or information is given, or the allegation is made, in bad faith."

15. When considering whether a claimant has been subjected to particular treatment 'because' she has done a protected act, the Tribunal must focus on "the real reason, the core reason" for the treatment; a 'but for' causal test is not appropriate: Chief Constable of West Yorkshire v Khan [2001] ICR 1065. On the other hand, the fact of the protected act need not be the sole reason: it is enough if it contributed materially to the outcome.

16. It is very unusual to find direct evidence of discrimination. It is for this reason that there is what is called a "shifting burden of proof". This is set out at Section 136. It is for the Claimant to prove the primary facts from which a reasonable Tribunal could properly conclude from all the evidence

before it, in the absence of an adequate explanation, that there has been a contravention of the Equality Act. If a Claimant does not prove such facts she will fail – a mere feeling that there has been unlawful discrimination or victimisation is not enough. Once the Claimant has shown these primary facts then the burden shifts to the Respondent and discrimination is presumed unless the Respondent can show otherwise.

17. As Mummery LJ held in Madarassy v Nomura [2007] ICR 867 it is not sufficient for the Claimant simply to prove facts from which the tribunal could conclude that the Respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.

18. It is not necessary in every case for the tribunal to specifically identify a two-stage process. As was said in Hewage v Grampian Health Board 2012 ICR 1054 "They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other. …"

Findings of relevant fact

19. The Respondent is a statutory body which has oversight of 10 statutory health and social care regulators. It is charged with, where appropriate, appealing to the High Court about fitness to practice decisions made by other regulators which are not sufficient public protection. The Claimant was one of two individuals in the role of "lawyer" in the section 29 team. Until March 2023 the section 29 team comprised two Heads of Legal and two lawyers. The section 29 team reviewed final fitness to practice outcomes following hearings by the disciplinary panels of the regulators overseen by the Respondent. As we understand it, a team of "scrutineers" (who were not themselves lawyers) conducted a first sift of those decisions. These were then referred to the lawyers who conducted detailed case reviews in order to make recommendations as to whether the Respondent should consider appealing the decision to the High Court. The Heads of Legal were then significantly involved in progressing those appeals, and were also responsible for line managing the lawyers. The scrutineers and the Heads of Legal were line managed by the Director of Scrutiny, who was also a lawyer.

20. When one of the Heads of Legal and the Director of Scrutiny left, the decision was taken to reorganise the team. The Respondent would not recruit a replacement Head of Legal but instead would recruit a Lead Lawyer sitting, in the hierarchy, between Mr Wiklund as the sole Head of Legal, and the lawyers.

21. The Lead Lawyer role was a new role. While part of their role would encompass the role which the lawyers undertook, the Lead Lawyer would also be responsible for leading, overseeing the work of, and managing the scrutineers and the process generally. The job description states that the main purpose of the role is to

    a. conduct detailed reviews of the evidence and make written recommendations for consideration in relation to potential appeals under section 29 of the 2002 Act of fitness to practice decisions made by the ten regulators that the Authority oversees.
    b. To oversee and manage the initial stages of the Authority's section 29 process including managing a small team.

22. The job advertisement provides that the role will have two main functions:

    a. conducting detailed reviews of cases that have been identified as requiring further review, making written recommendations for consideration in relation to potential appeals of fitness to practice decisions.
    b. leading and managing the team that conducts the initial stage reviews of the Authority's section 29 process. This will include quality assuring the work of the team and identifying learning points to be provided to the regulators to aid quality improvement.

23. Mr Wiklund discussed the nature of the role with the two lawyers in the team before the job was advertised. Mr Wiklund's evidence was that management of the team was always described as a key aspect of the role, and that is borne out by the terms of the job description and the advert. The person specification, however, does not refer to management experience or responsibilities as an essential or desirable quality.

24. At some point before the interviews began Mr Wiklund spoke to the Claimant and her colleague separately about how the lawyer role could be changed if one of them was successful in obtaining the Lead Lawyer position. We do not accept the Claimant's suggestion that this indicated that he had already made up his mind that she would not be successful, but prefer the evidence of Mr Wiklund that he thought that, given the change in the structure of the team, there was scope for a slight change to the lawyer role and he invited their thoughts.

25. On 10 May 2023 the lead lawyer job description, person specification, job advertisement and application were circulated to all staff at the Respondent; and soon after the position was published on external advertising platforms.

26. The job description and person specification were drafted by Mr Mockler. Mr Wiklund suggested some minor amendments to the job description. He did not suggest any amendments to the person specification. The person

specification was the same as the person specification which had been used for the Head of Legal role. Ms Dodds told the tribunal that the Directors group and HR had discussed removing any criteria from roles that weren't absolutely central to the job, including unnecessary qualifications or management experience, as these might deter people who might have other transferable skills which gave them the ability to do the role. We accepted this, noting Mr Wiklund's evidence that the person specification for his role did not include management experience either.

27. Five candidates were shortlisted for interview. Mr Wiklund drafted the interview questions, having obtained example interview questions from Mr Mockler and obtained some advice from Ms Dodds. He also formulated a written test, lasting one hour, to be completed by candidates immediately prior to interview.

28. The Recruitment Guide (56) provides that "the recruiting manager should prepare the interview questions, noting which aspect of the person specification the question is testing…"

29. Ms Dodds and Mr Wiklund discussed the introduction of interview questions about (i) management and (ii) EDI despite the fact that neither were on the person specification. She agreed that this was acceptable as EDI was a key focus for the Respondent and management was clearly an important part of the job. It was agreed that the management question would be written to allow for hypothetical answers in order not to discourage/disadvantage candidates with no management experience, as this had not been asked for in the person specification.

30. The candidates were to be asked five questions each bearing a score of five. The questions related to

    a. knowledge of fitness to practice and analytical skills
    b. ability to manage a programme of work and resolve competing priorities.
    c. commitment to EDI
    d. leadership and management
    e. communication, writing reports, problem solving.

31. Candidates were also asked to complete a written test lasting approximately an hour prior to the interview. The written test formed the basis of the first question in which candidates were asked to present their advice to the questions asked in the test. The way the candidate preformed in the written test was not scored before the interview and was not counted in the marks given to each candidate at interview. We accept that it was never the intention of the Respondent to score the written test except (i) in the event of a tie and (ii) to ensure that the top candidate at interview had scored acceptably in the test. This was not, however, explained to the candidates.

32. It is the practice of the Respondent to advertise all vacancies externally as well as internally. Both the Claimant and the other section 29 lawyer applied as internal candidates, and were shortlisted. Three external candidates were also shortlisted for interview. The Claimant was the only non white applicant.

33. The interview panel comprised of Mr. Wiklund (who would be managing the Lead Lawyer) Ms Dodds and Ms Oliver. Ms Oliver was chosen to sit on the panel as she was the other only senior lawyer at the Respondent. She was not however given the job description or the advertisement before the interviews. Ms Oliver told us that she was given a copy of the written test on the day of the interviews - just after the Claimant (who was interviewed first) had begun the test and shortly before her interview.

34. On 13 June 2022 Mr Wiklund emailed Ms Oliver with information about the interview process. Amongst other things he said that "the interview process will consist of a written test lasting one hour followed by interview. I am finalising the test today, but my intention is the first question after the test will require the candidate to present their advice."

35. On 16th June Mr Wiklund sent an email (296) to a number of other individuals at the Respondent attaching documents for the Lead Lawyer test. It explained "*For each candidate's tests, a blank word document with the candidate's name will need to be created for their written answers. This will need to be saved at the end of the test and a copy printed for the candidate before they go into the interview – they should be able to refer to it during the interview. I understand candidate's names will be removed from the versions provided to the interview panel later for marking."* The Claimant suggests that this was clear evidence of an intention for the test to be marked and included in the overall score – which then subsequently changed.

36. It was common ground that the Claimant was extremely good at her job, excellent at drafting detailed case reviews and making well reasoned and sensible decisions about whether or not to appeal a fitness to practice decisions. Mr Wiklund described her as the top performer in the team of lawyers and the front runner before the interviews took place.

37. All 5 interviews took place on 19 June 2023. The Claimant was seen first. Each candidate was asked to complete a written test immediately before the interview. The test was then printed off and provided to the candidate (but not to the panel) for the interview.

38. We understood that during the interviews each of the panel members scored each candidate on each question on a rough basis and then after each interview those scores were discussed, and a consensus score arrived at.

39. Following the interviews the winning candidate was an external applicant who scored 23. The Claimant scored 18.5, the other internal applicant scored 20. The Claimant scored fourth out of the five interviewees.

40. After the interviews had taken place, Mr Wiklund scored the written test anonymously. As one of those tests had been unacceptable, he asked for the names of the candidates to be provided so he could ensure that the concerning test answer had not been given by either of the top two candidates.

41. In those written tests the Claimant had scored 5, and the winning candidate 3. The other internal lawyer had scored 4 (and the other external candidates 4.5 and 1.5 respectively.) In an email dated 20th June 2023 Mr Wiklund reported to the other panel members that, as a result, he considered they did not need to reconsider the selection of the best candidate.

42. The successful candidate was offered the role on 20 June 2023. Mr Wiklund then informed the two internal candidates (in separate meetings) that they had been unsuccessful in their application for the role. Mr Wiklund told the Claimant that her answers to the written test, the first question and the EDI question were very strong, but that she hadn't performed well in relation to demonstrating management expertise. The Claimant was understandably upset. It is her case that in the feedback meeting Mr Wiklund said to her words to the effect that "there is nothing for you here, you may as well move on", which she understood to mean that he wanted her to leave the PSA. In a WhatsApp message to her colleague Rebecca Senior at the time the Claimant wrote "Absolutely! He pretty much said there's nothing here and he will help me to move on".

43. Mr Wiklund denied saying to the Claimant that he wanted her to move on. He suggested that the Claimant may have interpreted the offer for development and support wrongly.

44. Whatever was said, we do not accept that Mr Wiklund wanted the Claimant to leave or intimated as much. We accepted his evidence that in the meeting the Claimant found it hard to accept that she had not got the job, and once he had explained to her several times that she had not got the job because she did not score best at interview, he became blunt in order to bring the meeting to an end.

45. We also accept his evidence that he was disappointed that the Claimant had not scored best at interview and that he was concerned about the impact that the decision would have "on the three of us". He would have preferred an internal candidate to have been selected; as the job would have been filled more quickly and with less need for a settling in period. He did not want to lose an experienced member of the team, as he was already overworked. He had himself been in the position of losing out to an

external candidate who he believed was not the best candidate for the job, but when he told the Claimant this, she responded that "its not about you".

46. On 26 June 2023 both the Claimant and the other internal candidate (Ms Senior) asked for formal feedback from the panel chair.

47. The Claimant was taken ill on the way to work on 29th June. She was off for a couple of weeks, returning on 17 July 2023. On her return she received a copy of the interview panel's notes of her interview (298 – 310) and a summary from Ms Oliver of the Claimant's performance at interview. In the accompanying email (400), the Claimant was told that the test had been considered as part of the response to the first question, but that only the question itself counted towards the final score.

48. The Claimant also had a feedback meeting with Ms Oliver on 3 August 2023. The Claimant told Ms Oliver that she felt that the process as a whole was a way of getting her out of the organisation because of her prior involvement in standing up for a former colleague. Ms Oliver told the Claimant that, in her view, the panel had made a fair assessment of the candidates' performances on the day.

49. The Claimant submitted a grievance on 11 August 2023 (339). The other internal candidate, Ms Senior, who was pregnant at the time, also submitted a grievance alleging that she was discriminated against because of pregnancy.

50. In her grievance the Claimant alleged that the failure to appoint her to the role of Lead Lawyer was an act of deliberate victimisation and unfairness because (i) she had raised a grievance in relation to awarding a male member of the team a greater increase than her own and (ii) because of her decision to support DG by providing a witness statement for his discrimination claim. (At this stage no allegation of race discrimination was made.)

51. She said this unfairness was borne out by the unfairness in the scores for leadership and management - it was not fairly possible for her to have been scored 2/5 when her colleague Ms Senior, who had no management experience, had scored 3/5. She said that her answers to the management question were good. She also complained that leadership and management had not been identified as being desirable or essential on the person specification and that, accordance with the provisions of the recruitment guide, no questions should have been asked about management. Further, the decision not to score the test had been a deliberate departure from process in order to ensure that an area in which she performed strongly was discounted. She said that, for the avoidance of doubt, it was <u>not</u> suggested that Juliet Oliver would have been aware of any context around her past grievances.

52. The grievance investigation was undertaken by Mr Mockler. It was apparent in the hearing that Mr Mockler and Claimant had had a good relationship and that they respected each other. He had contacted the Claimant to enquire about her well-being when she was taken ill on her way to work on 26 June, although he was not her line manager.

53. Mr Mockler interviewed the Claimant and all three members of the panel as to their reasons for scoring the Claimant as they did. He looked at the recruitment guide, the job description, person specification, job advert, the interview notes taken by the panel, the chair's summary report and the email from Mr Wiklund to Ms Oliver dated 13th June (292). He did not however, ask to be sent all documents surrounding the interview process including any emails passing between the members of the panel, and was not told, nor did he ask, how the Claimant had scored in the test relative to the other candidates.

54. The Tribunal considers that the grievance investigation was less than thorough. Mr Mockler sought answers from the members of the interview panel about how and why they had scored the Claimant and the winning candidate. As to victimisation, he asked each panel member if any of them knew of any reason why any panel member would have wanted to prevent her from getting the job, but did not probe further or ask them what they knew about her 2017 pay grievance or her support for DG.

55. Mr Mockler sent his grievance report to the Claimant on 15 September 2023. She considered it failed to address her concerns and appealed.

56. The Claimant submitted an appeal on the 26 September 2023. Although the original grievance had not suggested race discrimination, by the time the Claimant submitted her appeal she had become aware that the successful candidate was a white woman. In her appeal she said that the grievance investigation had failed to address the core of her grievance and that, now she was aware of the identity of the successful candidate, she was also submitting a grievance that the decision not to appoint her was an act of race discrimination.

57. Unfortunately, on 28 September the Claimant was certified unfit for work and she agreed that the grievance appeal be determined on the basis of her written submission only.

58. The Claimant's grievance appeal was dealt with by the Chief Executive Mr Clamp. He reviewed the grievance report and associated documentation and interviewed the panel members. He did not uphold the appeal. In his outcome he told the Claimant that her written test formed part of the overall score for the interview in that it was part of the first question and that she was not disadvantaged as a result. He told her that as leadership and management were clearly part of the role of the Lead Lawyer, it was reasonable to include a question about this – and it only contributed 20% to the total score. He told the tribunal that he could find no evidence of

race discrimination or victimisation in the interview process. The Claimant received the grievance appeal outcome on 24th October 2023.

59. The Claimant resigned on 11 January 2024. She remained off sick until 22 January 2024, and then worked the rest of her notice from home.

60. Equality and Diversity at the Respondent. The Respondent employs a relatively high number of staff from black and Asian backgrounds. The Claimant said that she thought that the EDI report had stated approximately one third of the staff were non-white**.** For a time Mr Wiklund was the only white individual in the section 29 team. (Mr Siddique, the other lawyer in the team (until August 2019) and Mr Wiklund's colleague as Head of Legal were from ethnic minorities). At a senior level, currently 4/12 of the Senior Management team are non-white (previously this was 3 out of 11).

61. In November 2020 the Respondent had commissioned an equality diversity and inclusion audit. This was completed in April 2021 conducted by a consultant and trainer on equality and diversity. The Claimant contributed to this audit and was interviewed. In the section headed PSA organisational culture it is reported that *"about one third of the people interviewed for the audit commented on a sense of "otherness" and expressed various degrees of "not belonging". This may help illuminate the features of the culture as it relates the boundaries of cultural norms, the nature of the shared mindset and the parameters of accepted professional practice. All the interviewees who commented on "otherness" were from marginalised groups."* A further comment was that *"several staff and managers, mainly from minority ethnic groups raised the issues of communication style at the PSA. It was described as opaque, explicit, difficult to interpret, never direct… These descriptions are frequently used to describe the communication style of organisations which have a predominantly middle-class, professional culture. It can impact particularly negatively on BAME people or people who do not share the characteristics of the majority culture."*

62. The Claimant herself had told the consultant undertaking the EDI Audit that she had assisted a number of ethnic minority staff who had been treated poorly by the Respondent highlighting in particular the treatment of DG.

63. The Claimant and Ms Gustave gave unchallenged evidence that minority ethnic staff had set up a WhatsApp group called "browns at the PSA" because they had felt undervalued at the PSA and as a way of supporting each other. It is also clear that when DG was dismissed many of the black and ethnic minority staff felt that race was a factor in his dismissal.

The Claimant's case.

64. It is central to the Claimant's case that Mr Wiklund deliberately skewed both the questions to be asked, and the way that the interview was scored, in order to disadvantage her. In particular

a. The inclusion of a question about leadership and management was contrary to the recruitment guide and was designed to disadvantage her because she was not in a management role.

b. The person specification made no reference to management experience being either an essential or desirable criteria and the recruitment guide specified that "the recruiting manager should prepare the interview questions, noting which aspect of the person specification the question is testing…" Mr Wiklund had ignored this requirement of the Recruitment Guide in order to disadvantage the Claimant.

c. Mr Wiklund unfairly scored the Claimant 2/5 for the leadership and management question. It was inconceivable that he would have scored her less than her colleague, Ms Senior, given that she had some management experience and Ms Senior had not.

d. The decision not to score the test was (i) only taken after she had started her test and (ii) was deliberately designed to disadvantage her as it was known that she was likely to score the highest of the five candidates. The email of 16th June (see para 35 above) evidenced an intention for the test to be marked which then subsequently changed.

e. Mr Wiklund had been in the driving seat for the recruitment process, Ms Dodds and Ms Oliver deferring to his judgment.

f. Ms Oliver had not understood the role of the Lead Lawyer, was ill prepared for the interviews, and was not in a position to judge who was the best candidate.

g. Mr Wiklund was aware of the Claimant's protected acts. He must have known that she had provided a witness statement for DG. He knew that some staff had provided a witness statement and, given the Claimant's general support for DG, would have assumed it was the Claimant.

h. Mr Wiklund and Ms Dodds deliberately set out to ensure that the Claimant would not get the Lead Lawyer role because she had supported DG, the former Director of Scrutiny, by providing a witness statement in his race discrimination claim against the Respondent and/or because the Claimant was black.

i. She was the most experienced and suitable candidate for the role of Lead Lawyer

j. Mr Wiklund had asked the Claimant which aspect of her role as a lawyer she would change if she was not appointed to the role of Lead lawyer – demonstrating that this was his intention all the time. He also spoke to her in an unpleasant way in the feedback session by saying “there’s nothing for you here you may as well move on.

k. Mr Wiklund had not disclosed to the grievance or the grievance appeal that the Claimant had scored more highly than the successful candidate in the written test nor did he disclose that the successful candidate had completed only five of the eight questions in the written test.

l. Mr Wiklund did not want wish to appoint the Claimant because he resented the notion of a black person outperforming him as the Claimant was a better lawyer.

m. The Respondent was a challenging working environment for people of colour and the EDI report acknowledged “structural racism institutional discrimination and wider issues of hostile work culture”.

65. The Respondent’s case was that, although the Claimant was an excellent lawyer in her current role, she was not the best performing candidate at interview, that the interviews had been conducted in accordance with the Respondent’s normal processes. The scores of the panel members were logically consistent and supported by the notes. There was no evidence that any of the panel members were aware that the Claimant had provided a witness statement for DG no evidence to suggest that her failure to be appointed to the role was influenced by race or knowledge of her protected acts.

Conclusions

66. Victimisation. The Claimant spent some time in her evidence and cross-examination in emphasizing her view that DG had been dealt with in a high-handed and unfair way by the Respondent. However, as the Tribunal explained, this case was not about DG’s treatment (about which we can make no findings) but whether the Claimant had been victimized for providing a witness statement for his Tribunal case.

67. After DG was dismissed, the Claimant had provided a witness statement in support of DG. The Claimant informed Mr Clamp on 17 July 2019 that she had agreed to provide a written statement about her experience of working at the Respondent under DG’s leadership. (A copy of the statement was in the bundle, and although supportive of DG, it does not refer to race discrimination.)

68. As Mr Clamp had also been informed that another member of staff had proposed to provide a statement in support of DG, Mr Clamp sent an email on 4 September 2019 to all staff (146) to the effect that it was absolutely fine for anyone who was asked to provide a statement in support of DG.

69. Ultimately, DG's case was settled, and witness statements were never exchanged. Mr Wiklund said that, although he was aware that the Claimant was generally supportive of DG, he was unaware that she had provided a witness statement in support of DG. He told the tribunal he had not been involved in DG Employment Tribunal claim and that until Mr Clamp had sent the email in September 2019, he was not aware of the ET proceedings.

70. On the balance of probabilities we accept that evidence. The Claimant says that, as he was aware that she was generally supportive of DG, and he had received Mr Clamp email, he must have known she had given a statement. We do not accept that. He was not involved in DGs Tribunal claim and had no reason to come to that conclusion.

71. Ms Dodds also said that she had not known that the Claimant was providing a statement of support of DG in his employment tribunal claim. She told the Tribunal that she had not been involved in the decision to dismiss DG and, although she had been at a meeting to discuss his return to work shortly before he was dismissed, she had not been further involved in the dismissal. As Head of HR she had known about DG's Tribunal claim, had been at the early case management discussion and had provided a witness statement dealing with her involvement in DG's return to work interview, but thereafter had no further involvement in the Tribunal process. Witness statements had not been exchanged. We accept that evidence. DG, in his evidence to this Tribunal, did not suggest that Mr Wiklund or Ms Dodds were aware that the Claimant had provided a witness statement.

72. The Claimant has accepted that Ms Oliver would not have been aware that she had provided a statement for DG.

73. As no members of the panel were aware that the Claimant had provided a witness statement in support of DG in his Employment Tribunal claim the Claimant cannot have been unfairly scored or marked because she had provided such a witness statement.

74. Further we note that Mr Wiklund continued to give the Claimant excellent appraisals throughout her employment, a fact which does not lend support to the Claimant's case that he was likely to subject her to unfair treatment because of her support of DG. Mr Wiklund came across well in cross examination, and it was apparent that he had a high regard for the Claimant and had believed that they got on well. The Claimant said she

was always polite and "managed upwards" but it would appear that, if she distrusted him, this was not apparent to Mr Wiklund.

75. Moreover, there was nothing in the interview process (see below) which would lead us to conclude that it was unfair to the Claimant. The scores given to the Claimant and the winning candidate have been adequately and properly explained.

76. In the Claimant's particulars of claim (16) and in the list of issues the Claimant had also relied on a grievance that she had submitted in November 2017 as being a further protected act. In the particulars of claim this grievance is described as "regarding the PSA's conduct in awarding a male member of the legal team a pay increase of around 10%" whereas she had received a pay award equating to 0.27% despite the fact that she had been employed for longer and had more experience than him.

77. However, there is nothing in the Claimant's witness statement about this protected act, nor did she put it to any of the witnesses that they may have been aware of this 2017 grievance. Mr Wiklund's evidence was that he was aware that the Claimant had raised concerns about her pay but that the complaint was not raised with him directly and he had played no role in the grievance or its outcome. Ms Dodds's evidence was that the 2017 grievance related to a job evaluation and pay grading process carried out by PriceWaterhouseCooper (PwC), for the Respondent. She told the tribunal that the Claimant was unhappy at the salary and grading that PwC had placed on her role and that the grievance had been raised with PwC who had rejected it on the basis of the process had been carried out blind (i.e. that PwC had no information on specific post holders at the point they carried out the exercise and there was no suggestion that the process was tainted by sex discrimination). That evidence was not challenged.

78. Moreover, in relation to causation it seems inherently unlikely that either Ms Dodds or Mr Wiklund, neither of whom were involved in the pay award, or the rejection of the grievance would be influenced against the Claimant in 2023 because of a pay grievance raised with PwC in 2017.

79. In relation to the grievance and the grievance appeal, Mr Mockler and Mr Clamp were aware of the protected acts because they were the basis of her grievance, and in any event, she had told Mr Clamp at the time that she was to provide a witness statement for DG's Tribunal claim. Both thought highly of the Claimant.

80. We do consider that the approach adopted by Mr Mockler to the grievance was less than thorough, and that more probing questions could have been asked as to the possibility or victimisation of the Claimant. However, his conclusion that nothing in the evidence before him supported the Claimant's claims that the process had been designed or implemented in a way to disadvantage her, or that Ms Oliver had been effectively blindsided by Mr Wiklund was reasonable.

81. Mr Mockler said that he was surprised that the Claimant did not get the job, but having concluded the process was a fair and reasonable there is no basis for us to infer that either he or Mr Clamp victimised the Claimant for having, some 6 years ago, complained about PwC's pay review, or for having provided a statement in relation to a claim that had settled.

<u>Race discrimination</u>.

82. The Tribunal considered the burden of proof provisions in section 136 of the Equality Act 2010.

83. The Claimant was a strong candidate and was black British. The successful candidate was white. Although case law establishes that a difference in treatment and difference in race is not enough to shift the burden of proof we consider that the evidence in the EDI audit of the sense of otherness felt by many of the marginalised groups at the Respondent, the evidence of the Claimant and Ms Gustave as to the existence of a WhatsApp group entitled "Browns at the PSA" and the perception by those of colour that DG had been discriminated against constitutes the something else sufficient to shift the burden of proof and to seek an explanation from the Respondent.

84. However, having heard that explanation from the panel members, we accept that the Claimant did not get the Lead Lawyer role because she performed less well than the winning candidate at interview. We do not consider that race played any part in the panel's decision which was chaired by Ms Oliver and was unanimous. We do not accept that Ms Oliver was lent on or influenced by Mr Wiklund or Ms Dodds. She was the panel chair, a Board member and highly regarded. It was Ms Oliver who led the moderation discussion which ultimately scored each of the candidates after interview.

85. Each of the interview panel members gave clear and credible evidence that, while it was standard practice to require a written test, it was also standard not to use the test as part of the process, except insofar as it informed the candidate when presenting his or her answer to the first question; and to use the test score only in the event of a tie, or if a preferred candidate had provided an unacceptable test. Mr Wiklund said that it had been the practice adopted at interview when the Claimant herself had been recruited to her post. Given that approach, the fact that the winning candidate had scored lower than the Claimant and had only answered 3 out of the 5 questions was not relevant.

86. Ms Oliver told the Tribunal that she was told on the day of the interviews that the written test answers should not be separately marked, unless this was needed as a tie. She said that she was comfortable with this approach as that had been her expectation and it was also her experience from other organisations is that this was a standard/common approach. We also

do not accept that the decision not to score the test was only made after the Claimant had started her test. Although Ms Oliver was not given a copy of the test until late in the day, and was told that the written test answers should not be separately marked unless it was needed as a tie, it does not follow that the decision was taken at that time. Ms Oliver's evidence was that this was confirmation of, rather than a change to, the process that she was anticipating.

87. Mr Wiklund explained that the test was required (i) to give candidates a taste of the PSA work (ii) to put them under time pressure (iii) to require them to assimilate and analyse a large amount of information. This would assist the interview panel in assessing how candidates perform under pressure, provided an opening to the interview and an opportunity for the panel to see how candidates explained their approach.

88. The Claimant had criticised and challenged Mr Wiklund's evidence that the test was designed so that there was "no right answer". She said that there was clearly a right answer. The test required the candidate to decide whether or not to recommend an appeal. An appeal undertaken on a flimsy basis would be costly to the Respondent and a waste of time.

89. Ms Oliver and Mr Wiklund both explained that the test scenario was designed to have arguments that cut both ways to test if the candidate could pick up on the balance of competing factors. It was not the case, that there could only be one right answer to the test question. Ms Oliver who scored the Claimant 4 for her presentation (as opposed to Mr Wiklund 5) explained that she considered that the Claimant's presentation was well presented but incomplete, and that she felt that the Claimant was jumping about points rather than providing a coherent audit response.

90. Equally since half of the job (approximately) would involve managing a team of three scrutineers, it must have been obvious that the interview would need to include a question about leadership and management. There is nothing that leads to conclude (as the Claimant invites us to do) that this question was somehow designed to disadvantage her. The Claimant points to the recruitment guide, but we do not accept that it imposed a rule that questions about management could not be asked in a job where management was a key feature. Nor was there any obvious reason why Mr Wiklund would consider that the Claimant would perform poorly on that question. He was aware that she had had some management experience, albeit not at the Respondent, (in contrast to Ms Senior) and in any event the questions were designed to allow for hypothetical answers where individuals had no direct management experience.

91. All of the panel members marked the Claimant down, relative to the winning candidate, when scoring her answers to the management leadership question. All gave consistent reasons as to why that was so. Ms Oliver explained that in answering the management question the

Claimant had limited information about managing poor performance and challenging feedback, and limited insights about ensuring delivery of the work.

92. (While the Claimant complains that management experience was not in the person specification, neither was EDI – yet this question was also included. The Claimant scored 5 for her answer to this question. It is likely that this question would advantage the internal candidates more than the external candidates as they would have known the Respondent's approach to EDI.)

93. The Claimant also challenged why she had received a lower score than the winning candidate in relation to question 2, (which was about resolving competing priorities). Mr Wiklund explained that her answer related to the Claimant's current job and did not explain how she would deal with conflicting priorities in the context of the new role.

94. All in all, the Tribunal considered that the panel members explained adequately and credibly why the Claimant had scored as she did, relative to the winning candidate.

95. As for the written test, all of the panel members explained that it was standard practice not to score the test. There is nothing in the evidence to suggest that that is not the case.

96. The Claimant also points to the fact that the successful candidate only had five years post qualification experience, where she had 17. However, the approach of the Respondent that was that once candidates had been shortlisted, offers would be made purely on how the candidates performed at interview. Whatever the merits (or otherwise) of that approach, if genuinely and honestly applied it does not indicate race discrimination.

97. As for the grievance and the grievance appeal, while the grievance could have been more thorough, Mr Mockler and Mr Clamp's conclusion that there were no procedural irregularities or unfair outcomes and, on the basis of performance at interview, the best candidate was appointed was one that was clearly a reasonable one. We cannot infer that either concluded this because she was black or that a conclusion might have been different if she was white.

98. Nothing in the evidence suggests that Mr Mockler or Mr Clamp were influenced by the Claimant's race in rejecting the Claimant's grievance. Both accepted the explanations of the panel members which they found, as we have, to be credible and consistent with the Respondent's general approach.

99. It follows that there was no unlawful discrimination or victimisation and no breach of trust and confidence and the claim for a discriminatory constructive dismissal must also fail.

Employment Judge Spencer
3 December 2024

JUDGMENT SENT TO THE PARTIES ON

6 December 2024
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FOR THE TRIBUNAL OFFICE