EMPLOYMENT TRIBUNALS

Claimants: (1) Mr Babatunde Ladeinde
(2) Mr Olurotimi Ogunbayo
(3) Mr Chris Bicar
(4) Ms Adedotun Adeko

Respondent: Royal Mail Group Ltd

Heard at: Central London Employment Tribunal

On: 23, 24, 25, 26, 30 and 31 January and 1 and 2 February 2017

Before: EJ JL Wade
Ms S Plummer
Mr GW Bishop

Representation:
Claimant: Mr P Livingston (Counsel)
Respondent: Mr S Peacock (Solicitor)

RESERVED JUDGMENT

The judgment of the Tribunal is that the respondent did not discriminate against or victimise the claimants and the claims are dismissed.

REASONS

1. The history of these proceedings is complex. The claimants brought race and sex discrimination and victimisation claims in an earlier ET1 dated 25 July 2014 (“the first Tribunal”). The claims were rejected in March 2015 and they appealed. Meanwhile these proceedings were initiated on 8 December 2015. On 13 July 2016 the EAT upheld most of the first tribunal’s decision but remitted one part which related to the investigation of the claimants’ first grievance. This hearing was listed to decide both the second claim and the remitted point.

The issues

2. In the second claim the claimants, who are still employed by the respondent and who have now lived through literally years of litigation, bring various race (not sex) discrimination/ victimisation challenges against Royal Mail as set out below.

3. The list of issues was revised and agreed at the end of this hearing. Allegations 1-4 below are said to be direct race discrimination and all the allegations victimisation. The issues have been framed to run from March 2015 when the decision of the first Tribunal was promulgated so as to avoid any dispute about res judicata/ abuse of process:

1. *From March 2015 until August/November 2016 the Respondent failed to revert Ms King to her substantive Operational Postal Grade (OPG) role whilst the Claimants remained OPGs.*

2. *Did the Respondent fail to comply with its Managing the Surplus Framework ("MSF") policy, in particular by:*
   a) *Failing to promote the Claimants into the higher (managerial) grade of ML4? This refers to the continuing failure to promote the Claimants from March 2015 onwards.*
   b) *Failing to pay wages in accordance with the Respondent's policy on pay protection, whereas such pay protection was given to Cecile King when she was reverted in or around August 2016?*

3. *Did the Respondent fail to properly investigate and/or deal with the Claimants' grievance dated 16 April 2014? This is the matter remitted by the EAT.*

4. *Did the Respondent fail to deal properly or promptly with the Claimants' June 2015 grievance?*

5. *Did the Respondent fail to pay to the Claimants the net sums agreed and owed to them from their COT3 agreement?*

4. Direct discrimination is defined by Equality Act section 13:

> *"A person (A) discriminates against another (B) if, because of a protected characteristic [in this case the claimant because the claimants are black], A treats B less favourably than A treats or would treat others"*

Victimisation is defined by section 27:

"*A person (A) victimizes another person (B) if A subjects B to a detriment because –*
(a) B does a protected act ….."

We are aware of the leading case-law and this was highlighted for us by Mr Livingston in his submissions.

5. The Employment Appeal Tribunal remitted issue three to this tribunal because:

5.1 In relation to its findings on both direct discrimination and victimisation the first tribunal had not made "clear findings as to whether the burden of proof had shifted and, if it had, what is found to be the respondent's explanation or whether that showed a good explanation other than the protected act".

5.2 "The ET's reasoning was tainted by its earlier error of approach in – absent an explanation by the respondent – itself filling in the gaps".

5.3 The claimants say that the EAT also expressed concerns about the way the grievance appeal was handled.

6. In relation to the burden of proof, we remind ourselves of section 136 of the Equality Act which says:

"(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 provisions 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."

7. Notable in this case was the importance of identifying the Section 27/ 39 detriments as well as the section 13 less favourable treatment. The identification of a detriment, or a lack of one, is relevant to a decision on whether the burden of proof has shifted because "the provisions concerned" are all the relevant provisions in the Equality Act.

8. In that regard we also had to consider comparators in the direct discrimination claim and remind ourselves of section 23 which says 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."

The evidence

9. For the respondent, we heard evidence from:
(2) Mr Richard Wilkinson - Late Processing Manager who heard the 2014 grievance

(3) Mr Gary Gyde - Mount Pleasant Mail Centre Manager who heard 2014 grievance appeal
(4) Mr Peter Molyneux - HR Business Partner
(5) Mr Stephen Phillips - Independent Casework Manager who heard 2015 grievance
(6) Mr Dave Martin - Independent Casework Manage who heard 2015 grievance appeal
(7) Mr Bob Baker - Mount Pleasant Nightshift Manager who is Mrs King's line manager
(8) Mr Glyn Rees - Reward Development Manager.

10. For the claimants we heard from the claimants themselves and:
(1) Mr Rod Alcorn - Claimants' union representative
(2) Mr Julian Afari - Royal Mail substantive manager ML4 grade

11. The respondent witnesses were under-prepared. Their statements were unhelpful because they were arranged in a thematic rather than a chronological order and were not thorough. We do not, however, conclude that contradictions between the statements and the live evidence mean that witnesses were untruthful, rather that their statements were not written by or in sufficient collaboration with them. Instead, their lawyers wrote what they thought was right and this was confusing. We had to go to a lot of source material direct because it was not mentioned in the statements or in cross examination. Mr Livingston acknowledges that, given these inadequacies, we had to dig and also that we uncovered that a reason for much of the delay, as well as other confusion, was legal advice going on in the background. Mr Livingston had the chance to question on these points during the course of the hearing and he agrees that we did this in the interests of justice.

The facts

12. The findings up to March 2015 largely repeat the findings of the earlier tribunal but they need to be summarised here because otherwise the current claims are not easy to understand. In a few instances we have made more detailed findings because of the different emphasis needed to decide the current issues.

The claimants

13. The first claimant, Mr Babatunde Ladeinde, was first employed by the respondent as a postman in January 1989. His grade was Operational Postal Grade ("OPG").

14. Of the other claimants, all OPGs, Mr Chris Bicar had started in February 1987, Ms Adedotun Adeko in September 1989 and Mr Olurotimi Ogbunbayo in July 1995.

15. The claimants Mr Ladeinde, Mr Ogunbayo and Ms Adeko describe themselves as black British (Nigerian) and Mr Bicar as black British (Carribean).

16. The claimants successfully passed an assessment and started acting up in the November in 2003 as “substitute” or “acting” managers.

17. The respondent concedes, and the first Tribunal found, that from September 2004 the claimants were offered temporary promotion as “Temporarily Promoted Acting Managers” (“TPMs”). This is not a management grade and they retained their substantive OPG grade but they were to be working on equivalent work to ML4-graded substantive managers. TPMs are paid the same as ML4 managers with the same pay progression. Crucially, the TPM role is different and better in terms of pay than the substitute/acting manager role. The claimants were however not paid as TPMs and continued to be paid as acting managers.

18. In January 2014 no manager knew that the claimants were TPMs and not substitute managers because there was no supporting paperwork from 2004, no payroll or other record showing their status and they had not complained that they were being treated or paid incorrectly. Their status was not fully clarified until the first grievance appeal outcome in January 2015 at which point their enhanced pay was back dated.

19. Between 2004 and 2014 none of the claimants was promoted to a substantive position. They now say that they should have been automatically promoted to substantive ML4 grade after two years in the TPM role under the respondent’s Managing the Surplus Framework Policy (MtSF), appendix 9. Although the last of the claimants was reverted from TPM to an OPG role in September 2014 they continue to allege that from March 2015 onwards they should have been promoted.

Cecile King

20. Cecile King, the claimants’ chief comparator, is an OPG of Filipino race and national origin who was made a TPM on 18 October 2011. She worked first in Nine Elms and then was moved to Mount Pleasant in July 2012 where she was wrongly recorded as being a substantive ML4 grade (not a TPM). Mr Baker became her line manager from about 2012 and he thought she was a substantive manager at that time.

21. On 31 January 2014 Cecile King was placed into a vacant ML4 operational post, Parcels Night Manager, and this was recorded as being a transfer of a substantive surplus manager. At that time the claimants were regarded as acting and not TPMs and so very much not on a par with Ms King.

Reverting the claimants to OPG and the first grievance

22. On 3 March 2014, as a result of a new policy called the Continuing Efficiency Policy (CEP) eighteen TPMs and acting managers were given notice that they may be reverted to OPG in order to free up management roles for surplus substantive managers. In the end nine, of mixed colour/race, including the four claimants, were reverted. It is not known what happened to the other nine although it is thought that some probably took voluntary redundancy.

23. At this time Mr Gary Gyde was transferred into Mount Pleasant as Mail Centre Manager as a result of the CEP. He did not deal with the decision or the process of reverting the claimants.

24. On 16 April the claimants launched a collective grievance alleging race and sex discrimination. They complained that:

- They had missed out on being made substantive managers
- Cecile King had been promoted when they had not
- They wanted to be promoted
- They wanted to be paid as TPMs.

25. Their complaint did not make it clear that they now considered themselves to be TPMs and they provided no proof, indeed their solicitor's letter before action of 7 May 2014 makes the opposite point.

26. On 24 April 2014 HR confirmed that Ms King had been made a substantive ML4 manager on 30 July 2012. Then on 25 April they reversed that and clarified that she was *not* a substantive ML4 but was carrying out that role as a TPM. She continued in the role of Night Parcels Manager until August/ November 2016. The claimants asserted that she was in fact treated better than a TPM but there is no evidence of that.

27. The treatment of the claimants and Ms King at this time has been held not to be discriminatory and so this will not be revisited.

Promotion opportunities

28. From April 2014 there were no substantive management opportunities in Mount Pleasant which TPMs with substantive OPG grade could apply for in what was called an "Open resource" process. This was because there were displaced substantive managers both locally and in the region who had priority to be slotted into any roles which came up, this process being the objective of the CEP. There were occasionally times when there were no surplus managers in Mount Pleasant itself but the procedure was that a vacant manager role would then be offered to managers at other centres. There were also times when it would not have been prudent to openly advertise a role because more surplus management roles were occurring regularly and it was only a matter of time before one arose again; this restraint was compliant with policy.

29. We reach this conclusion from the evidence available to us and in the light of the findings of the earlier tribunal which was that the respondent's business was in perpetual decline which means that there was always a problem with what to do with surplus managers, particularly given the policy of no compulsory redundancy. As became a regular theme in this case, the respondent's evidence did not assist us as much as it could have. Witnesses who were operational managers from Mount Pleasant did not have a clear overview of the procedures, not surprisingly given that it was not their role. Mr Rees is a reward specialist so he had a better overview but did not know much about this particular case and Mr Molyneux did not have an overview either so we lacked the input of someone from HR who could give us more strategic insight.

30. On the other hand, the claimants were not able to point to particular vacancies across this time period as evidence of the respondent's failure to offer

them an opportunity to apply for promotion. One example they gave backfired because the white person appointed to a management job (Mr Evans) was in fact already a surplus manager. The other known example was of the surplus manager who was eventually appointed to the role which Ms King had been covering. He is Mr Afari, also a black employee, and his appointment has not been challenged by the claimants.

The first grievance investigation

32. Mr Wilkinson, the claimants' first line manager, was appointed to hear the grievance on 5 May 2014. Mr Gyde did not know Mr Wilkinson's capabilities and since it is the procedure for complaints to be dealt with through the line, the appointment stood. Mr Gyde thinks, with the benefit of hindsight, that Mr Wilkinson did not have enough experience in discrimination complaints and that this grievance was too complex for him but this was not a question at the time.

33. At this stage he had investigated at best a couple of grievances, and none of this nature. He had been on a diversity training course a number of years ago and had basic training on how to hear a grievance. He took "BEM" or "BAME" to be one group, a group to which both the claimants and Ms King belonged, and thought that any race discrimination allegations were therefore illogical. It did not occur to him that members of the "BAME" group will not always be treated the same, some possibly being preferred over others by a discriminator or that in this case a white discriminator might have preferred a Filipino over the claimants. The claimants say that he:

33.1 Did not investigate properly because he did not know what "race" was, based on his own ignorance of race discrimination. He thought that the race discrimination complaints were illogical and so did not do justice to the rest of the complaints.

33.2 He thought that the race discrimination complaints were not important as all BAME people had the same ethnicity.

33.3 Because the claimant issued the ET1 claim he decided to drag out the process (this is the allegation of victimisation).

34. The claimants neither allege that there was the evidence of race discrimination which Mr Wilkinson missed or that he reached a discriminatory decision but say that the process and approach was flawed by his discrimination. We must look at this because although the outcome of the grievance was not discriminatory, a discriminatory or victimising process (or lack of it) can itself amount to a detriment.

35. Mr Wilkinson readily accepts the gaps in his technical knowledge and says that at the time he was out of his depth and that he had struggled to fit his work on the grievance in with his "day job". He sees now that his was a simplistic approach. He says he "never in any shape or form set out to offend anybody, it was my intention to explore this case fairly as best I could".

36. He told us that the main thrust of the grievance seemed to be about Cecile King being promoted into a substantive role without competition, and we agree. It is important to hold onto this and remember that there were no other strands of enquiry which he ignored.

37. From 15 May Mr Wilkinson interviewed the claimants. He interviewed Mr Ogunbayo and the notes are agreed. Mr Wilkinson suggested to Mr Ogunbayo that since Ms King was also BME there could not have been any discrimination. Mr Ogunbayo responded that Mr Wilkinson could not put all racial groups together and clarified that his complaint was about the pigmentation of his skin, meaning that he was black.

38. The first tribunal recorded the conversation:

> *"Mr Wilkinson asks about the race discrimination issue and what group he saw himself in. According to the notes, Mr Ogunbayo replied, "I see myself as black and ethnic minority (BAEM)".*
>
> *RW: what do you see Ms King as?*
>
> *OO: my interpretation is my pigmentation and coloration is a disadvantage against Ms King.*
>
> *RW: Ms King is also of BAEM grouping as you have stated that she is Filipino which is the same category as yourself so surely you are of the same background group?*
>
> *OO: my facts regarding race discrimination are that the job was not advertised because I am black and she got the job. This is all I have to say regarding the race element of my complaint".*

39. When Mr Wilkinson put the same question to Mr Ladiende he agreed that he had a point. In his interview Mr Bicar said that his complaint was about sex discrimination not race discrimination and Ms Adeko said that her concerns were about fairness and not discrimination at all. Therefore, whilst his views were undoubtedly unsophisticated and inaccurate, Mr Wilkinson was entitled to understand that for three of the claimants race discrimination was not an issue. There is some suggestion that Mr Ladiende was coerced into taking this view but given the persistence with which he has litigated versus Mr Wilkinson's timidity we do not think that this was likely. We have to say that the entirety of this very lengthy litigation has been about promotion and the perceived preferment of Ms King, a fellow BAME worker, and that is exactly what Mr Wilkinson looked into.

40. A strand of the grievance, rather an unclear one, was that the claimants should be treated as TPMs rather than acting managers. However, the first and second claimants refused to show Mr Wilkinson more than the first paragraph of the letter they had received in 2004 which they said offered them TPM roles, and they would not let him copy it. It is therefore not at all surprising that he could not reach any conclusion about their status or level of pay. The third and fourth claimants did not even show him a letter.

41. On 3 June Cecile King was interviewed by Mr Wilkinson and she told him that she knew she was not substantive ML4.

Mr Bicard and Ms Adeko revert to OPG

42. On 23 May 2014 Mr Bicard and Ms Adeko were reverted to OPG. As has already been said, the decision makers involved in reverting Ms King were not involved in reverting them.

Early conciliation begins

43. On 29 May the claimants contacted ACAS to start the period of early conciliation prior to issuing a claim. They play down the significance of notification of intended legal action but in our experience it has a profound effect on the fluency of internal processes. The lack of fluency leads to a concern that there is victimisation going on and sometimes it is difficult to tell the difference between a cautious approach considered necessary because of the litigation and a victimising one. This was the issue discussed in the famous case of *Khan.*

44. Mr Wilkinson drafted a response on 11 June but did not send it out for reasons which were initially unclear. They became clearer when the witnesses in general, and Mr Wilkinson in particular, started to explain that they had received a lot of intervention from the respondent's HR/legal teams. This was frustrating for the claimants' side because this explanation had not previously been volunteered and only appeared after questioning from the tribunal.

45. The claimants complained of the delay in completing the grievance and he responded on 18 June 2014 to apologise for delay. He said he needed to investigate further and that he would communicate the outcome face to face. On 20 June Mr Wilkinson interviewed Mr Baker

46. The ACAS early conciliation period ended on 29 June.

47. On 30 June 2014 Mr Ogunbayo reverted. The respondent had waited for a few months to allow him to adjust back to his OPG shift times as convenient so it is incorrect to characterise his reversion as very abrupt. What actually happened perhaps explains why the emphasis of the first tribunal hearing was upon lack of promotion rather than the fact or manner in which the claimants had been reverted.

48. Mr Wilkinson wrote to the claimants again on 7 July; he had been asked by HR to put the process on hold to see if ACAS mediation could help and he was carefully keeping in touch. Mr Wilkinson obeyed instructions as he did not regard this as his decision. He understood that there was a region-wide issue because some other similar complaints had arisen in Sussex which involved the union successfully agreeing backdated Temporary Promotion pay for some of their OPG members. The claimants did not object or challenge the further delay and they are disingenuous now to say that there can have been no mediation because the ACAS conciliation period had ended; as they or their union well know ACAS have a wider mediation role.

49. On 25 July 2014 the first ET1 (Case number 2201461-4/2014) "the first tribunal" was issued. Following that, around 4 August Mr Wilkinson was asked, this time by the respondent's lawyers Weightmans, to put the grievance on hold so they can see if they could settle the litigation. They told him that there was no progress over a month later on 9 September.

The first grievance outcome

50. So, finally, on 10 September 2014 Mr Wilkinson issued his grievance outcome letters. At first he told us that he ran them past HR/legal who cleared them. Then he told us that they had in fact given him help with the letter which explains why his personal notes setting out his rationale were not reflected in it. The actual letter explained that the reason for Ms King's apparent preferment was "business need" which was exactly the reason found by the first tribunal and why there is no prospect of the claimants establishing that Mr Wilkinson's actual decision was discriminatory.

51. His private written rationale, not reproduced in the letters, contained his comment that it was illogical for the claimants to claim discrimination because they were part of the same BAME group as Ms King and he also recorded that the claim was unfounded because Ms King had not been promoted into a substantive management role. This was put on the case file but was not sent to the claimants or to HR/legal who helped him with the decision letter. This means that his personal thinking had a very limited effect.

53. The decision letter sent to Mr Ogunbayo contains a mistake because it says that he was not complaining of race discrimination but only sex discrimination, which is wrong. This was his understanding in relation to Messrs Ladiende and Bicar.

54. Mr Wilkinson did not refer to the issues of pay in his decision letter. He had worked alongside the claimants for some years and had never known them as TPMs, they had never said they were TPMs or that they were under-paid and there was nothing on file. He says in his statement that he did not understand the issue which is not surprising and in his rationale he noted that he could not see where a claim for loss of earnings arose.

55. We accept the claimants' point that his evidence was at times unclear and hesitant but to the extent that he handled the grievance badly and delayed the reason why is:

- he was not possessed of the necessary skills to handle equal opportunities grievances; the claimants agree he had never handled such a case before and that he was out of his depth.
- he was not offered and did not ask for help with the process until the end.
- he was confused about what the grievance was actually about beyond the fact that the claimants said they should have been promoted and he dealt with this point perfectly well.
- he had no evidence at all indicating that the claimants should be treated as TPMs and back-paid accordingly because he did not have any supporting paperwork.
- he was told to put the process on hold on several occasions which was understandable because of the litigation and the region-wide negotiations.

So having dug more deeply than the first tribunal on this point, we have not found unexplained decisions or delay.

The first grievance appeal

56. The claimants appealed the grievance outcome on 15 September. The appeal went to HR who handed it to the Mail Centre manger Mr Gyde; this part of the process typically takes two to four weeks and he received it on 9 October. The appeal did not allege that Mr Wilkinson had himself discriminated against the claimants and in fact the letter was only a few lines long.

57. On 15 September 2014 the claimant reverted to OPG because the acting work he had been covering had come to an end. Ms King was still doing a managerial role as a TPM and her work had not come to an end. At this point if Appendix 9 of the Managers' MtSF had applied it ceased to apply to any of the claimants because they were no longer acting mangers.

58. During this time, and in the run up to the busy Christmas period, the claimants were offered substitute manager work by Bob Baker which they turned down because they said they considered it not genuine and their position was that they should be substantive and not substitute managers. They later admitted that Mr Baker needed them but they thought that it was not fair that Cecile King was doing better than them so as a matter of principle they were not prepared to take on an acting manager role.

59. The claimants maintain that there was a glass ceiling in Mount Pleasant but having seen the statistics for managers at Mount Pleasant the first Tribunal recorded that diversity at Mount Pleasant was satisfactory and we are not going to look further into this issue.

60. From 23 October 2014 Mr Gyde met the claimants with their union representative and for the first time Mr Ladeinde and Mr Ogunbayo provided copies of their 2004 letters "proving" their TPM status. Having read them we are not so sure that they are proof but Mr Gyde decided that they had been TPMs from 2004 and the respondent conceded this point at the first tribunal hearing.

61. When he looked at Mr Wilkinson's handling of the grievance he had no concerns nor was he told of concerns by the claimants and their representative. They told the first tribunal that they had raised concerns about Mr Wilkinson's comments about BAME in a letter but the first tribunal concluded that that this was never sent or went astray (paragraph 68). Mr Gyde assured them at the start of the interview that there had been no discrimination and it was not mentioned again, the focus being on their reversion and the alleged failure to promote.

62. He was questioned at length about why he was not concerned by Mr Wilkinson's attitude and his response showed a lack of understanding of equal opportunities similar to Mr Wilkinson's. He should have said that Mr Wilkinson's "BAME" comments were not an issue at the appeal but he did not tell us that. He did not know what "BME" was although he is more used to "BAME" and took an "everyone is treated equally by me so why do I need Equal Opportunities policies?" attitude which can be dangerous. Learning and training is needed for the respondent's operational managers but what Mr Gyde said to us is of marginal importance given that these points were not raised at the time.

63. On 24 October Mr Gyde wrote to the claimants to say that the process was on hold whilst he consulted Royal Mail legal and HR about the 2004 letters. The claimants did not object. It was a complex process to work out exactly what the position was and then to calculate what back pay should be offered. Also, as everyone in Royal Mail knows, Mr Gyde was under pressure during the Christmas period and unable to make progress. He had already told them that he would also be offering four weeks' "notice pay" in relation to their reversion.

The grievance appeal outcome, 19 January 2015

64. Mr Gyde sent out his grievance outcome letter on 19 January 2015. He upheld a significant part of the grievance in accepting that claimants 1 and 2 were TPMs from 2004 and owed back pay (and claimants 3 and 4 were given the benefit of the doubt on this in February). He also confirmed notice pay for the period prior to their reversion to OPG.

65. Thus only in January- February 2015 did the respondent recognise that the claimants had been TPMs and not substitute managers, in other words that they had been like for like with Ms King. This did not mean that they had been wrongly reverted to OPG because they were subject to the CEP. The outcome was a generous interpretation of the 2004 letter and therefore beneficial to the claimants to a substantial degree, for example Mr Ladiende was to be paid £45,284.82. Since it was so beneficial to the claimants, on the face of it Mr Gyde's conduct does not give rise to concerns about discrimination or victimisation.

66. Mr Gyde did not instruct that Cecile King be reverted even though he had discussed this with Mr Ogunbayo. In the end the final decision to revert was not made until August 2016 and a variety of reasons were given for this by the various witnesses. We summarise the reasons which we find explain the delay in reverting her in our conclusions below. It is undoubtedly the case that different witnesses gave different reasons for the delay but this is not surprising given their varying levels of capability and knowledge of the legal proceedings and also their varying personal interest in the issue.

67. There was a four-month period between the appeal and its outcome. This is explained by the delay in appointing Mr Gyde, the claimants not providing the letter from 2004 which was a "game changer" until their interview, that he then froze the process to take advice and calculate back pay and the busy Christmas period, so the delay was not unacceptable or unexplained in the circumstances.

The first ET hearing case 2201461-4/2014

68. The Employment Tribunal hearing took place between 5 and 10 February. Its judgment was promulgated on 13 March 2015. The tribunal concluded that the failure to revert Ms King was not because of race or sex or because the claimants had complained of discrimination. Nonetheless, in relation to her reversion, it commented: "a wise employer seeking shop floor harmony might now wish to do so". However, then the claimants appealed and so the expected finality was not achieved. What was sensible in the eyes of the first tribunal became much more difficult as the conflict did not resolve and, if anything, got worse.

69. Although Mr Gyde had done some provisional calculations there followed a complex process of working out back pay more precisely. It appeared that a resolution had been achieved between the respondent's solicitors and the claimants' union and a COT3 was signed on 23 September 2015.

70. Regrettably there is now disagreement about what was intended and this will have to be litigated in the civil courts. The claimants allege that the respondent paid them less than they were entitled to as an act of victimisation but we have seen no evidence which could lead us to conclude that this might have been a motive for failing to pay what the claimants expected. Mr Rees, who was involved in a COT3 process gave a robust defence of the respondent's position and his tangential involvement in the discrimination side of the case does not give him an obvious motive for victimising.

The claimants' stage 2 grievance, 16 June 2015

71. On 16 June 2015 the claimant raised another grievance. This repeated the earlier themes of promotion and MtSF appendix 9, the respondent's failure to revert Ms King and alleged direct race discrimination and victimisation.

72. Mr Stephen Phillips, Appeals Casework Manager was appointed to hear it and, as before, the appointment took a few weeks. The claimants do not challenge his appropriateness to hear their grievance. He was given the Tribunal judgment but not the previous grievance papers and so did not look into Mr Wilkinson's decisions.

73. On 10 July 2015 a grievance meeting between Mr Phillips, Mr Ladiende and Mr Ogunbayo took place and a summary of the complaints of all four claimants was provided, thirty-eight points to be investigated in all. There were specific complaints of victimisation and discrimination is not mentioned explicitly but is implied.

74. For various reasons, not anyone's fault, the claimants did not return the signed and completed meeting notes until 11 August. Mr Phillips explained his subsequent delay by his busy workload, he had three weeks' leave to take and three ETs hearings to prepare for. He was also moving his team's offices.

75. On 29 September the claimants emailed complaining of the delay and that it was discrimination and victimisation. Mr Phillips responded that there was not an unreasonable delay considering his workload and that he wanted to get a good and is deep understanding of what had gone on before. He did not want to rush. That this hearing has lasted for nine days when all the background paperwork had been generated beforehand is some measure of the amount of material to be considered. He denied discrimination or victimisation and asked for evidence supporting their allegation, but none was provided.

76. On 16 October Mr Phillips told the claimants that he had been placed on a recruitment project, and by implication that he was further delayed. He has no control over his workload which is just allocated to him. He says that this was approximately a two-week removal from his usual role.

77. On 18 November 2015 Mr Phillips provided his outcome report. He is criticised for not responding to all of the various complaints explicitly but we find that he produced a thorough and logical report in the face quite a bit of duplication from earlier complaints. In deciding what to do about the reversion of Ms King he did not explicitly say that she should be reverted but that when the surplus situation came to an end her role should be openly advertised so that the claimants could apply.

78. He also understood that at that moment in time there was then no surplus so it could be advertised. He communicated his decision verbally to Mr Gyde and understood from him about four weeks later that all was on track. However, he told the ET that he had then found out that the surplus situation did not emerge. By then he was "off the case" as he had no ongoing management responsibility for the claimants.

79. He was criticised for the fact that his statement and his evidence did not match and he told us that the statement was written for him and that he did not spot various points when he checked it through. We have found that this was a common problem and have regularly gained more clarity from the extempore evidence and the documents that we have full written statements.

80. Mr Phillips also concluded that the right to automatic promotion under MtSF Appendix 9 did not apply to the claimants as they were not substantive managers. He obtained copies of the policies in an earlier role and had a good working knowledge; he did not give them to the claimants which was a pity. His conclusions concur with what Mr Rees said (he was not in the hearing when Mr Rees gave his evidence so their evidence was independent of one another's). He checked his conclusion with the policy team too.

81. The claimants say that his delay in providing an outcome was direct discrimination and victimisation but if he was that way inclined why would he be so thorough and why would he recommend that the role be advertised which was what the claimants wanted? Also his substantial pressure of work was thoroughly described and we accept that he is not under an obligation to complete such investigations within a particular timeframe. Clearly there are matters that are time critical such as preparation for tribunal hearings so that investigations such as this will inevitably take second place at times.

82. When asked why his decision was race discrimination or victimisation the claimants made an unfortunate allegation which they had to withdraw which was that he did not look at the situation of a Mr Patel who had been slotted in. When it was shown that he did he did they fell back on saying that it was inadequate.

83. When Mr Ladiende was asked why he thought Mr Phillips had discriminated against him he said that he did not assure them otherwise and if he had he would have believed him. When shown that Mr Phillips had done exactly that in his letter of 1 October Mr Ladeinde said he did not think that the delay was because of his race, and when pushed further he gave no reply.

84. At the hearing Mr Phillips gave a convincing account of why he was unlikely to be guilty of discrimination or victimisation. It is regrettable that he was the only one of the managers involved in the grievances who managed to

achieve this. He has done the role for 12 years, in and around London and so has come across many different employees who have felt aggrieved. He has had equal opportunities and unconscious bias training and was himself a TPM for 3 or 4 years and so empathised with the claimants' situation. He himself escaped this insecurity by changing career path within Royal Mail. He also agreed that this was a longer timescale than he had wanted so he was not arguing that he was infallible.

The second ET1, Case 2202759/2015 and others

85. A second ET1 was filed on 8 December 2015, this is the one we have decided at this hearing.

Stage 3 grievance appeal 11 December 2015

86. On 11 December 2015 the claimants filed a Stage 3 appeal. This was expanded in their "Grounds of appeal". They asked for a copy of the non-managerial "CWU" MtSF policy which Mr Phillips had referred to but it was not provided.

The road map to revert Ms King

87. On the back of Mr Phillips' recommendation (and after the Christmas rush) Mr Molyneux, the newly appointed HR Business Partner for Mount Pleasant, was tasked with supporting the reversion of Ms King in early 2016. He was asked to discuss this is in a conference call with Mr Gyde and the legal adviser; he had not been directly involved before. He needed to write a road map to revert her as it was no longer reasonable to wait; it had been a long time since the business found out that she was not substantive.

88. He constructed a road map but turned out to be very hesitant about applying it. To be frank, his evidence was quite muddled and we did not learn much from him apart from the fact that in the end the Ms King was reverted but not until the EAT judgment had been promulgated. It was not entirely logical to wait and it was frustrating for us that although he was put forward as responsible for the reversion it soon became clear that he was complying with legal advice behind the scenes that it was not a good idea to act before the judgement was out. There are no specific complaints about Mr Molyneux in the final list of issues.

89. He thought that Ms King believed herself to be a permanent manager and that the respondent was about to tell her differently so that she would be devastated. He was unaware that she had told Mr Wilkinson back on 3 June 2014 that she knew she was OPG. This is extraordinary but his surprise when told at the hearing that she knew she was not substantive was so great that we believed him.

90. Despite the hope expressed by Mr Phillips that a surplus manager role could be openly advertised so that at least one of the claimants could apply for it, by this time it had emerged that it was very unlikely, and the situation was getting more difficult. There was now a displaced manager in Mount Pleasant, Mr Afari, who remained displaced through most of 2016 until he was slotted into Cecile King's role.

The stage 3 appeal process

91. 21 January 2016 the claimants had a meeting with Mr Martin, Appeals Manager who was not appointed until 7 January, possibly due to Christmas. The claimants do not challenge his appropriateness to hear their grievance appeal.

92. On 19 March the claimants complained about his delay. They say that the delay would not have happened if they had not been black and/or complained of discrimination. Mr Martin defended this allegation by saying that he did not discriminate. Unlike Mr Phillips he was not able to add any more and so we had an unconvincing response to an unconvincing allegation taking us precisely nowhere.

93. In summary, Mr Martin says that he found the process complicated and he was busy. The claimants agree that he had never handled such a case before which made it complicated for him and explains why he was quite ineffective. When questioned by the ET, Mr Ladiende alleged unconvincingly, in the sense that he had not said this before, that Mr Martin deliberately treated it as confusing.

94. The Stage 3 grievance decision was delivered on 18 April 2016. Mr Martin agreed with and upheld Mr Phillips's recommendations and disagreed that Mr Phillips had dealt with the matter in a manner which could be described as cavalier. He confirmed that once Ms King was reverted the role would be kept available for a suitable surplus substantive manager who would be slotted in.

95. We find that Mr Martin's approach to the appeal demonstrated a lack of capability as far as grasping the issues raised was concerned. However, given that he supported the thorough and reasonable conclusions of Mr Phillips he really had nothing to add. His delay was no better and no worse than the others. One useful thing he did was identify for us the general reluctance of the operational managers to lose a good night manager. This goes a long way to explaining the delay in reverting Ms King because if they were not pushed by the policy people applying the CEP etc it was not in their interests to act. We include Mr Gyde in this category.

96. Mr Martin did not look at when and if black workers were promoted at Mount Pleasant and why there were no black managers above ML4. He says he focused so much on the written representations that he did not focus too much on what was said. He accepts that he overlooked that point, possibly because the previous ET had said there was no discrimination so he thought it been decided.

97. The ET hearing of this claim should have started on 9 June 2016 but did not.

The EAT decision

98. The EAT gave its decision 13 July 2016, remitting part of the ET's judgment to this Tribunal.

Pay protection for Ms King

99. Following the EAT decision Mr Molyneux finally accepted he had to revert Ms King although he was still hesitant because of this second ET and the effect the reversion would have on her. He agreed to consult with and revert Ms King and replace her with Mr Afari. The claimants agree that it was right to slot Mr Afari in so do not say that this was discrimination.

100. Mr Molyneux then started to think about pay protection and he arranged that she was to have one year's pay protection which is something that the claimants had not been given (they had been given four weeks' notice pay). We have already found that this was not an entitlement which the claimants missed out on under the MtSF policy because it did not apply to them.

101. Clearly this decision was hugely beneficial to Ms King and it seems to have arisen from the compassion Mr Molyneux felt for her, slightly misplaced because he did not know that she understood that she was not substantive. His approach was not comparable to the claimants because he had not been involved in their reversion. Mr Molyneux used the MtSF as a rationale because even though she was not a substantive manager it was a good hook to hang the decision on. The documentation from this time which we have seen does not establish that the claimants were entitled to pay protection or Ms King either.

102. When Mr Rees got involved he told Mr Molyneux that pay protection did not apply as she was a substantive OPG but he supported pay protection because of her unique situation. The claimants say she should have paid back the money.

Ms King is reverted in August 2016

103. Ms King was officially reverted in August 2016 with a year's pay protection. In fact, she stayed in her TPM role for weeks as the employee change request (ECR) was not processed quickly and she reverted "on the system" only on 1 November. Thereafter she has done acting management work quite often and has been trained into a vacant substantive OPG role.

Conclusions

104. This lengthy litigation started because of a misunderstanding that Cecile King had been promoted to substantive manager when she had not. The misunderstanding was discovered and explained by Mr Wilkinson in the first grievance outcome letter of September 2014 yet neither side found a way to resolve the issues in a more amicable way. It has already been decided that:

- The transfer of Ms Cecile King to a managerial role on 31 January 2014 was not discrimination
- The claimants were reverted from managerial work to operational postman work between May and September 2014 but this was not discrimination and the allegation is not repeated today.

- There was an ill-advised failure to revert Ms King between April 2014 and March 2015 but this was not discrimination and the allegation is not repeated today.

105. We deal with each of the current issues in turn below.

Issue 1. From March 2015 until August/November 2016 did the Respondent fail to revert Ms King to her substantive Operational Postal Grade (OPG) role whilst the Claimants remained OPGs. Was this direct race discrimination or victimisation?

106.1 There was a delay in reverting Ms King down to OPG from March 2015 until August, and in practice November, 2016. Like the first tribunal we do not find discrimination or victimisation although we agree that for the purposes of workplace harmony it might have been advisable to revert her more quickly.

106.2 First, the burden of proof did not pass in respect of either claim. Their reversion and Ms King's continuation in her TPM role between April 2014 and March 2015 were found by the ET and the EAT not to be discriminatory and whilst the delay continued for another year and a half we saw no evidence which made us concerned that the cocktail of reasons had changed so as to raise a concern that discrimination or victimisation had emerged.

106.3 In relation to the direct discrimination claim the burden of proof also did not pass to the respondent because there are significant material differences between the claimants and their comparator, Ms King:

a. The claimants had already reverted back in 2014, before the period complained of began and were OPGs at the material time and, unlike Ms King, not in a position to continue as TPMs.

b. The decision makers involved were different from those who reverted the claimants and they took their own considerations into account. Following the Court of Appeal's decision in *Reynolds v CLFIS (UK) Ltd [*2015] CR 1010 their identity is of course crucial.

106.4 Second, the claimants cannot establish that they suffered a detriment as a result of something which was not done to Ms King. We accept that an omission can be an act of discrimination but it has to cause a detriment to the claimants. There are two possible alleged detriments:

1. Ms King was occupying a role which, if vacant, the claimants could have applied for. We have found that from early 2016 Mr Afari was the uncontested heir apparent for that role to the exclusion of the claimants. Before that, from March 2015, although Mr Phillips briefly believed to the contrary, there was no prospect of the claimants as OPGs being able to apply for promotion because any vacancy would always be filled by a surplus manager either from Mount Pleasant or further afield. Therefore, the claimants' hopes of being promoted were not blocked by Ms King continuing as a TPM.

2. The claimants had a "legitimate sense of injustice as having been treated unfairly in comparison to Ms King". We do not agree that the sense of injustice was legitimate in that the claimants were not being unfairly treated in comparison to Ms King; how she was being treated and how they had been treated were two different things. They cite *Deer v University of Oxford* [2015] ICR 1213, CA in support of their contention that failings, even those where the end result is not unlawful, can be a detriment. We are aware that a detriment need not be physical or economic but in this case we do not agree that an unjustified sense of injustice can be a detriment. There is no supporting case law and the EHRC Employment Code appears to envisage something more tangible and specifically says that an unjustified sense of grievance is not enough to establish a detriment.

106.5 Third, from the evidence we conclude that the respondent had reasons for the delay which, were the burden to pass, show that it did not discriminate or victimise. As with some of the other issues below, we were able to dig more deeply into this matter than the first tribunal because this was a key focus of our enquiry and we found that some of the gaps or apparent illogicality were explained by the intervention of the legal team which was not disclosed in the witness statements. The witnesses ill-advisedly took responsibility for decisions which were not really theirs and which they did not fully understand and they were not supported at this hearing by evidence from the legal/HR advisers about their influence on the process. It was frustrating to have to work so hard to understand unexplained or illogical parts of the narrative when answers could so easily have been provided, especially as it is neither uncommon not wrong for lawyers to be involved in a case like this. It also put the respondent in peril of the burden of proof working against them.

106.6 The reasons for delay, influenced by legal advice throughout, were as follows:

a. The various managers dealing with the issue wanted to deal with the case properly and needed to understand what the outcome to the legal proceedings would be. The claimants were still saying they should be substantively promoted and so managers needed to know what the Tribunal thought of that before disturbing Cecile King. If the claimants were made substantive, then Ms King could have a similar claim.

b. The case went to the EAT so it was still live and case could not be closed. The EAT gave judgment in July 2016 which was the final trigger for her reversion.

c. And then there was another grievance and grievance appeal too. Managers wanted was to do the right thing but not until they knew they would not potentially have to unravel it.

d. The shift managers responsible for the smooth operation of Mount Pleasant did not want to knock her back down to OPG when she was doing an adequate job, particularly in the autumn/ winter which were critical times of year

e. There was considerable sympathy for Ms King and her managers felt that reverting her would seem like punishment. They were thinking of her and not the claimants. Working as a substantive manager for 2.5 years and then being reverted would leave anyone disappointed (and the claimants were upset too but they had different managers at the time they were reverted two years and more earlier).

f. The managers thought that right up to decision to revert Ms King in August 2016 there was complexity at every level. The claimants agree that those involved said they had never had a case like it and did not know what they were doing. Mr Ladeinde at one point disagreed that it was difficult and said that the right approach was obvious.

106.7 We appreciate that amongst the reasons for the delay was the fact that the claimants were litigating and there is no dispute that there were protected acts for the purposes of a victimisation claim. However, particularly bearing in mind the absence of a detriment, this is a case of the respondent legitimately responding to the litigation in an honest and reasonable way as in *Chief Constable of West Yorkshire v Khan* [2001] ICR 1065 rather than seeking to intimidate or threaten the claimants as occurred in *St Helen's MBC v Derbyshire* [2007] UKHL 16.

Issue 2. Did the Respondent directly discriminate against or victimise the claimants by failing to comply with its Managing the Surplus Framework ("MSF") policy, in particular by:

a. Failing to promote the Claimants into the higher (managerial) grade of ML4? This refers to the continuing failure to promote the Claimants from March 2015 onwards.

b. Failing to pay wages in accordance with the Respondent's policy on pay protection, whereas such pay protection was given to Cecile King when she was reverted in or around August 2016?

107.1 We find that the respondent did not discriminate or victimise because appendix 9 of the MtSF policy relied upon did not apply to the claimants.

107.2 We have examined the MtSF policies in the bundles and find that the claimants would not have been eligible to be promoted automatically from their substantive OPG grade to a substantive managerial grade after two years' service. This is because the policy they rely on applies to substantive managerial roles only (mainly CMA/Unite members). Appendix 9 is part of the MtSF policy not available to substantive OPGs.

107.3 There is a policy which is stated specifically to apply to Operational Postal

Grades, mainly CWU members, but the claimants say it does not apply to them because they were temporary. We disagree. The reference in that policy to temporary workers is, in context, clearly a reference to temporary staff, such as those taken on at Christmas time not to those who have substantive roles within the respondent's workforce and not to OPGs who are temporary managers.

107.4 Mr Rees, who as Reward Development Manager is the nearest we encountered to an MtSF expert, knows of no one who has ever moved to a substantive management grade from OPG via time served only. He says that there would always be an application first as there is no automatic right to go into a management role. We know that Ms King was given pay protection when she was reverted to OPG but the circumstances of that are so muddy that this is not evidence that appendix 9 was applied to her or should have been applied to the claimants.

107.5 He also says that, as the name suggests, the purpose of the policy was to ensure that as the Royal Mail's activities diminished year on year substantive managers who were surplus to requirements in the business had jobs to move into. This was essential since there was a policy of making no compulsory redundancies. In that context it would be irrational to agree automatically to promote substantive OPGs without retaining any flexibility as this would exacerbate the management surplus even more. In any event, these policies were applicable to surplus staff and these claimants were never surplus. His evidence was corroborated by Mr Phillips.

107.6 Mr Alcorn, a former union official who also gave evidence for the claimants at the first hearing, was not able to help us much with this issue. It seems that although the claimants were members of his union, CMA/Unite, it was standard for TPMs to leave the CWU for the period that they were managers so this did not prove which policy applied to them. He did not in fact know that the claimants were TPMs instead of acting managers and agreed that during this time surplus substantive managers were given priority over other staff who might wish to apply for management roles.

107.7 The claimants say that because the managers' MtSF policy was disclosed on the last day of the first ET hearing and the operational grade MtSF even later, the respondent's arguments are new and less credible. We do not agree, partly because there was lack of clarity on both sides and at the end of the day we needed to see the relevant documents in order to do justice which is why there is a continuing obligation to disclose. Also, neither Mr Rees nor Mr Phillips have ever wavered in their interpretation of the relevant documentation.

Issue 3. Did the Respond directly discriminate against or victimise the claimants by failing properly to investigate and/or deal with the Claimants' grievance dated 16 April 2014? This is the matter remitted by the EAT.

108.1 We have looked first at whether the burden of proof shifted to the respondent. This is in relation to the questions:

a. Was what Mr Wilkinson said about BAME and the illogicality of a discrimination claim direct race discrimination against these black employees in itself?

b. If not, is it material which shifts the burden of proof concerning Mr Wilkinson's conduct in handling the grievance and his delay? The first Tribunal said that his approach was "*a piece of evidence from which to draw conclusions as to whether the grievance handling was discriminatory*".

108.2 As he readily admits, Mr Wilkinson was out of his depth and we were very surprised that neither he nor Mr Gyde had more than "entry-level" knowledge of equal opportunities issues. We would not have expected that managers who worked for Royal Mail or another similar organisation which offers equal opportunities training and considers itself to be an equal opportunities employer in central London would have had such an unsophisticated approach. Given this conclusion, we have thought long and hard about whether this issue should be decided in the claimants' favour. We have decided that it should not be for a variety of reasons:

a. We have all struggled with the question of who the comparator should be and agree with the first tribunal that there is no appropriate comparator in relation to Mr Wilkinson's words. Mr Livingston's suggestion is of a hypothetical comparator who would be "a white non-British person raising a grievance about being discriminated against when compared to a white British person", but we do not think that it works. Firstly, one of the parties in the comparison has to be the claimants and secondly we conclude that Mr Wilkinson would have been equally befuddled when faced with a claim of discrimination by white people against white people. Ms King, who is their real comparator in the sense that she is the person they are aggrieved about, would have been treated exactly the same as them as she is a member of the BAME group. Given that the claimants define themselves as BAME Mr Wilkinson had a point, albeit an unsophisticated one. If his comments had been harassment, which they were not and this is not pleaded, they could have themselves been a breach of the Equality Act, but not otherwise.

b. As to detriment arising directly from Mr Wilkinson's ignorant approach, it is impossible to identify one for three out of the four claimants. Mr Bicar and Ms Adeko made it clear that they were not complaining that they suffered less favourable treatment because of their race and Mr Ladiende more reluctantly conceded this point. Therefore, Mr Wilkinson's ignorance had no discernible impact. Mr Ogunbayo alone asserted that Mr Wilkinson was taking the wrong approach when they met at the grievance meeting. However, Mr Wilkinson's views were not repeated in writing or in the decision letter and were not complained about by any of the claimants in the grievance appeal or any subsequent grievance so there is very little evidence of a detriment in the shape of a legitimate sense of grievance. Mr Ogunbayo's conversation with Mr Wilkinson was brief and non-confrontational so this is not surprising.

c. When it comes to a general allegation that the grievance handling was discriminatory/ victimisation the comparator is more easy to identify. Would a hypothetical white comparator have had their grievance taken more seriously and dealt with more quickly than the black claimants? The question of detriment is difficult, though. The claimants do not say that Mr Wilkinson missed evidence which would support a finding that there had been discrimination/ victimisation and they cannot say that his conclusion was discriminatory because it has been found not to be. Again citing *Deer*, they say that the manner of the enquiry left them with a legitimate sense of grievance that their claims had not been investigated seriously. As has already been said, a detriment need not be physical or economic but in *Deer* the connection between the protected act and the conduct of the respondent which resulted in the sense of grievance was clear, which here it most certainly is not. Try as we may we cannot see what Mr Wilkinson got wrong thus creating a sense of grievance which was legitimate.

d. If the burden of proof passed in relation to direct discrimination and victimisation, the respondent has shown that it did not contravene the Equality Act. Although it seems strange to say that ignorance is a cogent explanation, it was apparent from his evidence that he had struggled and was still struggling to understand what he had got wrong let alone how to apply equal opportunities principles adequately in the future. At the end of the day he did his job as best he could given that he really was not the right person to do it in the first place. And he meant no harm.

e. As far as the delay is concerned, as held in *Deer*, reliance on legal advice is an acceptable reason for behaviour and that was the reason for the majority of the delay. There were two significant periods during which Mr Wilkinson was told to down tools which he did. Otherwise, the delays are explained by his other work pressures and the fact that he struggled to understand and deal with a multi-party and complex claim which he could not easily understand.

f. Mr Wilkinson particularly could not understand the claims in relation to pay and we have already said that we find them difficult to understand ourselves, as did the claimants' solicitor at the time. He has been criticised for failing to deal with the pay issue but the reason he did not was because on the evidence available to him it had no substance.

At the end of the day, therefore, we find that whilst Mr Wilkinson was not up to the job he dealt with the grievance as best he could and he addressed all the points that he could clearly understand. He then produced a non-discriminatory outcome.

108.3 Mr Gyde also had a shallow understanding of race discrimination issues which was particularly surprising given that he was a manager in charge of a multicultural mail centre in central London. However, his delay is explained and his outcome, which was to award to the claimants tens of thousands of pounds cannot be said to have been at risk of being discriminatory or victimisation.

Issue 4. Did the Respondent directly discriminate against or victimise the claimants by failing to deal properly or promptly with the Claimants' June 2015 grievance?

109.1 We are frankly dismayed that this issue has remained live. As we have found, Mr Phillips conducted a thorough and reasonable investigation and gave clear responses to the complaints raised. The claimants had to resort to an allegation that he did not make his conclusions explicit as well as clear in every single of the responses to the many points raised. Also they did not do him the courtesy of explaining to him why they had alleged that his delay was discriminatory/victimisation. He empathised with their concerns and indeed hoped that he had made it possible for them to apply for Cecile King's role once vacated. There was no evidence at all which might lead us to be concerned that he discriminated or victimised and he was able to answer all of the allegations put to him.

109.2 Mr Martin was unfortunately a different story in that his appeal enquiry was superficial and he was not able to articulate his reasoning. Suffice to say, however, no chink in his approach was identified through which an allegation of discrimination or victimisation could be explored and since he supported Mr Phillips's very sensible findings it is impossible to begin to see where the discrimination or victimisation might lie.

Issue 5. Did the Respondent victimise the claimants by failing to pay to the Claimants the net sums agreed and owed to them from their COT3 agreement?

110. Responsibility for the misunderstanding that has led to this conflict must lie with the advisers on both sides who negotiated the COT3. We have seen no evidence to suggest that the respondents instructed their lawyers to hold back on making legitimate payments and we know that both sides are planning to litigate in the civil courts which means that there is a genuine dispute on interpretation. Therefore, we do not have sufficient evidence to enable us to conclude that the burden of proof has passed.

General conclusions

111.1 As recorded above, we have concern about the shallow understanding of race discrimination issues of managers within the respondent and we strongly recommend that measures are taken to increase understanding of diversity in the workplace. We also think that grievances should be directed to managers capable of dealing with complex issues swiftly and thoroughly. Finally, we were concerned by the lack of ownership which the respondent witnesses had of the tribunal proceedings and, in particular, their statements. However, none of this amounts to a concern that the respondents have discriminated against or victimised the claimants in breach of the Equality Act.

111.2 We know that the claimants are left with a general sense of unfairness but we urge them and their advisers to try to understand that all unfairness is not

discrimination or victimisation. It is very sad that the claimants have been complaining and litigating since early 2014; they and those around them will have been in a constant state of worry and they have chosen not to take up acting manager duties to everyone's detriment. It is deeply regrettable that neither side has found a way to break the cycle, through mediation or otherwise, so that more normal working relationships can be restored. We hope that this judgment will draw a line and bring this saga to an end although we fear that it will not.

Employment Judge Wade
20 February 2017