Case Numbers: 2300730/2015
2300313/2017
2302421/2017

EMPLOYMENT TRIBUNALS

Claimant: **Mrs M Itulu**

Respondent: **London Fire Commissioner**

Heard at: **Croydon** **On: 9/9/2020 to 2/10/2020[1]**
In chambers on 12/10/2020 to 15/10/2020 and on 31/10/2020

Before: **Employment Judge Wright**
Mr P Adkins
Ms B Leverton

Representation:
Claimant: **In person**
Respondent: **Miss R Thomas - counsel**

LIABILITY JUDGMENT

It is the unanimous Judgment of the Tribunal that the claimant's claims of unlawful discrimination contrary to the Equality Act 2010, of being subjected to a detriment under the Employment Rights Act 1996 and for unlawful deductions of pay fail in their entirety and are dismissed.

[1] The tribunal did not sit on 24/9/2020, 25/9/2020 and 30/9/2020.

REASONS

1. The tribunal understands these three claims are the seventh, eighth and nineth claims against the same respondent, which the claimant has presented. At the time of these allegations, the claimant was employed by the respondent as an Administrative Officer. Her start date was 21/10/1991. It is understood the claimant's employment ended on 13/12/2018 and that is the subject of a separate claim.

2. The first claim was presented on 1/2/2015. The second on 16/1/2017. The third on 7/9/2017.

3. The respondent is responsible for setting strategies and policies for the provision of fire and rescue services in Greater London.

   Preliminary issues prior to the start of the substantive hearing

4. On the 7/9/2020 the claimant applied to conduct the case remotely via video link as she was unwell and had been advised to self-isolate for 14-days. A telephone case management discussion was convened at short-notice on 8/9/2020. The respondent also indicated there were four outstanding preliminary matters which would need to be addressed prior to the hearing commencing. It was decided the tribunal would convene on the 9/9/2020 (day one) and consider the preliminary matters. That outcome was emailed to the parties on 8/9/2020. It was agreed the claimant could conduct the case via video conferencing platform - CVP. Due to what had been indicated in the previous case management hearings and to account for evidence given via CVP, the hearing day was shortened. In general, after the first hour, there was a 15-minute break, after the second hour lunch was taken, after the third hour there was a 10-minute break and after the fourth hour, the hearing concluded for the day. The tribunal generally sat between 10:00 and 15:30.

5. The initial case management discussion on 9/9/2020 (day one) could not take place via CVP and so was converted to a telephone discussion. It was indicated that the tribunal anticipated it would commence hearing evidence from the claimant on day three. On day two the claimant made an application that her evidence commence on day four, as she needed more time to prepare, the lists of issues had not been agreed and there was an outstanding witness statement from one of the respondent's proposed witnesses. The application was refused. The claimant's first claim had been presented in 2015 and it was not clear what 'preparation' she needed to do in respect of the respondent's cross-examination of her. The list of issues was in the process of being finalised (if not agreed) for

the second and third claims (the list for the first claim had been agreed). Finally, although there was one potential witness statement for the respondent outstanding, if that witness was called, the respondent anticipated calling her on day 15.

6. Despite what the claimant had said previously at a case management hearing (that the only claim relying upon the protected characteristic of sex, was an equal pay claim); there was reference to unlawful direct discrimination based upon sex in her first witness statement. It was confirmed, as per the agreed list of issues for the first claim, there was no s.13 Equality Act 2010 (EQA) before the Tribunal relying upon the protected characteristic of sex[2].

7. More controversially however, the claimant contended that the first case contained a claim she had been subjected to a detriment for making a protected disclosure. The Tribunal established no such claim was pleaded in the first claim and there had been no application to amend the claim to include a protected disclosure claim (unlike the claimant's previous applications to amend which had been successful). It was true to say, that the claimant had produced written particulars of the protected disclosure claim, however, she had not made an application to amend her claim in this respect. The position was, it was now the start of a 20-day hearing, which had been listed since 17/10/2018. There had been (according to the bundle index) 11 prior case management or preliminary hearings[3]. The list of issues in the first claim was directed to be agreed by 16/6/2015 and was recorded as 'agreed' (with no protected disclosure claim recorded) on 17/10/2016. The claimant was not new to Employment Tribunal litigation. Finally, the respondent would be prejudiced and may need to call additional witnesses or produce further witness evidence, when the hearing was now underway. For those reasons, it was confirmed there was no protected disclosure claim before the Tribunal in the first claim.

8. There was an application from the claimant to add documents to the bundle and the respondent agreed and provided a supplementary bundle. The respondent also agreed to provide and add any documents which the claimant identified as relevant, which the respondent could locate. Again, this was against a backdrop of the first claim at least, being listed for a final hearing on 30/11/2015[4]. It was not clear to the tribunal why there were so many last-minute matters arising in the case or why the bundle was served so late in the proceedings.

[2] See however the claimant's subsequent reconsideration application paragraph 23-25 and 30 below.
[3] Conducted predominantly by two experienced Employment Judges, EJ Baron and EJ Hyde.
[4] This tribunal is not clear why there was such a delay.

9. There was an issue over the supplementary bundle, which had been sent to the claimant by first class post on 10/9/2020 and which she had not received by the 15/9/2020. The claimant had refused to accept documents delivered by courier or by email. At that point, the respondent was directed to provide copies by email and the claimant to accept and read them. The respondent also made arrangements for a further copy of the bundle to be couriered to the claimant, which she was to accept (subject to quarantine measures).

10. The claimant applied for some documents to be removed from the bundle. This was on the basis that they related to her claims based upon the protected characteristic of disability, which had been struck out. The respondent objected on the basis that some of the documents related to matters upon which the tribunal had to make a determination; for example, whether there was a recommendation that a stress risk assessment be carried out. That application was refused on the basis that it was not in accordance with the overriding objective to spend time removing documents from the bundle. It was pointed out to the claimant the tribunal would only read the documents which it was taken to either in questions or by reference to the witness statement. If as the claimant said, those documents were irrelevant to the issues to be determined, then the tribunal would not be taken to them.

11. Finally, the claimant applied to consolidate claim number 2302419/2020 to these three claims. This was on the basis that she had made a claim of victimisation, based upon the respondent's invitation in writing to withdraw her equal pay claim. The application was refused as the respondent has not yet presented an ET3 in that claim and will require preliminary issues to be determined. Furthermore, the victimisation claim had not been addressed in the witness evidence and it may require additional witnesses to be called.

12. The Tribunal heard evidence from the claimant on days three to seven. Followed by the claimant's witness Mr Fitzroy Sterling (Mr Sterling's three witness statements were served upon the respondent on 10/9/2020). Mr Sterling attended (remotely) most of the hearing and it appeared he was supportive towards the claimant.

13. For the respondent, the tribunal heard from:

    Mr Richard Nye – claimant's line manager from November 2014-January 2015 and February 2017-August 2017 gave his evidence via CVP on day seven

Mr Ian Hughes – Deputy Assistant Commissioner (DAC) conducted meeting on 19/11/2013 gave his evidence via CVP on days eight and nine

Mr David Brown – Assistant Commissioner (AC) commissioning officer in relation to investigations carried out by Ms Howard and Ms Bloomfield gave his evidence via CVP on day nine

Mr Anthony Buchanan – Equalities Adviser, reviewed the investigations carried out by Ms Howard and Ms Bloomfield gave his evidence via CVP on day nine

Mr David Amis – Senior HR Advisor, hand-delivered a letter to the claimant on 8/10/2014 gave his evidence via CVP on day 10

Mr David Wyatt – Head of Information Management gave evidence via CVP on day 10

Ms Victoria Vaccarini – Team Leader, claimant's line manager from March 2012-October 2014 gave her evidence via CVP on days 10 and 11

Ms Kathryn Bloomfield – Community Safety Development Manager, investigated the claimant's complaint against Mr Hughes gave her evidence in person on day 11

Dr Adrian Bevan – Assistant Director gave evidence via CVP on day 11

Dr Sabrina Cohen-Hatton – Deputy Assistant Commissioner (DAC) heard grievance appeal in 2015 gave her evidence via CVP on day 12

Mr John Anthony – Programme Director, ENT Transition, heard the claimant's appeal dated 11/5/2017 gave his evidence in person on day 12

Mr Peter Groves – Head of Learning and Development and HR Strategy (at the relevant time), heard the claimant's appeal in relation to her transfer to the FRS C role, Union Street gave his evidence in person on day 12

Mr Dominic Johnson – Head of HR Management (at the relevant time), responded to the claimant's grievances against Mr Brown and Mr Bond gave evidence in person on day 13

Mr Chris O'Connor – Head of Community Safety, responded to the claimant in respect of the FRS C role in Community Safety and her having access to personal data gave evidence in person on day 13

Ms Deborah Millen – Technical Projects Manager, responded to the claimant's data protection concerns gave evidence via CVP on day 13

Ms Elise Blackman-Reid – Fire Safety Regulation Admin Manager, appointed contact manager in respect of the claimant's complaints against Mr Hughes and Ms Vaccarini's complaint against the claimant gave evidence via CVP on day 13

Mr Rob Bond – Head of Advice and Employee Relations, discussed transfer to another FRS C post and meetings about return to work and sickness absence in 2017 gave his evidence in person on days 14 and 15

14. The Tribunal had before it a bundle of in excess of 2300-pages (five lever-arch files). On day three a supplementary bundle (a ring binder) was provided. Only the pages in the bundle referred to were considered. The bundle was poorly paginated and appeared to have been 'recycled' from previous hearings, such that pages were numbered 1668z-1 to 1668z-116. Some pages contained more than one-page number (some old page numbers were crossed out, some were not). This bundle should have been completely repaginated. The bundle was not in chronological order. There was a direction for a core bundle, which would have been helpful, but was not provided. As the tribunal moves towards the use of electronic bundles, the respondent will need to revisit how it compiles a bundle.

15. Although the tribunal appreciates the claimant is a litigant in person she did not, in her evidence in chief, address the issues she relied upon as allegations of unlawful discrimination, particularly in respect of the first claim. This left her with the difficulty of transferring the burden of proof onto the respondent.

16. The parties were given the opportunity to make oral summary submissions at the conclusion of the evidence. The claimant declined the opportunity to do so and the respondent said, that in light of that, it would rely upon its written submissions. The parties were directed to provide written submissions. The submissions provided were considered. The respondent's submissions did not address the *res judicata*, Henderson or

estoppel issues referred to in the list of issues. Those matters were not therefore adjudicated upon.

17. The tribunal was surprised at the quality of the claimant's notetaking as evidenced in her written submissions as it did not observe her making any notes during the hearing. The claimant's submissions did include new evidence, new allegations and raised new actual comparators. Those aspects were disregarded.

Matters which arose during the hearing

18. There were many technical issues using CVP. There were connectivity issues on the first day. Thereafter, in the main, the issue was poor sound quality. It was often possible for that to be resolved by everyone disconnecting from the conference and then re-joining. That however would resolve the issue temporarily, such that the sound would be acceptable, with the problem then reoccurring for no apparent reason. The sound would 'drop' so that only odd words could be heard. This resulted in the sentence having to be repeated, which was frustrating. Sometimes the weblink to CVP would not work. On one occasion the system managed to mute all the parties. Obviously, time was lost in dealing with these issues, although the system was generally acceptable on the final four days of evidence when no time was lost. In fact the hearing concluded in time.

19. As the hearing proceeded as a hybrid hearing, the tribunal panel and Miss Thomas attended the hearing in person (apart from one day when the tribunal could only sit in the afternoon and Miss Thomas attended via CVP). The claimant, Mr Sterling and 11 of the respondent's witnesses gave their evidence via CVP. The remainder of the respondent's witnesses appeared in person.

20. Once the claimant's period of self-isolation had ended and throughout the hearing, the claimant was reminded to reconsider the possibility of attending the hearing in person. Given that the hearing centre was fully risk assessed, the claimant was encouraged to attend the hearing in person. The claimant said that she would need adjustments to attend in person. The adjustments had not been raised recently by the claimant (she says she raised them in the first preliminary hearing, however that was in March 2015 and it would be expected her needs had changed in the intervening five-years). The claimant was advised to make an application in writing setting out what adjustments she needed and why, along with medical evidence. Subject to the respondent's comments, the Tribunal would then consider the application.

21. On the seventh-day, the tribunal was expecting to hear the claimant's final witness, Mr Litten. Mr Litten was not available[5]. The tribunal proceeded to hear from the respondent's witnesses. The first witness according to the 'running order' was Mr Nye. The claimant indicated she was not prepared to question Mr Nye; she said however she was prepared to question Mr Hughes and wanted him to go before Mr Nye. The respondent said that the running order of its witnesses was a matter for it. Many were senior and former senior members of staff. The former members of staff were giving up their time to provide evidence and assist the tribunal and the respondent wished to call Mr Nye first. The tribunal gave the claimant an extra 30-minutes to prepare her questions for Mr Nye. The claimant was reminded that the issues to be determined in these claims were historic events and which had been the subject of litigation since 2015. The claimant knew the respective parties' position and had plenty of time to prepare. The claimant said she had been ill; however, she was reminded that at the telephone case management discussion on 8/9/2020, she confirmed she was well enough to conduct the hearing. It was pointed out the respondent's order of witnesses was a matter for it and it may choose to adjust the draft running order (that may be for operational reasons, availability, due to illness or for other unexpected reasons). It was also subsequently noted that on 8/10/2019 the respondent had been directed to send to the claimant details of the witnesses it was likely to call and the time estimate of their evidence. The claimant therefore had had nearly a year's notice of who the respondent's witnesses would be.

22. During the course of Mr Nye being cross-examined by the claimant, she made an application to admit into evidence a recording of a conversation (which she said would evidence that Mr Nye did not discuss a vacancy with her on the 21/7/2017). The respondent objected to the application on the basis that the recording had not been disclosed in accordance with the directions, Miss Thomas would need to take instructions and it would appear any recording had been made without the respondent's consent and knowledge.

23. The claimant's application was refused for those reasons and that Mr Nye was part-way through his evidence and would not be able to give instructions. In addition, if the recording on the claimant's case showed that Mr Nye did not discuss a vacancy; all that means is that he did not discuss the vacancy during the course of *that* recording. It does not mean that Mr Nye did not discuss the vacancy at some point during that day (21/7/2017), when the claimant was not recording the conversation.

[5] Mr Litten did not give any evidence either via CVP or in person.

24. Towards the end of the eighth day, the claimant was cross-examining Mr Hughes. She put some questions to him in respect of what she said was the direct sex discrimination claim in the first claim. It was pointed out to the claimant that not only had this question been raised at the start of the hearing (that the first claim did not include a sex discrimination claim), it was previously confirmed by the claimant's then representative the only claim relating to sex in the first claim was an equal pay claim and it was not included in the agreed list of issues. The respondent objected to the claimant pursuing a sex discrimination claim for those reasons, in addition to the prejudice to the respondent and the fact the respondent had concluded its cross-examination of the claimant and had not put those matters to her.

25. In view of the time of day and so as not to waste any time, the claimant was invited to email the tribunal over the weekend and to set out where in the preliminary hearings (or otherwise) she said she had made an application to amend her claim to include a claim of direct sex discrimination. Or to confirm where it was recorded that such a claim had been pleaded.

26. Although the claimant did email the tribunal, the tribunal was satisfied that apart from equal pay, there was no separate allegation of sex discrimination pleaded in the first claim, it was confirmed at the preliminary hearing on 30/3/2014 (page 242) there was only the equal pay claim, it did not feature in the agreed list of issues and it had been clarified at the commencement of this hearing. Furthermore, although the claimant said she wished to make an application to amend her claim to include a separate sex discrimination claim, she had not provided a draft of the amendment she wished the tribunal to consider and therefore, the tribunal could not take that application any further. The claimant has made applications to amend in the past and she is aware that she needs to provide the wording of the amendment she wishes to make.

27. On the morning of the tenth day, the parties were informed that the tribunal was not able to sit on days 12 and 13 (24/9/2020 and 25/9/2020). This caused problems for the respondent as one of its witnesses (Ms Vaccarini) was on annual leave after 25/9/2020. She therefore needed to have her evidence completed by the end of day 11. Both parties made submissions. The claimant said she was not prepared to cross-examine Ms Vaccarini. The respondent did not want to start with a witness, then interpose Ms Vaccarini, and have that witness under a restriction (with two other witnesses only able to give their evidence on 28/9/2020), until at least the 29/9/2020. The tribunal agreed to an extended lunch break for the claimant to prepare her questions for Ms Vaccarini, with her evidence to commence on day 10 and to be concluded on day 11. The claimant was again reminded it was up to the respondent which order it called its

witnesses and it may well have to change the order at short notice; however it had agreed to inform the claimant of any change.

28. Resuming on the eleventh day with Ms Vaccarini's evidence, the respondent said it had received an email from the claimant at 21:45 the previous evening. The email (which was not before the Tribunal) had attachments, which were documents the claimant wished to put to Ms Vaccarini. The documents dated from 2013/2014. The respondent objected to these documents being put before the tribunal and pointed out that it could not take instructions from Ms Vaccarini as she was part-way through her evidence. The tribunal did not allow the claimant to refer to those documents. The bundle was supplied to the claimant on 13/8/2020. Witness statements were exchanged on 2/9/2020. It would have been clear to the claimant at that stage if documents were missing from the bundle, to which she wished to refer. The claimant had already had documents added to the bundle at a late stage. The documents were six/seven years old and there was no explanation as to why they had not been previously disclosed.

29. The Tribunal did not sit on 24/9/2020 and 25/9/2020. It did however receive several applications from the claimant. Noting the respondent's objections, the Tribunal determined them as follows.

30. The claimant requested a reconsideration that the tribunal had not accepted there was a whistleblowing claim in the first claim. This was addressed on day three and it was confirmed the tribunal was satisfied there was no whistleblowing claim in the first claim and that it was not addressed in the claimant's first witness statement. The claimant drew the tribunal's attention to the three paragraphs in her witness statement where she did refer to such a claim, albeit the cross-reference to the bundle was incorrect. The tribunal revisited that on the morning of day four and confirmed irrespective of the reference to whistleblowing in the witness statement, there was no whistleblowing claim pleaded in the first claim. The application was refused as there was no reasonable prospect of the original decision being varied or revoked.

31. The claimant's application that there was a sex discrimination claim, separate to the equal pay claim in the first claim, was also reconsidered. Again, although this was addressed on day three, the claimant in effect applied for a reconsideration of that at the end of day eight. The Tribunal gave its decision on the morning of day nine and refused the application.

32. The claimant stated in the list of issues she has made a contractual sickness pay claim. At best, it seems the claimant disagrees with the respondent over the calculation of contractual sickness pay, which the respondent says it overpaid, but which it is not seeking to recover. If that

is correct (the claimant has not particularised this claim and has not set out where she disagrees she had been overpaid and if she claims she had been underpaid, she has not set out any basis for this) it is difficult to see what disadvantage the claimant has suffered. This does not appear to be a claim which the tribunal has jurisdiction to determine.

33. The tribunal was asked to reconsider its decision not to allow the emails which were sent to the respondent at 21:45 on 22/9/2020 (but not copied to the tribunal) to be admitted. There are 10 emails from the period 14/6/2013 to 8/10/2014. Clearly, these emails are of importance to the claimant and as such, it is not clear why they were not previously disclosed and if indeed they are not included in the bundle, why the claimant had not identified this before the 22/9/2020. Whilst not expressing any view as to the relevance of the emails, the tribunal permitted them to be added to the end of the supplementary bundle.

34. Of the email exchange between the claimant and Dawn Rhoden[6] dated 4/11/2013, the copy before the tribunal appears to have three different page numbers handwritten on it, indicating that it has appeared in at least one, if not two, other bundles. The tribunal did permit the claimant to refer to that email, it was summarised and put to Ms Vaccarini.

35. In respect of the application for reasonable adjustments in order that the claimant could attend the hearing in person, there was an application from 27/2/2020, made afresh to this tribunal. There was not a more recent application and no indication from the claimant that she would require adjustments to attend in person (this was not mentioned for example at the telephone case management discussion on 8/9/2020). A prescription was attached to the application, however that was printed out on 18/12/2019. The claimant said there was also a copy of a prescription from August 2020. The claimant has still not said what condition is relied upon which results in a need for adjustments. There was no medical evidence. The claimant did not say why she needed the start time putting back to 11am and there is no supporting evidence, for example from her GP. The claimant also requested a supply of heated water. Due to the current circumstances, HMCTS is not providing water in any format for any party (including the tribunal panel). The claimant would need to provide her own water and use a flask or bottle to keep it warm. The tribunal confirmed it was not averse to making reasonable adjustments, however, the claimant would need to explain why an adjustment was needed and have supporting evidence. At this point (day 12) there was no medical evidence of any form in front of the tribunal.

[6] A lawyer in the respondent's Legal and Democratic Services.

36. Mr Bond was due to give his evidence in person on days 13 and 14. The tribunal was informed after the hearing had concluded on day 12, that he was unwell and had gone to hospital. Mr Bond (who had retired two years ago) was keen to give his evidence to the tribunal and for his role to be concluded. To allow him time to recover, the respondent called the remaining four witnesses on day 13. The tribunal did not sit on the 30/9/2020 and it resumed on the 1/10/2020 and 2/10/2020 for Mr Bond to give his evidence on what then became days 14 and 15. Thus he had two days to recover and the claimant had an extra day to prepare.

37. Due to the relatively slow pace of the claimant's questioning, she was reminded a number of times, that she needed to ensure she put all her questions to all of the respondent's witnesses.

The lists of issues

38. The three lists of issues are appended to this Judgment. They appear as presented by the respondent and amended by the claimant. There was some duplication of the issues, however the tribunal has addressed them as presented.

39. In the second list of issues, the claimant has added:

> 'Contractual sick pay
>
> Did the Respondent overpay the Claimant's contractual sick pay in 2015?'

40. The tribunal did not understand this to be a claim. The claimant explained it was an issue of a breakdown of the sickness pay. This is not an issue which the tribunal has jurisdiction or needs to determine.

41. The tribunal is aware that it does not have to stick slavishly to the list of issues, if it is apparent there is a claim pleaded which is not included. This case was the opposite. The claimant attempted via her witness statement to include claims which were not pleaded and for which she had not made a successful application to include by way of amendment.

Findings of Fact

First claim chronology as per the list of issues

42. In the first claim, the claimant relies upon the following allegations of unlawful conduct based upon the protected characteristic of race, which she claims amounts to unlawful harassment.

43. The claimant attended a meeting with DAC Hughes on 21/10/2013 (pages 639-644). Whilst minutes of the meeting record DAC Hughes being reasonable, they record the claimant as being somewhat difficult, for example, DAC Hughes told the claimant she needed to telephone her line manager (Ms Vaccarini) if she had to leave work unexpectedly, for example for a domestic emergency. The claimant asked where this requirement was in the policy and she was told that the policy did not cover every eventuality. The claimant said that she 'will not follow it if it is not in the policy'.

44. This was a perfectly reasonable management request which was fully justified from a senior manager, whereas the claimant was obstructive from the outset. The claimant did not raise this as an issue in her feedback on 1/11/2013 (page 651).

45. The claimant wrote to DAC Hughes (page 653-656) on 1/11/2013 and provided her version of the minutes. She referred to 'threatening and sarcastic' comments being made; but did not say what they were. Mr Hughes did not accept the claimant's comments; however, he agreed to append her notes to the minutes for the sake of completeness.

46. The claimant has not led any evidence to say how DAC Hughes was intimidating and threatening. Her evidence in chief simply repeats the allegation that he was intimidating and threatening. Having had the opportunity to review the contemporaneous correspondence, read the witness statements and observe the participants when giving evidence, the tribunal finds, based upon the balance of probabilities, that DAC Hughes was not intimidating or threatening.

47. Julie Doyle[7] sent the minutes of the meeting to the claimant on 25/10/2013 (page 651). Although it is the claimant's allegation the minutes contained inaccuracies and were manipulated to distort what she and her colleague said, she has not advanced any evidence to say how they were inaccurate or distorted. Her evidence in chief repeats the allegation without providing any detail.

48. The claimant in a letter of 1/11/2013 set out her version of the minutes, however the tribunal finds, even taking into account the claimant's corrections, that it cannot be said Ms Doyle produced minutes which 'contained inaccuracies and were manipulated to deliberately distort what the claimant and her colleagues said'. Note-taking is accepted to be a record of the gist of what was said at the meeting and it is not expected to be 100% accurate. The tribunal finds there was no material difference between the two sets of minutes.

[7] Ms Vaccarini's line manager.

49. On 11/11/2013 at 7:36 Ms Vaccarini emailed the claimant and offered her the use of her (Ms Vaccarini's) office to prepare for and conduct an Employment Tribunal telephone preliminary hearing in respect of an earlier claim (page 657). The email also referred to an earlier email making the same offer, to which the claimant had not responded. The email also requested the claimant to attend a PRDS 2nd quarterly review meeting at 2pm.

50. At 12:36 (page 671) the claimant emailed Ms Vaccarini to say she was not well due to 'continuous stomach problems and dizziness' and could not attend the meeting. In reply, Ms Vaccarini stated that if the claimant was unwell, she should go home; if she was well enough to remain at work, then she should attend the meeting.

51. It is the claimant's case this is a pattern of harassment requiring her to attend meetings when she had to comply with Employment Tribunal Orders.

52. It is the tribunal's view that Ms Vaccarini's offer was extraordinarily generous. The claimant said she had returned from leave on the 11/11/2013. The claimant would have had advance notice of any Orders and if necessary, she could have alerted Ms Vaccarini to that. Ms Vaccarini's tone and suggestion are entirely sympathetic to the claimant's Employment Tribunal commitments in a claim against the respondent. Ms Vaccarini was conscious of the claimant's Employment Tribunal commitments and was accommodating in respect of them. It was not unreasonable of Ms Vaccarini to ask the claimant to attend a meeting if she remained at work, if the claimant was not well, it was open to her to go home.

53. The next allegation is that DAC Hughes 'threatened the claimant with acts of misconduct by reference to policy 481 that was not mentioned or discussed at the meeting on 21/10/2013'.

54. In fact, what DAC Hughes' letter said (page 674) was:

> 'Legitimate Management Instructions
>
> It is reasonable to expect an employee to follow a management instruction which is not necessarily written down in a policy. It is highly unreasonable and impracticable to expect every single management decision to be covered by policy. Policies provide framework and set general guiding principles but they cannot cover every single aspect of employment relationship.

> I would like to remind you that in accordance with the Disciplinary Rules policy no, 481. Appendix 1, page 4, the Brigade considers that refusal or failure to obey legitimate instructions, Authority policy and procedures is an act of misconduct.'

55. This is in the context of, the claimant saying in the meeting that she would not follow the reasonable management instruction DAC Hughes had set out in respect of contacting her manager if called away for a domestic emergency. DAC Hughes simply did not threaten the claimant in his letter, he set out an entirely reasonable management stance.

56. Ms Vaccarini wished, as the claimant's line manager, to conduct a return to work meeting with her on 25/11/2013. It is the claimant's case she had made a complaint against Ms Vaccarini on 19/11/2013 and therefore she was not a suitable person to conduct the meeting.

57. Ms Vaccarini was not aware of the claimant's complaint[8] and in the circumstances, as the claimant's line manager it was entirely reasonable for her to undertake the return to work review. Ms Vaccarini had sent the claimant an entirely supportive email during her absence on 20/11/2013 (page 678) and had made it clear the purpose of the meeting was to discuss the claimant's fitness for work and what support she may need going forward[9].

58. The tribunal finds that it is important, for the sake of consistency, that the line manager conducts the return to work meeting. Ms Vaccarini was best placed to discuss matters such as the action plan and attendance factor; and any adjustments thereto. Although the claimant mentioned a 'sensitive' matter she wished to discuss, Ms Vaccarini made it clear she wished to discuss the return to work in general terms and said she would arrange for another manager to discuss the sensitive matter with the claimant if she so desired.

59. Mr Hughes wrote to the claimant on 10/12/2013 inviting her to a PRDS meeting (quarterly review). The background was that the claimant had met with Ms Vaccarini on 16/5/2013, however the meetings then scheduled for 4/7/2013 and 29/11/2013 did not take place. Ms Vaccarini did speak with the claimant about the need for a PRDS in December on 29/11/2013 (described as a preparatory meeting). Ms Vaccarini was then

[8] The respondent understood the complaint to be against DAC Hughes only, not DAC Hughes and Ms Vaccarini. This forms part of a later allegation, but for the purposes of this particular allegation of harassment, it is sufficient to note that Ms Vaccarini was not aware of the complaint.
[9] The claimant referred to the reason for her absence being gastrointestinal and dizziness.

absent due to ill health. Ms Doyle (Ms Vaccarini's line manager) was also absent.

60. DAC Hughes as the next line manager decided he would conduct the PRDS, despite the claimant's outstanding complaint against him on 19/11/2013. DAC Hughes took the view that it was entirely proper for him to conduct the PRDS as it was important to meet regularly to discuss performance objectives, rather than have another manager conduct the PRDS, as DAC Hughes was in the claimant's chain of line management, he considered he was best placed to undertake this review. In light of the claimant's concerns, he agreed (contrary to the usual procedure) she could be accompanied by a work place colleague and he was due to be accompanied by a representative from HR.

61. The email the claimant complains of is (page 735):

> 'Good Morning Ms Itulu
>
> As you can see from the two screen shots below there are no recorded review meetings between you and a manager.
>
> Regular reviews are the main channel for feedback and dialogue with Individuals about performance and development. In the absence of your regular line manager and her line manager, it is now my responsibility to meet with you to undertake the review.
>
> I note what you say regarding harassment: the Harassment Complaints Procedure makes it clear that it is not solely the effect on the recipient that counts, but also whether it is reasonable for the conduct to have that effect.
>
> I think I have been absolutely clear and reasonable in my request for you to attend the PRDS meeting on Friday 13th December. This matter Is not open to further discussion or negotiations.
>
> Should you choose not attend the meeting you may be subject to managerial action which could lead to a written warning, as It is untenable for you to refuse to carry out perfectly reasonable management instructions.
>
> Kind Regards
>
> Ian Hughes'

62. The tribunal finds that any form of perfectly reasonable management instruction, such as a request to attend a review meeting, resulted in an obstructive and belligerent (bordering on rude) response from the claimant. If, simply by raising a complaint about a manager (which at that

point had not been upheld[10]), that manager was removed from the chain managing the claimant, the result would be there would be no-one available to manage the claimant.

63. The claimant raised a grievance on 19/11/2013 (page 675). The complaint was passed to AC Brown and he said it would be investigated under the Harassment Policy number 529 (page 688). There were two versions of that Policy in the bundle. The first issued on 1/10/2007 and reviewed as current on 21/5/2010 (page S117) and the second issued on 1/10/2007 and reviewed as current on 3/9/2013 (page S133). The second Policy provides at paragraph 5.6 for a 'contact person' to be appointed for both the complainant and the accused person. The contact person is responsible for responding to any concerns or questions (page S137).

64. It is clear that a contact person was not appointed when the claimant first complained. AC Brown did not appoint a contact person when he wrote to the claimant acknowledging her complaint on 28/11/2013 (page 688).

65. AC Brown subsequently wrote to the claimant on 11/2/2014 confirming Ms Blackman-Reid was the contact person in accordance with Policy 529.

66. The claimant said a coordinating officer had not been appointed and AC Brown said that the Policy had been newly updated and the claimant's use of terminology had confused him (as the Policy provides for a *contact person* rather than a *coordinating officer*).

67. Ms Blackman-Reid wrote to the claimant on 28/2/2014 to inform her she was the contact person. Ms Blackman-Reid accepts that it was not made clear in her letter which complaint she was the contact officer for, however, she was appointed in respect of the claimant's complaint and also in respect of the concerns the respondent had decided it needed to investigate in respect of the claimant's behaviour towards Ms Vaccarini.

68. On 28/4/2014 the claimant again complained to AC Brown that a coordinating officer was not appointed when she first complained on 19/11/2013.

69. The claimant was absent from work due to ill health from 12/12/2013 to 27/8/2014. After DAC Hughes had tried to arrange the claimant's PRDS in December 2013, there was minimal correspondence. Ms Bloomfield wrote on 19/12/2013 as the claimant was unable to attend the meeting arranged for that date. Ms Khan wrote to the claimant on 20/1/2014 to say that she had been appointed to line manage the claimant in the absence of Ms Vaccarini and Ms Doyle. Ms Bloomfield wrote again on 3/2/2014 as due to

[10] For the sake of completeness, the complaint was not subsequently upheld.

the serious nature of the allegations the claimant had made, she wished to progress her investigation. The claimant wrote to Ms Bloomfield on 10/2/2014 and sent four pages of additional information for her to take into account. Then the claimant wrote to AC Brown on 18/2/2014 pointing out that a contact person had not been appointed in November 2013.

70. It is noted that the claimant did not immediately raise the issue of the lack of appointment of a contact person when she first complained and that she only retrospectively complained once she was informed of Ms Blackman-Reid's appointment by AC Brown.

71. The claimant did not respond to Ms Blackman-Reid's letter of 28/2/2014 and 14/4/2014; in reply she asked AC Brown to tell Ms Blackman-Reid not to contact her.

72. There was no detriment to the claimant not being informed of Ms Blackman-Reid's appointment until the letter of 11/2/2014 and the tribunal accepts this was no more than an oversight by AC Hughes, in applying a Policy which had recently been amended. Any oversight was soon rectified and in any event, the claimant did not wish to engage with the contact person.

73. Ms Howard (Manager appointed to investigate the claimant's behaviour towards Ms Vaccarini) wrote to the claimant on 25/3/2014 (page 782). She confirmed Occupational Health (OH) had agreed she may meet with the claimant whilst she was absent from work and proposed a meeting on 4/4/2014. The claimant did not attend and she raised queries with Ms Howard. Ms Howard re-arranged the meeting for 15/4/2014 (page 788). It appears the claimant was unaware of this (letters sent by recorded delivery were not collected and the respondent was unaware they had not been delivered until they were returned by Royal Mail). On 23/4/2014 Ms Howard rearranged the meeting for 12/5/2014. The meeting did not take place.

74. On 28/8/2014 Ms Howard wrote to the claimant to say that she could not keep the investigation open indefinitely. She advised the claimant that if she was not able to attend a meeting on 16/9/2014 or give an alternative within five days of that date, that she would conclude her investigation based upon the information she had (page 824). In response, the claimant proposed the date of 23/9/2014 and a rescheduled start time of 14:00.

75. At approximately 13:15 the claimant called Ms Howard and asked for the meeting to be put back to 16:00. The reason given was that she was engaged in exchanging witness statements with the respondent for her

Employment Tribunal case, due to commence on 29/9/2014. The claimant followed this up with an email (page 832). Ms Howard said the claimant called her around 13:25, did not propose the time of 16:00 and vaguely asked for the meeting to be put back, which she did not agree to (page 890).

76. In written response on 24/9/2014, Ms Howard pointed out that the date and time was of the claimant's own choosing and as such, she would have expected the claimant to make plans which did not conflict with other arrangements and as the claimant was no longer absent from work due to sickness, she would have expected her to make herself available for the meeting. Ms Howard concluded that she was not prepared to make any more arrangements to interview the claimant.

77. Even if the date for exchange of witness statements was put back at the respondent's request (as the claimant seemed to suggest), all the claimant had to do was to let Ms Howard know and to suggest that due to matters outside of her control, that the interview be rearranged once she became aware of this, i.e. the day before, or much earlier on the 23/9/2014; not 35/45 minutes before the meeting was due to start.

78. The claimant states that she became aware on or about the 16/4/2014 or 17/4/2014 that Ms Vaccarini had told staff based at Lewisham and Union Street (the respondent's 'HQ') that she had taken out a complaint against the claimant and that the investigation would carry on until September 2014. The claimant referenced this on 28/4/2014 in letters to Ms Howard and AC Brown (pages 794 and 796). Ms Vaccarini denied this, saying that she did not in any event take out a complaint against the claimant and that she only discussed the situation with her husband (who also works for the respondent) and her adviser, in confidence.

79. The claimant has led no evidence in respect of this allegation. She has not said who heard Ms Vaccarini make this statement or where the statement was overheard. Ms Vaccarini said it was Mr Litten who made this comment not her[11].

80. The tribunal finds Ms Vaccarini would not have any reason to say in April that the investigation would continue until September as she could not possibly have known that at that stage.

81. The claimant alleges Ms Bloomfield failed to send her the outcome of her investigation. The tribunal finds that on 10/6/2014 Ms Bloomfield wrote to the claimant asking to meet her to give feedback on her[12] findings (page

[11] As noted, the tribunal did not hear from Mr Litten.
[12] Ms Bloomfield's findings.

816). That letter was resent on 11/7/2014 as the claimant had not collected the recorded delivery from Royal Mail (page 815). The claimant wrote to AC Brown on 22/8/2014 asking further questions, but she did not enquire about the outcome of the investigation. In November 2014 the claimant queried the outcome and the report was sent to her via email on 3/12/2014 (page 950). AC Brown confirmed the report had been ready for some time and noted that the claimant had only recently raised it as an issue with Mr Bond. It is not correct to say that there was any detriment applied to the claimant. Ms Bloomfield contacted the claimant when the report was ready and offered to discuss it with her. As soon as this was raised with Mr Bond, a copy of the report was supplied.

82. On 15/7/2014 the claimant was informed of an OH recall appointment (page 805). On 18/8/2014 the claimant was advised of a rescheduling of that appointment to 8/10/2014 (page 810). That letter did not give a reason for the rescheduling. This was queried on 21/8/2014 and on 22/8/2014 it was confirmed in an email that as explained to the claimant, it was the OH provider who had changed the appointment, not the respondent. The reason was given as: 'they need to extend the LGV Clinic the Doctor was attending that morning.' As a result OH had to reschedule the claimant's appointment.

83. It was OH who changed the appointment not the respondent and a reason was provided both orally and in writing to the claimant. There was no detriment.

84. Following on from that, Rob Bond was aware the claimant had an appointment with OH on 8/10/2014. Mr Bond was tasked with meeting with the claimant to discuss the outcome of Ms Howard's investigation and her transfer from Lewisham as a result of the investigation. Mr Bond wished to meet with the claimant shortly after the OH referral in order that the claimant could return to work as soon as possible after that consultation.

85. Mr Bond asked Mr Amis to hand deliver an invitation to a meeting on 10/10/2014 to the claimant at the OH premises (which are close to the respondent's HQ). Clearly, had the letter been posted (as the claimant suggested) that could have potentially caused delay to the meeting taking place. The claimant took offence to this course of action. There was no detriment, in fact it was to the claimant's advantage that the meeting took place as soon as possible.

86. The claimant also alleged Mr Amis failed to respond to the question why it had been necessary for him to hand deliver the letter to her at OH. Mr Amis informed the claimant that his interaction with her was not a

'meeting' that he was merely handing over a letter, as he had been asked to do, as it was important that she received the letter as soon as possible. This was not a detriment.

87. By a letter dated 9/10/2014 Mr Bond informed the claimant one of the recommendations of the investigation into the complaint by Ms Vaccarini was that she[13] be transferred from Lewisham to the Admin Support Team in Fire Safety Regulation, based at HQ (page 872)[14].

88. The claimant continually referred to Ms Vaccarini's complaint being 'retaliatory'. Ms Vaccarini was spoken to and as a result of that the respondent decided that it needed to investigate the concerns she raised about the claimant. The tribunal finds there was no retaliatory complaint from Ms Vaccarini and in fact there was no complaint.

89. The claimant complains that she was not informed of the recommendation or provided with a copy of the report. Clearly, the claimant was informed of the recommendation she be moved, as it was set out in Mr Bond's letter to her. AC Brown then wrote to the claimant on 24/10/2014 to say he was now in receipt of a copy of the report and that he accepted the findings in full (page 883). AC Brown also enclosed a copy of the report.

90. As a sub-point to that complaint, the claimant said there was no warning or consultation, that the move was from a substantive post, to a supernumerary post and the move was in breach of the compromise agreement dated 25/11/2014.

91. The tribunal finds there was no alternative to moving the claimant from Lewisham due to the findings of the report. The claimant preferred to work at HQ as it was nearer to her home and she had for example, asked to stay on and work at HQ after a training course. The respondent had offices at other locations (such as Stratford), but the claimant would not consider them. It was untenable for the claimant to remain at Lewisham and as such, she had to relocate.

92. The tribunal finds there was no need to warn or consult with the claimant prior to the respondent's communication on the 9/10/2014. The process the respondent underwent once Mr Bond met with the claimant was sufficient. For example, once the claimant made representations to Mr Bond, he considered them and (engaging with the claimant), made adjustments to the proposal to accommodate the claimant. Mr Bond's meeting was the start of any consultation process.

[13] The claimant.
[14] The report upheld the allegation the claimant had bullied Ms Vaccarini.

93. The proposed role was supernumerary, not substantive; however it was confirmed to the claimant that even though there was a reorganisation underway at HQ, she would not be affected by that and she was not at risk of redundancy. Mr Bond confirmed that her position was secure.

94. The tribunal does not accept the compromise agreement dated 25/11/2008 was bypassed by the decision to transfer the claimant, which Mr Bond implemented. All the compromise agreement provided, was that the respondent would confirm by letter the fact of the claimant's recent transfer to Lewisham. There is no mention of the transfer being a permanent arrangement or that the claimant will never subsequently be moved. It is accepted the claimant was subject to a mobility clause in her contract of employment and that her duties could be adjusted in order to suit the respondent's requirements.

95. The tribunal finds the initial contract of employment did not mirror paragraphs 4(i) and (ii) of the compromise agreement, however it does not understand how this can be an allegation of harassment. The claimant was moved into a supernumerary role as an outcome of the investigation. The tribunal finds it was contractually open to the respondent to relocate the claimant and to give her amended duties that were within her skill-set.

96. The claimant was due to return to work on 13/10/2014. She objected to Mr Bond's proposal and proposed that she work in a different team at HQ. This was due to her objection to working, as she saw it, in the same office as Mr Ocitti[15] and she suggested she work at HQ in the Central Service Delivery Team. The tribunal finds Mr Ocitti did work at HQ, however he was not in the same team as the claimant and the respondent proposed they would work on different floors.

97. On 16/10/2014 (page 875) Mr Bond explained to the claimant that he did not consider it suitable to move her to the Central Service Delivery Team, as some staff members in that team were under notice of redundancy as the Team was being reorganised.

98. The claimant complained that Mr Bond did not offer her a FRS C role on or around 24/10/2014 and 6/11/2014. The Employment Tribunal hearing the claimant's 2013 claims, made a finding of fact that other than Lewisham (where the claimant did not want to work at that time due to those proceedings), the only base the claimant was prepared to work from was HQ (page 438zd). The vacancy that was available in October 2014 was in the Training and Release Team and the role was going to be based at

[15] Mr Ocitti had raised a complaint about the claimant in 2007/2008 and in turn, she had raised a complaint about him.

Stratford and therefore the claimant was not considered for that role as it would not be based at HQ (page 1044).

99. The claimant complained that independent managers were not appointed to consider her complaints about Ms Howard's investigation which she raised on 31/10/2014. It appears she takes issue that Mr Buchanan (who was appointed to carry out a review of Ms Howard's investigation) was Ms Howard's line manager and they both worked in the Equalities Department.

100. Mr Buchanan wrote to the claimant on 26/11/2014 (page 924). He found the claimant had failed, despite having numerous opportunities, to attend for an interview with Ms Howard. The claimant was also given the opportunity to present written representations, which she did not provide. He did not consider further investigation was warranted. Mr Buchanan did deal with the claimant's concerned and the tribunal finds the claimant regularly raised grievances and she did not need any input from Mr Buchanan to do so.

101. The tribunal finds Mr Buchanan was independent of Ms Howard and was a suitable person to review the investigation. Even if he were Ms Howard's line manager, he would be ideally placed to review her decisions. Objectively, Ms Howard offered to meet with the claimant on four occasions, the last occasion was at a date and time of the claimant's own choosing and the claimant failed to attend. Whichever manager reviewed Ms Howard's decision was likely to have reached the same conclusion, that she had done all she could to meet with the claimant.

102. The claimant's next allegation of harassment is that on 28/11/2014 AC Brown ignored her grievance and failed to investigate the grievance regarding Mr Buchanan's decision of 26/11/2014. By an email of 28/11/2014 sent at 7:34, the claimant sent a four-page letter of grievance to Patricia Oakley, Strategic Advisor to the Commissioner (page 937). Ms Oakley replied to the claimant on the same day, confirming she had passed the letter to AC Brown.

103. AC Brown accepts he received the email and said that he then overlooked that he needed to appoint a manager to hear the grievance.

104. The grievance was not processed as per the respondent's policy and within the requisite time limit. The tribunal finds that human error and the sheer volume of correspondence resulted in the fact the grievance was overlooked. It is noted that the claimant did not raise this as an issue at the time.

105. Mr Bond sent his outcome to the claimant's grievance on 11/11/2014 and the claimant appealed that outcome on 17/11/2014 (page 916). The grievance was sent to Mr Groves on 20/11/2014 and he contacted the claimant to ask for her availability on 21/11/2014 to meet. Mr Groves proposed a date of 27/11/2014 and he confirmed the date and time on 25/11/2014.

106. Mr Groves wrote to the claimant on 5/12/2014 to confirm his understanding of the key points of her grievance (page 968). The claimant replied to that email and sent a follow up email on 17/12/2014 (page 977). Mr Groves then sent an email on 19/12/2014 to inform the claimant he was then on leave until 5/1/2015 (page 981). He completed his investigations on 8/1/2015 and sent his outcome on the 9/1/2015 (page 1030).

107. The claimant's issue appears to be that Mr Groves 'ignored' her email of 5/12/2014 and that action constitutes harassment relevant to the protected characteristic of race. Mr Groves did not 'ignore' the claimant's email. He was conducting an investigation in the background.

108. Following on from that, the claimant then says Mr Groves dismissed her appeal and failed to address all of the issues which she raised in her appeal of 17/11/2014. It is factually correct that Mr Groves dismissed the substance of the claimant's appeal in respect of where and in which team she would be based. It is more accurate to say that the claimant does not accept Mr Groves' outcome, rather than he dismissed the appeal. The claimant does not say how Mr Groves failed to address all of the issues which she raised on appeal. The tribunal finds the appeal was appropriately handled.

109. The claimant also relies upon the prohibited conduct of direct race discrimination. The first list of issues records five allegations.

110. The claimant claims a failure to carry out a stress risk audit between 25/9/2013 to 11/12/2013 and between 4/3/2014 and 8/12/2014 was less favourable treatment. It is her case that this was recommended by OH in reports dated 25/9/2013 and 19/9/2014.

111. The OH report of 25/9/2014 did refer to the claimant continuing to have symptoms related to stress[16]. It did not however, recommend a stress risk audit, unlike the report of 26/4/2013 which did recommend a stress risk assessment be carried out; which Ms Vaccarini completed.

[16] It also referred to dizziness.

112. The claimant refers to an OH report of 19/9/2014 which she says the respondent failed to action (page S165). That letter does refer to it being 'advisable' to meet with the claimant to address her concerns and to do a risk assessment. The letter is addressed to HR and said it was copied to Mr Amis. The letter also notes that the claimant wishes to have a copy of the report two days before it is sent to management. The respondent has no record of receiving this report and Mr Amis said that he did not find a copy of the report when he handled the claimant's subject access request and that he had double checked prior to giving his evidence and he still could not locate a copy of the letter. The letter was also in a different format to the other OH reports. It is noted, that an Employment Tribunal hearing took place on 28/9/2014 to 1/10/2014 and that in the 2013 proceedings, the claimant had not wanted to work at Lewisham while those proceedings were ongoing. In view of the proximity of the Tribunal hearing and the preparation needed, the tribunal finds that the claimant would not have attended a meeting in any event. Following that hearing, there was a further referral to OH on 8/10/2014 and the claimant met with Mr Bond on 10/10/2014. This was not less favourable treatment.

113. The claimant relies upon the fact a contact person was not appointed when she raised a complaint on 19/11/2013. This is factually correct and the background is explained at paragraphs 63-72 above. The claimant did not raise this as an issue or complain about this at the time. She only complained once the contact person had been appointed. It is not accepted the claimant was treated less favourably than Ms Vaccarini because of her race. This was simply an oversight by AC Brown. There was also no detriment to the claimant.

114. The next allegation is that Mr Bond only addressed one issue raised in the claimant's grievance of 28/10/2014 in his response of 11/11/2014. There is again a lack of particularisation from the claimant in respect of this allegation and she does not expand upon it in her evidence-in-chief.

115. It is not clear what the claimant alleges Mr Bond failed to do. Clearly as Mr Bond did not uphold the claimant's grievance, she was disgruntled with the outcome, but that is not the same as an allegation she was treated less favourably (than Ms Vaccarini or a hypothetical comparator) because of her race. The claimant appealed the outcome of her grievance on 17/11/2014 (page 916) and it was considered by Mr Groves, who met with the claimant on 28/11/2014. The claimant refers to being subjected to a detriment contrary to the EQA, yet again however, she does not say what the detrimental treatment was.

116. The fourth allegation is the claimant suffered less favourable treatment in that the respondent failed to follow its grievance and harassment complaint procedures in processing the grievance lodged on 28/11/2014. The issue the claimant takes is not at all clear. In her first witness statement, the claimant refers to a detriment under the EQA and references that the respondent did not require Mr Sterling to first make a complaint about the outcome of the investigation into the complaint he made against his then line manager before he could appeal the respondent's decision of 2/7/2013. Mr Sterling is not one of the claimant's named comparators. In light of that and the lack of particulars, this allegation is not made out by the claimant.

117. The last allegation is that Ms Bloomfield failed to process the grievance raised on 19/11/2013 as against Ms Vaccarini, rather than against DAC Hughes only (page 676).

118. The respondent accepts it did not treat the claimant's grievance of 19/11/2013 to be against Ms Vaccarini, but as against DAC Hughes. The respondent however asserts this was not less favourable treatment than an actual comparator (Ms Vaccarini) or a hypothetical comparator.

119. The claimant's grievance reads:

> 'Dear Sir
>
> Complaint of Race, Sex Discrimination and Hostile Working practices and conditions
>
> My complaint is about detrimental working practices and conditions because of my protected characteristics -race and sex. In particular, in reference to meeting held on 21 0ctober 2013, meeting notes, DAC Hughes' letter SE/DAC/IH dated 12 November 2013 and incident on 04 November 2013.
>
> I feel and believe that I am not receiving reasonable support to ensure that I carry out the duties of my role without harassment. I am afraid to come to work every day because I feel threatened in view of the continued intimidating events happening at work.
>
> I believe DAC Hughes' actions toward me, and decisions taken relating to my previous grievance dated 21 June 2013 amount to detriments on ground of sex and race, compared to other employees of a different race and sex.
>
> I had already expressed that I feel anxious about having one to one meetings with management based on allegations that are untrue made against me following such meetings.

> The aftermath of what happened at work on 04 November 2013 has further intensified my anxiety. I engaged with Ms Victoria Vaccarini when she requested to discuss work issues. Ms Vaccarini subsequently called me to her office and said "I feel I am under attack".
>
> I have been made ill from stress at work with the result that am suffering ill-health. I am, so stressed that I am on verge of a nervous breakdown. I reasonably believe that to continue working in the same conditions, if not addressed will push me over the edge.
>
> I stated my position clearly and that is, that I will abide by Policy. It is the responsibility of management to review policies so that employees know what to do and what is expected of them in any situation.
>
> DAC Hughes has made it clear that I should not correspond with him further.
>
> I look forward to hearing from you.
>
> Yours faithfully'

120. In a follow up email on 9/12/2013 (page 724) the claimant said:

> 'I am not clear why AC Brown made a decision to arrange for officers to conduct an investigation under the Harassment Complaint Procedure (Policy 529) into the allegations I made and not under the Grievance Policy (394b) also. My complaint is about the management decisions of DAC Hughes and the knock on effect of those decisions. The harassing and intimidating conduct has not ceased, but still continuing.'

121. The claimant does not reference Ms Vaccarini in that email, save that in her list of eight enclosures, there is reference to an email exchange between her and Ms Vaccarini from 25/11/2013 to 3/12/2013. AC Brown acknowledged the complaint on 28/11/2013, but did not state against whom he considered the complaint to be (page 688). Ms Bloomfield attempted to meet with the claimant on 19/12/2013, however the claimant was then unwell and not able to attend that meeting (page 695).

122. On 3/2/2014 Ms Bloomfield wrote to the claimant to say: 'I am writing to you regarding the way forward with regards to your complaint against DAC Hughes which you made in a letter to James Dalgleish dated 19/11/2013' (page 742). In reply on 10/2/2014 the claimant wrote to Ms Bloomfield and declined her offer to meet (page 752). In that letter the claimant referenced a conversation she had with Ms Vaccarini on 4/11/2013. The claimant referred to a complaint to the respondent's management and that DAC Hughes was aware that she had made such a complaint. The claimant did not reference a specific complaint against Ms Vaccarini.

123. The tribunal finds that the claimant received a letter from AC Brown on 15/2/2014 informing her of the allegations made against her by Ms Vaccarini which the respondent decided it needed to investigate. The claimant replied to AC Brown on 18/2/2014 and then asserted she had made a complaint against both AC Brown and Ms Vaccarini (page 759).

124. The tribunal finds that it was reasonable for the respondent to interpret the complaint was only raised against DAC Hughes.

125. The last issue in the first claim is an equal pay claim; the claimant compares herself to Mr Ajibola in that she was employed on like work or on broadly similar terms. The claimant was grade FRS C in the Fire Safety Policy Group. Mr Ajibola's substantive grade was B, however he was acting up into a FRS D role. He was the claimant's line manager.

126. It was the claimant's own case that when she was moved into the Fire Safety Policy Group as a supernumerary FRS C, that she had no managerial responsibilities. At paragraph 46 of her witness statement, she says:

> 'The Respondent admitted that the FRS C role that the Claimant formerly held in the South East Area Support Team had management responsibilities. The Respondent admitted that the grade FRS C role in the CS team does not have managerial responsibility. This clearly contradicts the Respondent's contention that the Claimant had suffered no detriment and undermines its case.'

127. Furthermore, the claimant was paid more than Mr Ajibola. The claimant was paid at the top of band FRS C on £33,394. Mr Ajibola was placed on the bottom of the pay scale for FRS D and was on £33,062.

128. The respondent submits many of the claimant's allegations are out of time. The claim was presented on 1/2/2015 and early conciliation took place between 19/12/2015 and 22/12/2015. Any issue prior to 20/9/2015 is therefore out of time.

129. The claimant contends that it is conduct extending over a period of time. In the alternative, she argues that it is just and equitable for the tribunal to exercise its discretion to extend the time limit. Although she does not go beyond that and say why the discretion should be exercised. The burden is upon the claimant if the claimant wishes to persuade the tribunal to extend time.

130. The tribunal finds that in the main, the complaints in the first claim amount to a continuing act extending over a period of time. Save that the

allegations against Ms Vaccarini are self-contained and are not part of the matters which result from Mr Hughes' decision for Ms Vaccarini to return to her role as the claimant's line manager. The allegations against Ms Vaccarini are out of time.

Second claim

131. In the second list of issues, paragraphs 6 to 8 deal with the claimant's claim that she made a protected disclosure within the meaning of s. 43B of the Employment Rights Act 1996 (ERA).

132. It is noted that the respondent had a whistleblowing policy. It is fair to say that the claimant has demonstrated that she was fixated with the respondent's policies and the implementation of them. There is no mention of the claimant following the whistleblowing policy. She did not take the tribunal to it in her evidence in chief or in her questions or answers. The tribunal finds that had the claimant made protected disclosures at the time she now says she did, she would have ensured she made those disclosures under the respondent's policy.

133. In her witness statement, the claimant sets out her protected disclosure as her letter to the respondent of 19/11/2013 (page 676). That disclosure is different to the ones which appear in the list of issues (at paragraph 7). There is no evidence from the claimant in respect of the detriments she claims she was subjected to, although again, they appear (8.1 to 8.29) in the list of issues. There is nothing to link the letter of 19/11/2013[17] to the allegations of detriment.

134. The tribunal finds that the letter of 19/11/2013 is not a protected disclosure. It is not a disclosure of information. The letter contains assertions made by the claimant. There is no information disclosed which in the claimant's reasonable belief was in the public interest. Furthermore, the tribunal finds there is no disclosure made in the public interest. At best, the letter is a complaint about DAC Hughes, with a reference to a comment made by Ms Vaccarini. The letter refers to the claimant's personal circumstances and her position. If the letter were to amount to a protected disclosure, then any grievance raised by an employee about their situation could be claimed to amount to a protected disclosure. The ERA was amended in 2013 for that very reason.

135. Even if the letter did amount to a protected disclosure, the detriments complained of in the list of issues are not mentioned in the claimant's witness statement. In her witness statement the claimant refers to a detriment in respect of her fall at work in December 2013 and the

[17] Addressed to Mr James Dalgleish head of HR at the time

respondent's response to that. Whereas in the list of issues, the claimant identifies 29 allegations of detriment.

136. The list of issues is not the claimant's witness statement or her evidence in chief. Even if it were to be accepted the claimant had made protected disclosures for the purposes of s. 43B ERA, the claimant has also failed to lead any evidence regarding what she says were the detriments (paragraph 8.1 to 8.14 and 8.16 to 8.29). In the alternative, the allegations were too vague to address[18].

137. The claimant did refer to the FRS grade C role in her first witness statement at paragraph 110 o, whereas the allegation is made in the second claim. The claimant referred to a vacancy in the IT department from October 2014; and then from July 2015 onwards. A failure to offer the claimant a vacancy in October 2014 pleaded in the second claim is subject to issue estoppel or Henderson v Henderson[19]. The claimant therefore cannot pursue that allegation.

138. In any event, the claimant's allegation is incorrect. The vacancy that was available in October 2014 was in the Training and Release Team and the role was going to be based at Stratford and therefore the claimant was not considered for that role as it would not be based at HQ (page 1044).

139. The second allegation, that there was a failure to offer the claimant a vacant FRS C job from July 2015 onwards, was insufficiently particularised and despite spending some time considering this, the tribunal was unable to identify which vacancy the claimant was referring to.

140. The claimant's first witness statement cross-referred to page 875, a letter from Mr Bond dated 16/10/2014. The letter did not make an offer of a vacancy. The claimant has either misunderstood or misrepresented the contents of the letter.

141. The claimant claims she was subjected to detriment for raising health and safety concerns under s. 44 ERA. She relies upon s. 44 (1)(c)(ii) and s. 44 (1)(d) ERA. The claimant therefore contends that she was an employee at a place where there was a health and safety representative, but that it was not reasonably practicable for the employee

[18] For example, 'the respondent made allegations that were detrimental to the claimant in relation to the application of polices and employment matters, including risk assessment, grievance, harassment and disciplinary procedures' (8.25).
[19] [843-1860] All ER 378, the issue being that the allegation should have been pleaded in the first claim.

to raise the matter by that means. In the alternative, that she was in circumstances of danger which she believed to be serious and imminent and which she could not reasonably be expected to avert and she left, or proposed to leave, her place of work.

142. It is again noted that the claimant has not in her second witness statement led evidence in chief as to what she says were the circumstances which led to her being subjected to a detriment.

143. It appears the claimant's case is that she could not raise her concerns with a health and safety representative as she was not at work (she was on sickness absence). That is not accepted. The tribunal finds the claimant engaged in voluminous correspondence with the respondent whilst she was absent from work and so could have raised this concern.

144. In addition, it is not accepted the claimant was in circumstances of danger. It appears the claimant relies upon the presence of Mr Ocitti at HQ, when Mr Bond informed her she would be located there once she was removed from Lewisham. Mr Ocitti's mere presence at HQ was not a circumstance of danger and it was certainly not the type of mischief the legislation was designed to protect employees from. Mr Ocitti had not threatened the claimant. The respondent took the reasonable view that years had passed since the claimant had complained about Mr Ocitti and vice-versa. Furthermore, the tribunal finds that the claimant had in the past attended HQ and had not raised any issue in respect of Mr Ocitti. The tribunal finds this is again another example of the claimant resisting sensible management of her and using every possible excuse to avoid doing what she was reasonably being asked to do.

145. The claimant's facts do not fall within s. 44 ERA and therefore, she cannot have been subjected to a detriment as a result.

146. The next form of prohibited conduct which the claimant relies upon is victimisation under s. 27 EQA. The claimant lists as the protected act the seven earlier Employment Tribunal claims and the grievances dated 26/10/2014, 28/10/2014 and 28/11/2014. The tribunal is prepared to accept the previous Employment Tribunal claims amount to protected acts.

147. The claimant has not led evidence in chief in respect of some of her detriments. The claimant refers to the respondent making a false report that she fell off her chair and then says the respondent concealed the correct details of the incident, failed to investigate it and failed to report it to the HSE. It is correct to say the incident on 11/12/2013 was incorrectly reported. Once pointed out, it was corrected. The claimant took issue that

the report referred to a pre-existing medical condition and the report was amended. That was despite the claimant herself making several references to dizziness when discussing her health in the months preceding the incident. The report was not concealed, it was corrected and updated. There was no need to report the incident to the HSE.

148. In respect of 15.2 in the second list of issues, the claimant said the respondent failed to offer her an FRS C vacancy in the IT department.

149. The tribunal is not clear what allegation 15.2 refers to. It may be a repeat of allegation 8.15, in which case the findings set out above stand. It may be that the allegation is repeated at 15.19 below, although it is not obvious.

150. A vacancy in fact was discussed at a meeting between the claimant and Mr Bond in August 2016 for an Incident Analyst. The claimant followed this up on 24/10/2016 and 28/10/2016, to which Mr Bond responded on 4/11/2016 that the claimant was given the opportunity to provide any information she wished to be considered to assist in the process of matching her skills to the person specification for that role (page 1368-1369). Mr Bond confirmed he made that clear to the claimant in his letter of 26/8/2016 and email of 5/9/2016 (pages 1330 and 1340).

151. At a meeting on 28/7/2016, the claimant and Mr Bond discussed an FRS C role in IT (allegation 15.19). Mr Bond followed up the meeting in writing on 29/7/2016[20]. Mr Bond said that if the claimant wished to be considered for the Incident Analyst position, he would arrange an assessment and obtain advice from OH. Thereafter on 4/8/2016 Mr Bond informed the claimant that a skills assessment was necessary in order to be considered for the role (page 1312). The tribunal finds the claimant did not engage with the process. The claimant did not respond directly regarding the skills assessment despite being given further opportunities to do so. For example, on 18/8/2016 Mr Bond asked the claimant if she wished to supplement the information he had summarised for her (page 1321). On 26/8/2016 Mr Bond again asked the claimant if she wished to supplement the information (page 1331). In response on 24/10/2016 the claimant informed Mr Bond that it was her reasonable expectation that the respondent should offer her the vacant FRS C post in the IT department (page 1369). Mr Bond replied on the 4/11/2016 to inform the claimant that based upon the limited information the claimant had supplied, there was not a reasonable match against the person specification for her to be offered the IT role. Mr Bond did however inform the claimant that he was

[20] It was in this letter that Mr Bond informed the claimant that contrary to his understanding, the Training and Release Officer role was no longer available as the interviews had already taken place.

expecting a substantive position to become available in Community Safety which was likely to be a better match to the claimant's skills and experience (page 1368). The claimant's allegation is disingenuous and there was no detriment.

152. Allegation 15.3 was withdrawn or removed. In respect of 15.4, Mr Amis attended the appeal meeting in his role as Senior HR Advisor as a note-taker. The claimant did not object at the time. There are many references in the emails to the claimant or others in her department at Lewisham being asked to attend meetings as note-takers. It was noted in the Employment Tribunal's reasons of 19/7/2013 that it was standard procedure for a note-taker to be present at meetings. There was nothing detrimental in Mr Amis attending in this role.

153. Dr Cohen-Hatton's appeal outcome letter was sent to the claimant on 12/10/2015 (page 1219). Dr Cohen-Hatton dealt with each of the claimant's appeal points in turn, giving a reasoned decision and further investigated where necessary and adequately explained. Dr Cohen-Hatton looked at the sickness pay calculation and found the claimant had been overpaid, however she confirmed the respondent was not seeking reimbursement. That outcome was not detrimental to the claimant. The tribunal finds the outcome was based upon Dr Cohen-Hatton's findings and was not because the claimant had done protected acts.

154. The respondent did originally refuse to release to the claimant the name of the person who made the report in respect of the incident on 11/12/2013. The respondent's reason for this was that this was a junior member of staff who had an expectation of privacy. Subsequently, the respondent overturned its decision and informed the claimant of the name of the person making the report. Although the claimant desired to know the name, it was not a detriment for her not to know the name. The refusal to reveal the name was not connected to any protected act. The reason for not revealing the name was the respondent's belief it was complying with the Data Protection Act 1998.

155. The outcome letter was dated 12/10/2015 and the claimant provided additional information 11/11/2015. The additional information did not provide any new evidence for consideration. In any event, Dr Cohen-Hatton told Mr Bond and Mr Amis in an email that the information had no bearing on her outcome and would not have altered it, even if the claimant had provided it prior to her outcome, rather than after.

156. In an unparticularised allegation, the claimant said Mr Bond threatened her with dismissal using the capability procedure. The tribunal finds this relates to Mr Bond's letter of 18/8/2016 (page 1320) when Mr

Bond referred to the respondent's Sickness Capability process and Managing Attendance policy. Not only is this not detrimental to the claimant, the tribunal finds Mr Bond would have pointed out to any employee that an extremely long period of sickness absence could lead to it being managed under the appropriate policy, irrespective of whether they had done a protected act or not.

157. The next allegation of victimisation is that the claimant was being pressurised out of her job as she had made protected disclosures and done protected acts. This is a vague and loose allegation and it is not sufficiently particularised to require the respondent to provide a non-discriminatory explanation.

158. The claimant was absent from work from 19/1/2015 to 19/2/2017. Her next complaint is that she met with Mr Bond on 4/8/2015 to discuss her return to work and that Mr Bond did not send her the minutes of the meeting during 2015 and part of 2016. Despite being unfit for work, the claimant was in regular contact with various personnel at the respondent during this period of time. She did not raise this as an issue. It is the respondent's case that there was no particular action arising from that meeting and so no need to record it. There was no detriment.

159. Allegation 15.11 is that OH recommended action to be taken to resolve the claimant's work place stressors and that the respondent failed to act upon this advice. The date for reference is 17/9/2015. The tribunal could not locate correspondence from OH related to that date. There is a Med 3 certificated in the bundle dated 25/8/2015 which certifies the claimant as unfit for work from 25/8/2015 to 26/10/2015 with 'stress at work, shoulder pain and back pain'. In view of the actions Mr Bond took when the claimant indicated she may be fit to return to work in January 2017, the tribunal finds that had it been indicated the claimant could return to work in September 2015, action would have been taken.

160. The claimant next referred to an appointment with OH on 17/11/2015 (page S79). That report refers to the claimant reporting that 'little had changed' and her return to work depending upon 'resolution of perceptions or work place issues'. The report goes onto say 'please re-refer when return to work is likely'. The Med 3 certificate for this period declared her to be unfit for work from 23/10/2015 to 23/12/2015 due to 'stress at work, shoulder and back pain'. There was no particular indication at this point in time that the respondent should be taking any action. Clearly when the claimant contacted Mr Bond in January 2017 regarding her return to work, he responded and quickly arranged a further OH appointment for the claimant. The tribunal finds there was no

omission by the respondent and the claimant has not been subjected to any detriment because she had previously done protected acts.

161. AC Brown did write to the claimant on 8/2/2016 (page 1303). The claimant alleges he 'excluded her from employment matters she had a right to know about'. The letter informed the claimant that despite the recommendation that formal disciplinary action should be taken against her, AC Brown had decided, due to the passage of time, to deal with matters informally. The claimant also contends that DAC Hughes failed to process her grievance dated 28/11/2014. The findings of fact above (paragraph 102-104) where the claimant pleaded this as an allegation of harassment are repeated.

162. The next allegation is that AC Brown made 'adverse decisions' against the claimant (15.14). It is not clear what 'adverse decisions' the claimant is referring to. If the 'adverse decision' was AC Brown's decision not to take formal disciplinary action, but to deal with the matter informally, then the claimant has not made out how this amounted to a detriment. If that is not the 'adverse decision' referred to, then this allegation is too vague to address and as such, the burden does not shift to the respondent for it to provide an explanation. It is difficult to understand how a decision to reduce disciplinary action from formal to informal can be 'adverse'.

163. Allegation 15.15 should have referred to a letter of 8/2/2016 (page 1303) which was placed on the claimant's file. This is referred to in the first witness statement at paragraph 68, although the claimant dates the letter as 18/2/2016.

164. The allegation is that AC Brown 'placed a copy of his letter dated 8/2/2016 on the claimant's personal file, without advising the claimant that it would not form part of her disciplinary records'. It is not clear if there is a typographical error in the detriment as set out. AC Brown's letter refers to the Stage 1 disciplinary award not having taken place due to the claimant's prolonged absence. AC Brown proposed dealing with it by means of 'informal action'. It is not clear if that is what led the claimant to say it would not form part of her disciplinary records. Certainly however, AC Brown concluded by saying in the final sentence 'a copy of this letter will be placed on your e-PRF[21]'.

165. The tribunal finds this to be a perfectly sensible course of action and that certainly, the claimant by means of her absence having eventually avoided disciplinary action being taken, there should be some record of this on her file.

[21] Electronic personal file.

166. Mr Bond wrote to the claimant on 26/8/2016 (page 1330). The claimant makes a very subjective allegation that Mr Bond was seeking to smear her as a trouble maker in an attempt to create an adverse working environment for her, without specifying exactly what she was referring to. All Mr Bond was seeking to do was to discuss the claimant's long-term sickness absence and for her to return to work. Mr Bond pointed out the claimant had exhausted the respondent's internal processes and that no findings had been made in her favour. He went on to say that the claimant's proposal that her attendance was not managed through the respondent's procedures, was not accepted. The claimant's long-term absence did requirement management. The respondent applying its procedures to the claimant is not a detriment.

167. At 15.17 the claimant alleges Dr Cohen-Hatton subjected her to a detriment as she[22] did not review her outcome. The outcome was the final stage of the process and the claimant was not entitled to any further review. In any event, Dr Cohen-Hatton did reconsider, but did not change her view and the outcome remained. It was only stated the respondent would endeavour to address any outstanding issues within 10 days and in fact there were no outstanding issues.

168. The allegation of victimisation at paragraph 15.18 seems to be a repeat of allegation 15.2. If so, the tribunal repeats its findings above in respect of that allegation. In respect of allegation 15.19 the tribunal repeats the findings at paragraph 151 above.

169. In respect of allegation 15.20, the claimant did refer to that situation at paragraph 30 of her second witness statement. Mr Nye said he discussed a vacancy for an FRS C role in the North East area at Stratford. The claimant denies he had mentioned the vacancy to her. Mr Anthony verbally offered a role similar to the claimant's role in Lewisham, however she was not interested in discussing it. The tribunal finds that the subject of the role was broached, but that the claimant did not wish to engage with the respondent.

170. The claimant's grievance of 28/11/2014 was overlooked. The claimant did not draw this to the respondent's attention until August 2016. As soon as the claimant did so, the respondent addressed the outstanding grievance. The Commissioner refused to consider the claimant's grievance of 2/11/2016 as it was presented out of time (page 1668b). If it is the claimant's case that the respondent determined her grievance to be out of time, yet proceeded to consider the claimant's 2014 grievance at a much later point in time; the circumstances do not compare. The fact the Commissioner determined the claimant's grievance to be out of time, was

[22] Dr Cohen-Hatton

not because the claimant had some years previously done protected acts. It is clear that when the claimant raised grievances within the time limits, they were fully considered by the respondent[23].

171. The next allegation (15.22) was the claimant made further representations to the Commissioner as to why he should consider her grievance. The claimant complained of not having received an email from AC Brown on 12/2/2016 as it had been sent to an old email address. The subject matter of the grievance was in fact AC Brown's email to the claimant of 8/2/2016 (not the email of 12/2/2016). Hence, the respondent did not change its view the grievance was out of time. The tribunal finds the respondent would have reached this decision irrespective of the fact the claimant had done protected acts. The respondent had good reasons for its policy and the tribunal finds it would have applied the time limit to any member of staff.

172. Allegation 15.23 is the claimant's complaint that her email address could be viewed through the address window on a letter the respondent sent to her. Mr Johnson wrote to the claimant on 5/12/2016 to apologise for the error and said the respondent would try to ensure that it did not happen again. The tribunal finds there is absolutely nothing to link an administrative error to previous protected disclosures.

173. The claimant seeks to expand this allegation in her next listed detriment (15.24) and she rejected the explanation as she 'reasonably believed it was a deliberate act to spite' her. The tribunal finds this to be an absurd allegation. The claimant is seeking to manufacture an everyday occurrence into a serious allegation of victimisation. There are grave consequences following a finding of unlawful discrimination and frivolous allegations should not be made and pursued.

174. The final allegation related to this issue is that the matter was passed to Mr Wyatt. Mr Wyatt rejected the claimant's claim for compensation on 4/1/2017 (page 1668z-68). Mr Wyatt accepted the respondent's error and confirmed it had apologised. He considered the impact this had had on the claimant. He found the claimant had not provided any information in respect of the 'substantial distress' she said had been caused or any evidence as to why this might be the case. He referred the claimant to the Information Commissioner should she wish to take the matter further. The tribunal finds this to be a reasonable response. There is no possible basis for a finding that this was conduct by the respondent because the claimant had done a protected act.

[23] Or if overlooked, was considered once the fact it was outstanding was raised.

175. Allegation 15.26 is a complaint about the respondent's conduct of proceedings in the EAT and as such, falls within the conduct of proceedings immunity.

176. The second claim was presented on 16/1/2017 and early conciliation took place on 9/1/2017. As such, any allegation prior to 10/10/2016 is out of time. The respondent submits that there is no continuing act and that the tribunal should not exercise its discretion to extend time.

177. As with the first claim, the claimant contends the events are a continuing act and if not, invites the tribunal to extend the time limit as it would be just and equitable to do so. She does not say why.

178. The tribunal finds the allegations in the second claim arise from the claimant's sickness absence and follow on from the events the tribunal found were in time in the first claim. As such, the finding is they are continuing acts.

Third claim

179. The third claim makes allegations of unlawful discrimination regarding events which took place between 15/2/2017 and 8/8/2017. Notwithstanding the respondent's submissions on the out of time point[24], the tribunal notes that the Grenfell Tower fire tragedy took place on 14/6/2017.

180. For the purposes of the third claim, the protected characteristics are sex or race.

181. The first allegation of direct discrimination relates to the claimant's return to work. The claimant alleges she was treated less favourably than someone of a different race or gender in that once OH confirmed she was fit for work on 15/2/2017, her pay was not reinstated. The claimant had been on zero pay for one and a half years.

182. The background was that the claimant was unfit for work from 19/1/2015 due to stress, anxiety and depression. On 24/1/2017 (page 1424) the claimant emailed Mr Bond and sent him a 'fit note' which stated that she may be fit for work subject to workplace adaptations[25] (page 1152).

[24] See below.
[25] Which were set out.

183. Mr Bond responded on 26/1/2017 and said he would need to make a referral to OH prior to the claimant returning to work. He had made a provisional appointment on 2/2/2017 at 15:45 (page 1426). The claimant responded on 27/1/2017 and informed Mr Bond that she could not attend the provisional appointment due to it clashing with the timing of her 'ongoing medication, rehabilitation and therapy process'. She said she could attend between 11:15 and 14:00, or on 8/2/2017 between 11:15 and 14:00. Mr Bond's response was sent to the claimant on 31/1/2017 in which he said that there were no OH appointments on 8/2/2017 and he offered the only other available date that week of 10/2/2017 at 14:30, or, 15/2/2017, 16/2/2017, 17/2/2017 at 11:15am. In reply, the claimant said that she was unable to attend OH as she was attending an Employment Tribunal hearing between 13/2/2017-17/2/2017 and 20/2/2017-24/2/2017.

184. On 1/2/2017 Mr Bond informed the claimant that the Employment Tribunal hearing had been vacated and asked for the claimant's availability. Eventually, the claimant was seen by OH on 15/2/2017 at 11:15 (page 1161). The tribunal finds that the claimant was uncooperative in finding a suitable appointment. Certainly, if the claimant was keen to return to work the tribunal would have expected her to have been more forthcoming in terms of her availability.

185. OH found the claimant was fit to return to work, on a phased return, working three half days for the first two weeks, to build up gradually to full time within 6 to 8 weeks. On 17/2/2017[26] the claimant met with Mr Bond and he provided the claimant with the summary of the meeting and noted the claimant's preferred start time of 10:30 and her preference to work three half-days Monday to Wednesday. On the 18/2/2017 (page 1448) Mr Bond confirmed the claimant's full pay would be reinstated from Monday 20/2/2017, however that the claimant should report to Mr O'Connor on 22/2/2017. This was due to the claimant's manager being unavailable and she was placed on excused attendance on 20/2/2017 and 21/2/2017.

186. Irrespective of the fact the respondent had offered the claimant OH appointments much earlier in February 2017 the claimant could not return to work on 15/2/2017[27] as she still had to meet with Mr Bond for an Attendance Support Meeting, prior to returning to work so that the OH report could be discussed. It is not therefore correct to say the respondent failed to properly implement its policy and failed to reinstate the claimant's pay from 15/2/2017. The claimant had chosen the days she wished to work as part of the return to work adjustments and Monday 20/2/2017 was

[26] A Friday.
[27] A Wednesday.

the first day (in accordance with that pattern). The claimant was therefore paid from that day and there was no less favourable treatment[28].

187. The claimant's next allegation of less favourable treatment was that the respondent 'unilaterally' varied the claimant's contract of employment without informing the claimant. This is too vague an allegation. There is no specificity. The claimant has not said what aspect of her contract was varied. The burden does not transfer to the respondent.

188. The following complaint of less favourable treatment is: 'did the respondent have the power to change terms of the claimant's contract subject to any limitations, in either a mobility clause or elsewhere, say policy?' Again, this is too vague an allegation and the burden does not shift to the respondent.

189. The claimant then accused Mr Bond of 'suspending' her from work without pay from 15/2/2017 when OH had advised she was fit for work from that date. OH said in a report dated 15/2/2017 that adjustments, including a phased return to work, ergonomic chair and left-handed mouse were recommended. Clearly, the claimant was not in a position to return to work immediately, she needed to have the Attendance Support Meeting and discuss matters such as her working days with Mr Bond. The findings above are restated. For the sake of completeness, there was no suspension of the claimant by Mr Bond.

190. Allegation number 13 is that Mr Bond made a verbal job offer to the claimant in a meeting on 17/2/2017, without informing her of the intention for the teams to merge. This is factually incorrect. Mr Bond sent the claimant a letter dated 1/3/2017 following the meeting on 17/2/2017 (page 1452). In that letter, he stated:

> '… you also expressed concern about the potential for you to be co-located with the Fire Safety Admin Support team as part of the accommodation moves planned for staff based at Union Street over the coming months. I am advised that final decisions on the accommodation strategy have not yet been taken, but managers are aware of your concerns and efforts will be made to avoid this if possible once definite proposals are known.'

Mr Bond therefore did not fail to inform the claimant of an intention to merge the teams on 17/2/2017.

[28] When questioning Mr Bond, the claimant sought to use her own situation some years earlier as a comparator and then relied upon actual comparators which she had not identified earlier. The claimant argued the actual comparators were hypothetical comparators. The claimant was not able to rely on herself as a comparator or actual comparators who had not been identified and named earlier in the proceedings.

191. The next allegation is that Mr O'Connor offered a unilateral variation of the claimant's contract in a letter dated 8/8/2017, not agreed by the claimant, which she says amounts to a demotion (page 1668z-106). Mr O'Connor offered the claimant a substantive position of Community Safety Development Officer role at FRS C. He confirmed who the line manager would be and where the claimant would be seated. He confirmed there would be no requirement to work evenings or weekends and that the claimant need not undergo a Disclosure Barring Service check.

192. An email on the claimant's behalf was sent on 29/8/2017 attaching a letter in which the claimant said:

> 'I object to, and do not accept the changes the Brigade senior managers made to my contract of employment because I have not accepted the job offer – Community Safety (CS) Development Officer Role. I do not agree the changes to my contract of employment are lawful because it is my view that the unilateral variation of my contract (changes) are unlawful and spiteful.'

193. The claimant was also certified as unfit for work for one month due to 'stress at work causing anxiety and pains'.

194. The claimant had previously complained about being moved into a supernumerary post; this was a substantive post, at grade FRS C. The claimant complains the role was a demotion as there was no managerial responsibility. Mr O'Connor confirmed on 6/9/2017 that the role was not a demotion. Some roles, but by no means all, at grade FRS C had managerial responsibility. The role was vacant (Mr O'Connor was told not to recruit to it as it had been earmarked for the claimant) and it was reasonable to transfer the claimant to it, particularly in light of her carrying out a supernumerary role when she returned to work in February 2017. The transfer was not a 'job offer' as the claimant interpreted, it was a management instruction for her to transfer into a vacant role, at the same grade and which was within her capabilities. The claimant's contract was not unilaterally varied.

195. The claimant alleges that Dr Bevan 'failed to deal properly' with her grievances dated 11/5/2017. Dr Bevan was provided with a bundle of documents from the claimant, which he considered. A hearing took place on 24/5/2017, at which the claimant was accompanied. After the hearing, Dr Bevan took time to review the documentation and submissions, including the further documents which the claimant sent on 24/5/2017 and 25/5/2017. His outcome letter was sent to the claimant on 12/6/2017. It cannot therefore be said that Dr Bevan failed to deal properly with the claimant's grievance. Furthermore, the claimant has not identified what aspect of the grievance she accused Dr Bevan of mishandling. It is clearly

the case the claimant was not satisfied with the outcome, but that is not the same as an allegation of less favourable treatment (either because of her race or her gender) of failing to deal properly with the grievance. Dr Bevan properly dealt with the claimant's grievance.

196. Then the claimant complained that Dr Bevan accused her of not pursuing the matter informally to 'taint her and to undermine her complaint without just cause'. What Dr Bevan actually said was:

> 'It would also appear from correspondence I have seen between you and HR (Rob Bond and Catherine Gibbs) between 27/1/2017 and mid-February 2017 that it would appear that you have not attempted to resolve this matter informally prior to raising a formal grievance.'

Dr Bevan was making an observation that the claimant had not engaged in the informal part of the process, before making a formal complaint and nothing more. He is certainly not seeking to 'taint' the claimant. Dr Bevan went on to consider the substantive grievance and provided his outcome. This allegation is not made out.

197. In the same outcome, Dr Bevan under the heading work location, said that aspect of the grievance had not been upheld as no management decision had been taken to co-locate the claimant with Mr Ocitti. The claimant's complaint is that this conclusion 'dismissed her concerns over her working environment'.

198. It is clearly incorrect to say the respondent dismissed the claimant's concerns. On 22/6/2017 Mr Nye reported to Mr O'Connor that he had attempted to show the claimant where she would be sitting in relation to Mr Ocitti, but she was not interested. On the same date, Mr O'Connor also emailed the claimant regarding her physical location (page 1531e).

199. Although not following the chronology, the next allegation of direct discrimination is that the respondent did not provide the claimant with a comfortable chair. On 27/3/2017 an email was sent on the claimant's behalf to say that she was unable to attend work, one reason being that the respondent was 'depriving' her of a suitable chair. Mr Bond responded less than an hour later that there was a chair for the claimant 'to try' at HQ. Clearly, a suitable chair was provided and Mr Bond in fact clarified there were two chairs for her to try.

200. When the claimant met with Mr Bond to discuss her return to work on 17/2/2017 she mentioned that she was attending counselling sessions at her local church and she requested paid time off to continue to attend

these sessions. The claimant compares herself to other members of staff who are given paid time off to attend in-house counselling sessions[29].

201. This is not a valid comparison. The in-house counselling sessions are conducted by qualified counsellors. The sessions provided by the claimant's church were provided by volunteers. In addition, the claimant had returned to work on full-pay, whilst on a phased return to work, initially working three half-days per week[30]. It is perfectly reasonable to expect the claimant to arrange for the counselling sessions to take place outside of her reduced working hours. There was no less favourable treatment because of race or sex.

202. The claimant then complained that there was a failure of the respondent to follow its own policies (without specifying which policy), failing to justify why it did not reinstate her pay from 15/2/2017 and referring to her role as supernumerary, whereas Ms Vaccarini's role was substantive.

203. The claimant's pay was not reinstated from 15/2/2017 for the reasons set out above. The claimant's role was supernumerary. The claimant could not return to the substantive role she had held in Lewisham as the decision had been taken that she could not work at the same location as Ms Vaccarini. Ms Vaccarini had returned to her substantive role at Lewisham. It is not clear what the allegation of less favourable treatment is here, however, the claimant's circumstances were materially different to those of Ms Vaccarini. The respondent had upheld the complaint that the claimant had bullied Ms Vaccarini, whereas, it did not find any fault on the part of Ms Vaccarini.

204. The claimant then complained of less favourable treatment by the respondent 'failing to properly implement its policies regarding the grievance dated 11/5/2017 (on the claimant's case a unilateral variation of the claimant's contract) and alleging HR had offered the claimant another job role in the North East area sometime in June 2017'.

205. It is not clear what polices the respondent had failed to properly implement and what less favourable treatment is being alleged. A vague allegation does not transfer the burden to the respondent to provide a non-discriminatory explanation.

206. It is not clear how the allegation that HR had offered the claimant another job role in the North East Area, sometime in June 2017, was less favourable treatment.

[29] There was no named comparator.
[30] Of her own choosing.

207. The claimant (point 22) alleges Mr Nye told lies about her, alleging he had discussed a job role in the North East Area shortly after a return to work interview on 30/6/2017. It is not clear from the allegation what lies the claimant alleges Mr Nye told about her. This allegation is not sufficiently particularised for the respondent to have to answer it.

208. The claimant's allegations of direct discrimination were set out at paragraphs 9 to 22. There was then another list of allegations (a to j) which appeared to be the respondent's list of allegations as per its understanding of the claimant's case.

209. There were two additional allegation, relating to an ergonomic keyboard (f) and not carrying out a return to work interview until 30/6/3017 (g). The remaining allegations have been addressed as above.

210. On 18/4/2017 the claimant emailed Mr Nye to say that she was finding it difficult to use the standard keyboard which had been provided. Mr Nye forwarded the email first thing the following day to Mr Bond, saying he thought arrangements were in hand to obtain an ergonomic keyboard and asked for an update (page S91). In June 2017 there had been an email exchange between the claimant and Mr Bond about the keyboard the claimant used at home and Mr Bond said he would see if he could order the same one for the claimant (page 1541a). Mr Nye conducted a stress risk assessment on 30/6/2017 and confirmed the ergonomic keyboard had been obtained and was available after the meeting.

211. The allegation is that the respondent failed to carry out a return to work meeting with the claimant until 30/6/2017, after she had returned in February 2017. The claimant had been accompanied to and attended an Attendance Management Support meeting with Mr Bond on 17/2/2017. She also met with Mr Bond on 27/2/2017. Mr Bond sent a 4-page detailed letter to the claimant following those meetings. Mr O'Connor had also met with the claimant on 22/2/2017, along with Mr Nye who was going to line manage the claimant (page 1668z-98). The tribunal finds that sufficient meetings took place with the claimant once she returned to work.

212. The next form of prohibited conduct in the third claim upon which the claimant relies is victimisation. The detriments are set out at paragraphs 30.1 to 30.8.

213. The first detriment is that the claimant was suspended without pay from 15/2/2017 when OH said the claimant was fit for work. The tribunal has found there was no suspension and no entitled to pay for this period as per the findings set out above.

214. Making a verbal job offer to the claimant at a meeting with Mr Bond on 17/2/2017 without notifying the claimant as to the intention to merge the teams. The findings made above apply. The allegation is rejected.

215. Making a job offer to the claimant by letter dated 8/8/2017 which the claimant asserts amounted to a demotion. The findings above apply. The allegation is rejected.

216. Failing to deal properly with the claimant's grievances dated 11/5/2017. The claimant's grievances were heard by Dr Bevan on 24/5/2017. The outcome was provided on 12/6/2017 and Dr Bevan upheld the claimant's grievance in respect of her job description (page 1511). The tribunal finds that the grievance was properly dealt with. The real issue is that the grievance was not upheld in its entirety. Dr Bevan's outcome was not victimisation arising out of earlier protected acts.

217. Failure to take action over the claimant's concerns about her working environment, work station and equipment. Based upon the findings made above, there was no failure by the respondent and no victimisation.

218. Failing to provide the claimant with a suitable chair and ergonomic keyboard. On the contrary, as per the findings made above, the respondent did provide the claimant with a suitable chair and keyboard.

219. Denying the claimant paid time to attend external counselling appointments. The respondent did deny the claimant paid time off during working hours to attend counselling[31] appointments at her church. The non-discriminatory reason is that the claimant was working reduced hours, on full-pay and she was expected to arrange the appointments outside of working hours. This was a reasonable requirement by the respondent and it is not victimisation.

220. Failing to properly implement policies and telling lies about the claimant. This allegation is too vague to be answered.

221. In the third claim, the claimant also alleges that she made protected disclosures and was then subjected to a detriment. The claimant relies upon three incidents when she says she made protected disclosures.

222. The first is that on 9/5/2017 the claimant disclosed information to Mr Bond that the respondent was breaching its legal obligations by storing

[31] Volunteers who were not medically qualified.

three employees' private and sensitive health data on its intranet, which six thousand employees had access to.

223. The second is that on 15/5/2017 the claimant disclosed to Mr Bond information about breaches of the respondent's legal obligations by storing three employees' private and sensitive health data on its intranet, that could be accessed by other employees.

224. The third is that on 12/7/2017 the claimant disclosed to Mr O'Connor breaches of the respondent's legal obligations by storing three employees' private and sensitive health data on its intranet.

225. The claimant refers to other 'protected disclosures' in her witness statement by reference to page numbers in the bundle. Those documents were however follow up emails, or not emails sent by the claimant, so could not amount to protected disclosures by her.

226. The claimant says that the disclosures were made in the public interest.

227. The respondent does not resist that the email of 9/5/2017 is a protected disclosure and the tribunal is prepared to accept that it is (page 1502). The issue is therefore whether the claimant was subjected to any detriment.

228. The first alleged detriment is that on 11/5/2017 the claimant was required to remove the data, which she did not have the correct level of access to do.

229. The alleged second detriment is that on 13/7/2017 the respondent failed to investigate the complaints as required under the respondent's whistleblowing policy, blamed the claimant and failed to speak to or interview the claimant before speaking to staff in the Information Access Team and failed to review the supporting evidence thereafter.

230. In the third list of issues, those allegations are repeated at paragraphs 32-36.

231. The detriments are not referred to in the claimant's third witness statement.

232. The tribunal finds that it is quite simply wrong to say that the claimant was required to remove the data. The claimant makes that allegation, but has not discharged the burden and has provided no

evidence of this. The tribunal finds this is not factually correct and there is no detriment.

233. In respect of the second claimed detriment, the tribunal finds the opposite occurred. The claimant's email of 9/5/2017 was forwarded to Ms Millen of ICT Enterprise Application Management on 10/5/2017 by Mr Bond (page 1501). Ms Millen responded to the claimant on 11/5/2017. The claimant replied on 15/5/2017 (page 1499). Ms Millen then conducted some further investigation and referred to her colleague. Ms Millen then heard nothing further until she received an email from Mr O'Connor on 13/7/2017. Ms Millen re-referred to her colleague and it transpired the claimant had been given incorrect access rights to a particular application. Upon receipt of that information, Mr O'Conner confirmed the matter was resolved (page 1607b). It cannot therefore be said that the respondent failed to investigate the claimant's complaints. The respondent did not investigate it under the whistleblowing policy as the claimant did not raise it under that policy.

234. The claimant has failed to discharge the burden placed upon her in respect of her allegation that the respondent blamed her, failed to interview her (Ms Millen's colleague spoke to the claimant (page 1607b)) and failed to review supporting evidence thereafter.

235. This is another example of the claimant overreacting and transforming what is in reality quite a simple matter, into something of far more substance. Not only that, the claimant then attempts to turn it into a form of unlawful discrimination by the respondent, resulting in her suffering from detriments. There were no detriments. The respondent responded to the claimant's email appropriately and professionally. The matter was properly dealt with and then was closed.

236. The claimant also pursues a claim of unauthorised deduction from wages under s. 13 ERA. The claimant seeks reinstatement of her pay from 15/2/2017 to 19/2/2017.

237. The Tribunal finds there was no unauthorised deduction. According to the working pattern the claimant had selected, she was not due to return to work until the 20/2/2017 and her pay was reinstated from that date.

238. The claimant also makes a claim for a guarantee payment under s. 28 ERA. This, as the respondent submitted is misconceived. Mr Bond informed the claimant on 31/1/2017 that nil pay status would remain until the claimant had been assessed by OH and until the respondent was

satisfied she was able to return to work in a meaningful capacity. Those circumstances do not fall within s. 28 ERA.

239. The claimant also referred to the Working Time Regulations 1998 and seemed to say that when she attended OH she was at the respondent's disposal. The claimant was asked to identify which Regulation she relied upon, however she did not do so. This claim is not particularised and therefore not able to be responded to.

240. The third claim was presented on 7/9/2017 and early conciliation took place between 4/9/2017 and 5/9/2017. Matters occurring before 5/6/2017 are therefore out of time.

241. The claimant's case is the allegations are conduct extending over a period of time and should be treated as being done at the end of that period. In the alternative, she contends that it would be just and equitable to accept jurisdiction, without more.

242. Certainly, the issue over pay in February 2017, under whichever legislation it is pursued is out of time. The claimant has not suggested why the tribunal should exercise its discretion under the ERA[32] to extend time and the tribunal declines to do so.

243. The tribunal is however prepared to accept that the events complained of, arose as a result of the claimant's return to work in February and there is sufficient nexus between them for them to be considered to be conduct extending over a period of time.

The Law

244. In the first claim, the prohibited conduct is under s. 13, s. 26 and s. 27 of the EQA, namely direct discrimination, harassment and victimisation.

> 13 Direct Discrimination
>
> A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
>
> 23 Comparison by reference to circumstances

[32] S. 23 (2) and (4) ERA

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

26 Harassment

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

S. 27 Victimisation

(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 S. Act;

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

S. 136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
>
> (4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

245. In respect of harassment under s. 26 EQA, in Richmond Pharmacology v Dhaliwal 2009 IRLR 336 the EAT set out a three step test for establishing whether harassment has occurred: (i) was there unwanted conduct; (ii) did it have the purpose or effect of violating a person's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person and (iii) was it related to a protected characteristic?

246. At paragraph 22 of Richmond Pharmacology, the EAT said:

> 'We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.'

247. Section 27 EQA provides that a person victimises another person if they subject that person to a detriment because the person has done a protected act.

248. A protected act is defined in section 27(2) and includes the making of an allegation (whether or not express) that there has been a contravention of the EQA. It is for the claimant to prove that they did the protected acts relied upon before the burden can pass to the respondent, Ayodele v Citylink Ltd 2018 ICR 748 (CA):

> 'Before a tribunal can start making an assessment, the claimant has got to start the case, otherwise there is nothing for the respondent to address and the nothing for the tribunal to assess.

> There is therefore no burden of proof on an employer unless and until the claimant has shown that there is a prima facie case of discrimination which needs to be answered.'

249. In Scott v London Borough of Hillingdon 2001 All ER (D) 265 the Court of Appeal held that knowledge of the protected act on the part of the alleged discriminator was a precondition. The burden of proving knowledge lies upon the claimant.

250. The burden of proof in s. 136 EQA provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person contravened the provision concerned, the court must hold that the contravention occurred.

251. The authority on the burden of proof in discrimination cases is Igen v Wong 2005 IRLR 258. That case makes clear that at the first stage the tribunal is to assume that there is no explanation for the facts proved by the claimant. Where such facts are proved, the burden passes to the respondent to prove that it did not discriminate.

252. In Shamoon v Chief Constable of the RUC 2003 IRLR 285 it was said that sometimes the less favourable treatment issues cannot be resolved without at the same time deciding the reason-why issue. It is suggested that tribunals might avoid arid and confusing disputes about identification of the appropriate comparator by concentrating on why the claimant was treated as she was, and postponing the less favourable treatment question until after they have decided why the treatment was afforded.

253. In Madarassy v Nomura International plc 2007 IRLR 246 it was held that the burden does not shift to the respondent simply on the claimant establishing a different in status or a difference in treatment. Such acts only indicate the possibility of discrimination. The phrase 'could conclude' means that 'a reasonable tribunal could properly conclude from all the evidence before it that there may have been discrimination'.

254. In Hewage v Grampian Health Board 2012 IRLR 870 the Supreme Court endorsed the approach of the Court of Appeal in Igen Ltd v Wong and Madarassy v Nomura International plc. Which said that it is important not to make too much of the role of the burden of proof provisions. They require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

255. The courts have given guidance on the drawing of inferences in

discrimination cases. The Court of Appeal in Igen v Wong approved the principles set out by the EAT in Barton v Investec Securities Ltd 2003 IRLR 332 and that approach was further endorsed by the Supreme Court in Hewage. The guidance includes the principle that it is important to bear in mind in deciding whether the claimant has proved facts necessary to establish a prima facie case of discrimination, that it is unusual to find direct evidence of discrimination.

256. The Court of Appeal in Ayodele v Citylink Ltd 2017 EWCA Civ 1913 confirmed that the line of authorities including Igen and Hewage remain good law and that the interpretation of the burden of proof by the EAT in Efobi v Royal Mail Group Ltd EAT/0203/16 was wrong and should not be followed.

257. In Dresdner Kleinwort Wasserstein Ltd v Adebayo 2005 IRLR 514 the EAT said that the shifting of the burden to employers meant that tribunals are entitled to expect employers to call evidence which is sufficient to discharge the burden of proof. The EAT said that one of the factors to be taken into account, in an appropriate case, could be the respondent's failure to call witnesses who were involved in the events and decisions about which the complaint is made, in cases where the burden is found to have passed to the employer.

258. A detriment has been held to be 'putting under a disadvantage' and 'exists if a reasonable worker would or might take the view that [the action of the employer] was in all the circumstances to his detriment' (MoD v Jeremiah 1980 ICR 13), 'disadvantaged in the circumstances and conditions of work' (De Souza v AA 1986 ICR 513 CA, or simply a 'disadvantage' (Porcelli v Strathclyde Regional Council 1986 ICR 564).

259. The protected characteristic is race, the claimant is of black/Nigerian descent and Ibo ethnic origin (s. 9 EQA).

260. The claimant also relies upon the s. 65 in the EQA in respect of her claim for equality of terms/equal pay/equal work.

> 65 Equal work
>
> (1) For the purposes of this Chapter, A's work is equal to that of B if it is—
>
> (a) like B's work,
>
> (b) rated as equivalent to B's work, or
>
> (c) of equal value to B's work.

(2) A's work is like B's work if—

(a) A's work and B's work are the same or broadly similar, and

(b) such differences as there are between their work are not of practical importance in relation to the terms of their work.

(3) So on a comparison of one person's work with another's for the purposes of subsection (2), it is necessary to have regard to—

(a) the frequency with which differences between their work occur in practice, and

(b) the nature and extent of the differences.

(4) A's work is rated as equivalent to B's work if a job evaluation study—

(a) gives an equal value to A's job and B's job in terms of the demands made on a worker, or

(b) would give an equal value to A's job and B's job in those terms were the evaluation not made on a sex-specific system.

261. The complaint is under s. 39 of the EQA.

39 Employees and applicants

(1) An employer (A) must not discriminate against a person (B)—

(a) in the arrangements A makes for deciding to whom to offer employment;

(b) as to the terms on which A offers B employment;

(c) by not offering B employment.

(2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

(3) An employer (A) must not victimise a person (B)—

(a) in the arrangements A makes for deciding to whom to offer employment;

(b) as to the terms on which A offers B employment;

(c) by not offering B employment.

(4) An employer (A) must not victimise an employee of A's (B)—

(a) as to B's terms of employment;

(b)in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

262. Besides issue estoppel and res judicata, the respondent also takes issue with the time limit under s.123 EQA, that the claims have been presented out of time.

123 Time Limits

(1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

263. In the second and third claims, the claimant also pleads that she has made a protected disclosure under s. 43B of the Employment Rights Act 1996 (ERA). She also claims she was subjected to a detriment under s. 47B ERA.

43B Disclosures qualifying for protection.

(1) In this Part a " qualifying disclosure " means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

47B Protected disclosures.

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a) by another worker of W's employer in the course of that other worker's employment, or

(b) by an agent of W's employer with the employer's authority,

on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

264. In Kilraine v London Borough of Wandsworth [2018] ICR 1850 the Court of Appeal said that the word 'information' in S.43B(1) ERA has to be read with the qualifying phrase 'tends to show'; the worker must reasonably believe that the information 'tends to show' that one of the relevant failures has occurred, is occurring or is likely to occur. Accordingly, for a statement or disclosure to be a qualifying disclosure, it must have sufficient factual content to be capable of tending to show one of the matters listed in S.43B(1)(a)–(f) ERA. An example was given of a hospital worker informing their employer that sharps had been left lying around on a hospital ward. If instead the worker had brought their manager to the ward and pointed to the abandoned sharps, and then said 'you are not complying with health and safety requirements', the oral statement would derive force from the context in which it was made and would constitute a qualifying disclosure. The statement would clearly have been made with reference to the factual matters being indicated by the worker at the time.

265. Section 43B(1) ERA requires that, in order for any disclosure to qualify for protection, the person making it must have a 'reasonable belief' that the disclosure 'is made in the public interest'. That amendment was made to avoid the use of the protected disclosure provisions in private employment disputes that do not engage the public interest.

266. In the second claim, the claimant relies upon s.44 ERA:

44 Health and safety cases.

(1) An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that—

(a) having been designated by the employer to carry out activities in connection with preventing or reducing risks to health and safety at work, the employee carried out (or proposed to carry out) any such activities,

(b) being a representative of workers on matters of health and safety at work or member of a safety committee—

(i) in accordance with arrangements established under or by virtue of any enactment, or

(ii) by reason of being acknowledged as such by the employer,

the employee performed (or proposed to perform) any functions as such a representative or a member of such a committee,

(ba) the employee took part (or proposed to take part) in consultation with the employer pursuant to the Health and Safety (Consultation with Employees) Regulations 1996 or in an election of representatives of employee safety within the meaning of those Regulations (whether as a candidate or otherwise),

(c) being an employee at a place where—

(i) there was no such representative or safety committee, or

(ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,

he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

(2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

(3) An employee is not to be regarded as having been subjected to any detriment on the ground specified in subsection (1)(e) if the employer shows that it was (or would have been) so negligent for the employee to take the steps which he took (or proposed to take) that a reasonable employer might have treated him as the employer did.

(4) This section does not apply where the detriment in question amounts to dismissal (within the meaning of Part X).

267. In the third claim, the claimant relies upon the protected characteristic of race s. 9 EQA or sex, s. 11 EQA. The claimant appears to rely upon the combined protected characteristic of sex ***and*** race, rather than her sex (s. 11 EQA) ***or*** race (s. 9 EQA). As s.14 EQA is not in force, she cannot rely upon the combined characteristics of being a black female. The prohibited conducted has to be based upon either her sex ***or*** her race.

268. The claimant also presents claims of unlawful deduction from wages under s.13 ERA, for a guarantee payment under s. 28 ERA and under the Working Time Regulations

13 Right not to suffer unauthorised deductions.

(1) An employer shall not make a deduction from wages of a worker employed by him unless—

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined

effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

28 Right to guarantee payment.

(1) Where throughout a day during any part of which an employee would normally be required to work in accordance with his contract of employment the employee is not provided with work by his employer by reason of—

(a) a diminution in the requirements of the employer's business for work of the kind which the employee is employed to do, or

(b) any other occurrence affecting the normal working of the employer's business in relation to work of the kind which the employee is employed to do,

the employee is entitled to be paid by his employer an amount in respect of that day.

(2) In this Act a payment to which an employee is entitled under subsection (1) is referred to as a guarantee payment.

(3) In this Part—

(a) a day falling within subsection (1) is referred to as a "workless day", and

(b) "workless period" has a corresponding meaning.

(4) In this Part "day" means the period of twenty-four hours from midnight to midnight.

(5) Where a period of employment begun on any day extends, or would normally extend, over midnight into the following day—

(a) if the employment before midnight is, or would normally be, of longer duration than that after midnight, the period of employment shall be treated as falling wholly on the first day, and

(b) in any other case, the period of employment shall be treated as falling wholly on the second day.

Conclusions

269. The tribunal found the specific allegations against Ms Vaccarini were out of time and so it does not have jurisdiction to consider them. Beyond saying it would be just and equitable to extend the time limit, the claimant has not advanced this point. In those circumstances the tribunal declines to exercise its discretion. As such, the allegations of unlawful discrimination against Ms Vaccarini fail for lack of jurisdiction and are rejected.

270. The tribunal finds the respondent's witnesses were truthful and they were clearly doing their best to assist the tribunal.

271. It will be clear from the findings of fact, that the tribunal finds the allegations which the claimant makes, arise from her rejecting the respondent's reasonable management of her. She would not accept any decision unless it was the outcome she wanted. She would not accept that mistakes are made. She did not help herself and when matters were genuinely overlooked, she did nothing, rather than point out the error to the respondent. Every decision the respondent took, resulted in complaints, grievances and appeals.

272. In an email dated 15/8/2014 (page 693g) Ms Vaccarini said to Ms Howard who was investigating the claimant's complaint:

> …
> There are couple of points below that I would like to add that I forgot to mention at the meeting, which I believe are quite important:
>
> 1. When I phoned my manager, Julie Doyle on 4th December 2013 (the day after my doctor had signed me off sick), Julie advised me that Magdalene laughed when she was told I was off sick.
>
> 2. I believe that Magdalene's behaviour towards me is a specific attempt to stop me from managing her. Her constant complaints and refusal to attend meetings are delaying tactics to frustrate managerial processes, actions and instructions.
>
> 3. I believe that Magdalene's continued behaviour towards me and her complaints are vexatious and malicious. Her behaviour is specifically targeted and designed to cause me as much stress as possible, trying to break me, so I am unable or unwilling to manage her.
>
> 4. Magdalene has proven that she cannot accept instructions from any manager, as is evidenced by her taking out complaints and Employment Tribunals against managers as soon as they attempt to manage her, discipline her or simply try and give her work to do.

273. The tribunal finds this was a true reflection of the working situation and that the claimant had become unmanageable.

274. The claimant's allegations of harassment are rejected. Even if the conduct was unwanted (it is difficult to see how managing the claimant could amount to unwanted conduct) it was not related to the protected characteristic of race, or sex. Any management steps which the respondent took, did not have the purpose or effect of violating the claimant's dignity. In the alternative, the conduct did not create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. In fact the opposite was true. All of the respondent's staff behaved professionally, courteously and reasonably. They manage to continue to do so, even when the claimant attempted to provoke them by constantly refusing to be managed and regularly complaining and raising grievances. Furthermore, there was no detriment or other complaint under s. 39 EQA engaged. Based upon the findings made, the allegations of harassment fail and are dismissed.

275. For the claim of direct discrimination relying upon the protected characteristic of race in the first claim and race or sex, based upon the findings made, the claimant has failed to discharge the burden to establish

the less favourable treatment alleged, was because of the relevant protected characteristic. The steps the respondent took in respect of the claimant were reasonable steps in relation to managing her and dealing with her workplace issues. Ms Vaccarini was not a comparator as there were material differences between her and the claimant and Ms Vaccarini had not committed any misconduct[33]. A hypothetical comparator would be someone of a different race or gender to the claimant and who had committed misconduct. The tribunal finds the claimant was not treated less favourably because of either her race or her gender. The respondent was simply attempting to manage the claimant. The tribunal finds all the claims of direct discrimination fail and are dismissed.

276. The equal pay claim was ill-judged, flawed and inappropriate. The claimant was paid more than her male comparator and once that element was established, the claim should have ended there.

277. The tribunal found in the second claim, that the claimant did not establish she had been subjected to any detriment and that she had not evidenced that she had made protected disclosures. The claim under s. 48 ERA fails and is dismissed.

278. In the third claim, the tribunal accepted the claimant had made a protected disclosure, however she was not then able to establish that she had been subjected to any detriment, much less a detriment as a result of making a disclosure. The two alleged detriments the claimant advanced did not factually occur.

279. The claim under s.44 ERA, that the claimant was subjected to detriments for making complaints on health and safety grounds, as per the findings made; fails. Based upon the findings made, the claimant was not able to establish her situation came within s. 44 (1)(c)(ii) or s. 44 (1)(d) ERA.

280. According to the findings made, even if there had been protected acts, the respondent had not subjected the claimant to a detriment. It certainly had not subjected the claimant to a detriment because the claimant had done a protected act. The respondent's treatment of the claimant was more than even-handed and in some cases was to her advantage. It was extremely patient with the claimant and granted her a great deal of latitude. The respondent could have taken disciplinary action against the claimant in respect of her actions (for example, her attending Lewisham when she had been expressly told not to) and it did not do so.

[33] The respondent having found the claimant had bullied Ms Vaccarini and it intended to take disciplinary action (although due to the claimant's long-term absence it did not subsequently do so).

The respondent was more than fair and reasonable in its dealings of the claimant. The claims of victimisation in the second and third claims fail and are dismissed.

281. The unauthorised deduction from wages claim fails as the tribunal does not have jurisdiction to consider it.

282. The claimant was unwilling to accept any other explanation for any issue, including any innocent explanation, if she did not agree with the outcome. Not only that, the claimant then attempted to turn the outcome into an allegation of unlawful discrimination or being subjected to a detriment. This is now the third independent tribunal panel that has rejected all of the claimant's complaints spanning a number of years.

283. A provisional remedy hearing was listed for 15/1/2021. At the hearing the date was originally given of 26/2/2021, however that date subsequently became unavailable. The hearing remains listed, however it will not now be a remedy hearing.

Employment Judge Wright
5/11/2020

IN THE EMPLOYMENT TRIBUNAL
LONDON SOUTH

Case No: 2300730/2015

B E T W E E N:

MRS M ITULU

Claimant

-and-

THE LONDON FIRE COMMISSIONER

Respondent

LIST OF ISSUES

Jurisdiction

1. Have any of the Claimant's claims been presented outside the statutory time limits for bringing such a claim

2. If there is not a continuing act would it be just and equitable to extend time?

3. Are any of the Claimant's claims issue estopped or res judicata?

   The Respondent has identified which allegations it contends are issue estopped or res judicata in its letter dated 5 August 2016 *which states as follows;*

   Paragraphs 1-27 and 42-44 of the Claimant's claim form refer to events in 2013 and earlier. The events occurred well before the Claimant's previous claims, (case numbers 23445/2013 and 2361516/2013), were heard and dismissed by the Employment Tribunal

in a Judgment dated 6 October 2014. Accordingly, to the extent that the Claimant seeks, in her claim, to raise matters which have or could have been addressed in the Claimant's previous claims, the Respondent submits that the complaint is issue estopped or res judicata.

Race Harassment – Section 26 Equality Act 2010

The Respondent has indicated its position on the factual allegation. It does not accept that any of the allegations amounted to harassment within meaning of 26 – in particular that any conduct was related to the Claimant's race and even if it had the prescribed effect on the Claimant it was not reasonable for it to do so.

4. Did the Respondent engage in unwanted conduct by:

   a. DAC Hughes intimidating and threatening the Claimant that she was refusing to obey management instructions at a meeting of 21st October 2013. **[Section B Paragraphs 6 of ET1]**

      R does not accept it intimidated or threatened C at the meeting

   b. *[name]* Mrs Julie Doyle (South East Area Admin Manager, on behalf of DAC Hughes) producing minutes ***of a meeting on 21 October 2013~~12 November 2013~~,*** that contained inaccuracies and were manipulated to deliberately distort what the Claimant and her colleague said. *Minutes of meeting were sent to Claimant on 25 October 2013 –* **(Section B Paragraph 6 of ET1)**

      R does not accept that minutes inaccurate or manipulated

   c. On 11th November 2013, *Victoria Vaccarini* accused the Claimant of refusing to attend 3rd Quarter review meeting because she informed Ms Vaccarini that she was feeling unwell following attending the ***Tribunal Telephone*** PHR. *Ms Vaccarini said that if the Claimant was well enough to attend [**attend work**] and the telephone PHR then she was well enough to attend the meeting. **A pattern had been set** Claimant was being asked to attend ~~a~~ meeting**s**; ~~when she had an ET hearing~~ **[when she was required to comply with ET orders in ongoing proceedings]*** .**(Section B Paragraph 7 of the ET1) [Link Paragraph 16 of the ET1]**

      It is accepted Ms Vaccarini discussed the fact that C said she was too unwell to attend the meeting and whether she should go home. It is not

agreed that she accused the Claimant or that this was part of a pattern as alleged.

d. DAC Hughes' letter to the Claimant on 12th November 2013 threatening the Claimant with acts of misconduct by reference to policy no.481 that was not mentioned or discussed at the meeting on 21st October 2013. **Chided the Claimant there will be no further communication with her**. (**Section B Paragraph 8 of the ET1**)

It is agreed DAC Hughes wrote to C. It is denied he threatened her.

e. By refusing to let another manager other than Ms Vaccarini conduct the Claimant's return to work interview on 25th November 2013 as requested by the Claimant ***when the Claimant had made a complaint against Ms Vaccarini on 19 November 2013***. (**Section B Paragraph 10 of the ET1**) [**Link Section B Paragraph 9 of ET1**]

It is accepted that Ms Vaccarini conducted the RTW on 25th November. Ms Vaccarini was not aware of the alleged complaint 19th November.

f. DAC Hughes, ***an operational manager*** refusing to appoint a ***Fire and Rescue Services*** (FRS) Staff to carry out the Claimant's 3rd quarter review of set objectives as requested by the Claimant; and insisting on carrying out the Claimant's appraisal on 10th December 2013 **with threat of management action, despite the Claimant having made a complaint against DAC Hughes.** (**Section B Paragraph 12 of the ET1**)

Respondent accepts that DAC Hughes carried out the appraisal on 10th December 2013. The rest is not accepted

g. ***By AC Brown*** (**Head of Operations, Prevention & Response**) appointing a contact officer ***11 February 2014*** in Ms Vaccarini's **retaliatory** complaint **from 01 March 2012** against the Claimant made ~~in~~ **on 23 January and 22 July 2014** February 2014 *but refused to appoint a contact officer* not appointing a contact officer in the Claimant's complaint against Ms Vaccarini and DAC Hughes made on 19th November 2013 in accordance with the Respondent's policy. **(Paragraph 5 and Section B Paragraph 17 of the ET1**). **By AC Brown failing to address concerns the Claimant raised in her letter dated 18 February 2014 which the**

Claimant complained about in her letter of 28 April 2014. [**Section B Paragraphs 18-18 (i)]**

R does not accept these factual allegations

h. Ms Howard refusing to move the meeting from 2pm to 4pm on 23 September 2014 when the Claimant informed her she was running late **due to matters in connection with witness statements for a tribunal hearing**. (**Section B Paragraph 16 of the ET1**)

It is agreed that the Claimant asked to move the meeting from 2pm the remainder is not agreed.

i. Ms Vaccarini informing employees based at Lewisham and Union Street that she had taken out a complaint against Claimant and that the investigations may carry on until September 2014. The Claimant became aware of this around 16/17 April 2014. (**Section B Paragraph 18 (ii) of the ET1**)

R does not accept this allegation

j. **By the Respondent not sending *Ms Bloomfield Community safety Development Manager did*** not send the outcome of the Claimant's complaint against DAC Hughes in writing as the Claimant requested on 22nd August 2014 in a letter to AC Brown (**Head of Operations, Prevention & Response**) after choosing an option proposed by the Respondent in a previous letter (**18 August 2014), Claimant received on (20 August 2014); having made enquiry of what had become of her complaint against Ms. Vaccarini to AC Brown**. (**Section B Paragraph 19 of the ET1**). **Claimant still had not yet received a response from AC Brown regarding her letter of 22 August 2014. [Link Section B Paragraph 29 of the ET1**]

R does not accept this allegation

k. By delaying the Claimant's return to work; rescheduling the Claimant's occupational health appointment **initially notified** by letter dated 15 July 2014 **on** ~~from~~ 16th September**, then by letter dated 18 August 2014** to 8th October 2014 ~~by letter dated 18 August 2014~~ without any reason given for **rescheduling** ~~the cancellation~~. (**Section B Paragraph 20 of the ET1**)

It is agreed that the appointment was rescheduled.

l. By not being pre-warned **by the Respondent** that the Claimant was required to meet with Mr Amis to be given a letter to attend a meeting with the Respondent on 9th October 2014 about her return to work; but given the letter on attending occupational health appointment on 8th October 2014 in the premises of the occupational health at 115 Southwark Bridge Road, SE1 (**Section B Paragraph 21 of the ET1**). **By Mr David Amis failing to provide a response to question the Claimant asked as to why it had been found necessary to deliver that letter to her at the OHS**.
It is agreed that Mr Amis gave the Claimant a letter on 8th October. It is not accepted that Mr Amis failed to provide a response.

m. On 9th October ***2014*** by Mr Bond imposing forced transfer on the Claimant to transfer to Union Street from permanent substantive post to temporary supernumerary post to work in the same team as Mr Ocitti (*against* who***m the Respondent*** had ***upheld the Claimant's complaint of harassment***). ***The Transfer was said to be*** on the ***recommendation of*** a report ***following*** a complaint against her by Ms Vaccarini which had been upheld. ***However the Claimant had not been informed of the recommendation, or provided with a*** copy of the report. (**section B Paragraph 22 of the ET1**)

i. By requiring the Claimant without any warning or consultation that she should transfer to Union Street from substantive permanent post to temporary supernumerary post in order to bypass the contents of the Compromise Agreement between the Respondent and the Claimant reached on 25th November 2008 (**ET1 Paragraph 25**]

ii. Did the initial contract of employment between the Respondent and the Claimant mirror paragraphs 4(i) and (ii) of the Compromise Agreement and what happened in practice from 9 October 2014 ("supernumerary grade")

iii. ***The Claimant did not consent to the transfer*** **due to health and safety reasons** **[Paragraph 24 of the ET1**]

iv. ***The transfer to supernumerary role was not authorised by any of the Respondent's policies*** **[Link Paragraphs 22, 25 of ET1] meetings on 09 and 10 October 2014**

v. ***The transfer was not authorised by the Claimant's contract***

The Respondent accepted that the Claimant was transferred to Union Street. It is accepted that Mr Ocitti was in that team and that the Claimant had complained about Mr Ocitti in 2008. It is accepted that this was a recommendation in Ms Howard's report. The Respondent does not accept that this was in breach of the compromise agreement or a breach of the Claimant's contract.

n. On10th October 2014, (~~*claimant to check date of meeting*~~) by Mr Bond ignoring the Claimant's complaint of **victimisation**, being bullied into a premeditated transfer, imminent danger at work and breach of Health and Safety, ERA, continuing harassment and insisting the Claimant should report to the Fire Safety Regulation Department to work in the same team as Mr Ocitti. (**Section B Paragraphs 23-27 of the ET1**)

This is not accepted

o. By failing to inform, ***as committed to by Mr Bond in the letter dated 16 October 2014,*** the Claimant of a permanent vacancy (FRS C grade), ***the*** same as the Claimant's substantive grade on around the 24th October 2014 and 6th November 2014 **and by letter from Mr. Bond (Head of Employment Relations) on 16 January 2015** (**Section B Paragraph 28 of the ET1**)

This is not accepted

p. By the Respondent not appointing independent managers to process the Claimant's concerns dated 31 October 2014 about Ms Howard's investigation.

i. Mr Buchanan not dealing with some of the Claimant's concerns about Ms Howard's investigation on 26th November 2014. The matters which Mr Buchanan did not deal with are set out in the Claimant's grievance dated 28 November 2014. (**Section B Paragraph 30 and 31 of the ET1**)

This is not accepted

q. ***On 28 November 2014,*** **b**y AC Brown **(Head of Operations, Prevention & Response)** ignoring the Claimant's grievance forwarded to AC Brown by Ms P Oakley, and failing to investigate that grievance dated 28th November 2014 about Mr Buchanan's response dated 26th November 2014 regarding investigation carried out by Ms Howard (**Section B Paragraph 32 of the ET1**) [**Link Paragraph 25 of the ET1**]

It is accepted that this grievance was not progressed at this time (R says overlooked). Was heard by Mr Hetherington in April 2017 after the Claimant highlighted it was outstanding in 2016.

r. By Mr Groves ***(Training and Development Manager)*** ignoring the Claimant's chase up emails for appeal heard on 27th November; dated 5th December and 17th December 2014 respectively. (**Section B Paragraph 33 of the ET1**) **[Link Section B Paragraphs 30 -31 of the ET1]**

This is not accepted

~~s. By Mr Bond responding to the Claimant's grievance on 11 November 2014, and stated, "You will not be working in the same team as Mr Ocitti in response to this element of your grievance".~~

t. By Mr Groves **dismissing the Claimant's appeal** and failing to address all issues raised in the Claimant's appeal **dated 17 November 2014** and providing an evasive response on 9 January 2015. (**Section B Paragraph 33 of the ET1**) [**Link Section B Paragraph 31**]

This is not accepted

5. If so, was this treatment such which falls within section 26 of the Equality Act 2010?

6. If so was such treatment related to her race?

7. If so, did this have the purpose or effect of violating the Claimant's dignity, or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

Victimisation – ***section 27 Equality Act 2010***

8. Did the Claimant commit a protected act or (acts)?
Protected acts listed at Paragraph 4 (i) – (iv) of the ET1

a. The Claimant's ET1 filed 04 June 2008

b. The Claimants ET1 filed 25 June 2008

c. ***Claimant's ET1 dated 15 October 2008.***

d. The Claimant's ET1 filed 2012

e. The Claimant's grievance to Mr. Bond dated 29 February 2012

f.a. Claimant's ET1 filed 14 March 2013 – *Race discrimination, Victimisation and unlawful deduction of wages alleged*

g.b Claimant's ET1 filed 26 July 2013 – *Victimisation and harassment alleged*

c. *Claimant's grievance against Victoria Vaccarini* dated 19 April 2013

d. *Claimant's meeting with I Hughes on 21 October 2013*

h.e. The Claimant's grievance letter to DAC Hughes dated 01 November 2013 and grievance letter to Mr. Dalgleish dated 19 November 2013

i. The Claimant's letter to AC Brown dated 18 February 2014.

j. The Claimant's letter to AC Brown dated 04 March 2014

k. The Claimant's letter to Ms. Howard dated 01 April 2014

l. The Claimant's letter to AC Brown dated 28 April 2014

m. The Claimant's letter to AC Brown dated 22 August 2014

n. The Claimant's complaint: victimisation to Ms Howard email dated 23 and 24 September 2014.

o. f The Claimant's letter dated 10 October 2014

p. g The Claimant's letter dated 21 October 2014

q. h The Claimant's letter to Mr Bond dated 26 October 2014

r. i The Claimant's letter to Mr. Bond dated 28 October 2014

s. The Claimant's letter to Mr. Anthony Buchanan dated 31 October 2014

t. The Claimant's letter to Mr. Bond 17 November 2014

u. The Claimant's Appeal written submission 27 November 2014 (Mr Groves)

v. The Claimant's grievance to AC Brown dated 28 November 2014 & 05 December 2014

w. The Claimant's complaint: danger **at work** and victimisation to Mr. Bond by email dated 08 and 10 December 2014

x. The Claimant's complaint to Mr Bond dated 24 December 2014

y. The Claimant's letter to Mr. Bond dated 05 and 06 January 2015

z. The Claimant's complaint to Mr Groves dated 05 and 17 December 2014 and 12 January 2015

aa. The Claimant's complaint to Mr. Bond dated 23 January 2015

Does the Respondent accept that the above are protected acts?

The Claimant needs to identify which protected act led to her alleged less favourable treatment

9. Was the Claimant subjected to the following treatment?

a. Ms Howard ***on 24 September 2014*** undertaking an improper and unfair, one sided investigation without the participation of the Claimant and without having interviewed any ***of the*** witnesses ***referred to by Ms Vaccarini in her complaint*** (**Section C Paragraph 38 of the ET1**)

b. Ms Howard undertaking an investigation which was designed to facilitate the decision to relocate the Claimant to Union Street from Lewisham for the sole purpose of circumventing the Compromise Agreement reached on 25th November 2008 and engineered by retaliatory complaint. (**Section C Paragraph 38 of the ET1**)

c. Ms Howard ***on 24 September 2014*** failing to take into consideration the compromise agreement reached on 25 November 2008.

d. Ms Howard refusing the Claimant's reasonable request to postpone the meeting for 2 hours on 23 September 2014 that falls within five working days of the original date 16 *23* September 2014 proposed by Ms Howard. (**Section C Paragraph 38 of the ET1**)

e. ~~Ms Howard refusing to move the meeting from 2.00pm to 4.00pm on 23 September 2014 and telling the Claimant that she had given her many chances. (**Section C Paragraph 38 of the ET1**)~~

f. ~~Ms Howard's conclusion that the Claimant bullied and harassed Ms Vaccarini based on retaliatory false allegations not connected to protected characteristics; and recommendations for a stage 1 disciplinary process against the Claimant. (**Section C Paragraph 41 of the ET1**) [**Undated report in October 2014**]~~

~~*g.* **On 09 October 2014**, Mr Bond failing to discuss the outcome of the Howard investigation with the Claimant before forced transfer imposed on the Claimant to a supernumerary temporary post to Union Street [**Paragraph 22 of the ET1**]. **By transferring the Claimant from a team which was not subject to any organisational review, to a supernumerary role, engineered by a retaliatory complaint against the Claimant by Ms Vaccarini, and being victimised for making protected acts against Ms Vaccarini and DAC Hughes as outlined at paragraph 5 of the ET1. [Section C Paragraph 38 of the ET1]**~~

h. ~~Having information that proposed transfers were supernumerary roles deliberately withheld on 6 occasions: **09 October 2014, 10 October 2014, 16 October 2014, 24 October 2014, 06 November 2014, 19 December 2014** (**Section C Paragraph 39 of the ET1**)~~

~~***i.*** Failing to inform the Claimant of a vacancy of Fire Rescue Service (Training & Release Team Officer); and failed to offer the Claimant the vacant permanent job: Post No:320405 on 16th October 2014 and on 16th November 2014 with reference to Mr Bond's letter dated 16th October 2014 - ***(cross refer to paragraph 4 (o).*** (**Section C Paragraph 40 of the ET1**)~~

j. ~~By Mr Bond responding to the Claimant's grievance on 11 November 2014 and stated, "You will not be working in the same team as Mr Ocitti in response to this element of your grievance". *Mr Bond only considered one issue in the Claimant's grievance letter (allegation of Harassment and Victimisation*) **dated 26 October and 28 October 2014 – link to appeal dated 17 November 2014. [Section C Paragraphs 29; 31 of the ET1**]~~

k. By the Respondent not informing the Claimant about a promotion opportunity to FRS D and excluding her from the recruitment exercise whilst she was on sick leave from 8th December 2014 [**when she refused to attend work**]. **[Section E Paragraph 45 of ET1**]

l. By Mr. Rob Bond (Head of Employment Relations) Threatening the Claimant with disciplinary action and dismissal on 24th October 2014 ("*which could ultimately lead to your dismissal from the Authority*"); 23rd December 2014, and 4th January 2015, because she had ***done the protected acts*** and protected disclosures including to Mr. Bond on 08 December 2014**. (Section C Paragraph 41 of the ET1)**

10. If so was the Claimant subjected to this treatment because she had undertaken protected acts?

[Deleted following Judgment of Tribunal 3rd July 2020. C seeking to appeal to EAT]

Direct ***Race*** Discrimination – ***Section 13 Equality Act 2010***

11. [Question deleted following ET Judgment dated 9 June 2017]

12. Did the Respondent treat the Claimant less favourably ***because of her race***

13. ***The Claimant to state the element of racial characteristic being relied upon.*** *Race Colour, ethnic and/or national* origin. [**Claimant complied with ET Order dated 31 October 2019 on 28 November 2019**]. **The element of racial characteristic is colour, national origin and ethnic origin. The Claimant is a black female, national origin (Nigeria) and ethnic origin (Ibo)**

14. ***The Claimant relies on*** an actual comparator (Ms Vaccarini), ***and*** a hypothetical comparator,

Less favourable treatment being complained of

15. Failing to carry out a stress risk audit between 25th September 2013 to 11 December 2013, and between 4th March to 8th December 2014 ***as recommended by the Respondent's own OH in their reports dated 25 September 2013 and 19 September 2014.*** (**Section D paragraph 42 of the ET1**)

16. AC Brown appointing a contact officer in Ms Vaccarini's complaint against the Claimant made in February 2014 but failed to appoint a contact officer when the Claimant made complaint against DAC Hughes and Ms Vaccarini on 19 November 2013 in accordance with the Respondent's extant policy applicable during both complaints. See paragraphs 17 and 18 ET1

    This is denied or that it amounted to a detriment

17. Mr. Bond only addressed one issue raised in the Claimant's grievance dated 28 October 2014 by outcome letter 11 November 2014 and Claimant reiterated she was being subjected to 'detriment' and/or detrimental treatment, which amounted to contraventions of the Equality Act on grounds of her race on 17 November 2014 appeal documents. See paragraph 31 ET1

    This is denied or that it amounted to a detriment

18. Did the Claimant suffer less favourable treatment by the Respondent failing to adhere to its grievance and harassment complaints procedures in processing Claimant's grievance lodged on 28 November 2014?

    R accepts that there was a delay in the processing of this grievance but denies it was less favourable treatment than an actual or hypothetical comparator

19. Did the Claimant suffer less favourable treatment by Respondent (Ms. Bloomfield) failing to process the Claimant's grievance lodged on 19 November 2013 against Ms Vaccarini, but DAC Hughes only? The Claimant lodged the grievance dated 19 November 2013 against both DAC Hughes and Ms Vaccarini.[34]

    The Respondent accepts that it did not treat the Claimant's grievance as being against Ms Vaccarini but does not accept it was less favourable treatment than an actual or hypothetical comparator.

[34] Paras 16-19 inserted following EJ granting permission to amend 3rd July 2020

20. [Question deleted following ET Judgment dated 9 June 2017]

21. If the Respondent did treat the Claimant less favourably than an actual or hypothetical comparator, has the Claimant proved facts from which the Tribunal could conclude that such treatment was because of the Claimant's race ~~or disability~~?

22. [see below]

23. [see below]

24. [see below]

25. [see below]

26. [see below]

27. [see below]

[Paragraphs 15-19 deleted following ET Judgment dated 9 June 2017]

[Judgment subject to appeal to the Court of Appeal**]**

Equal Pay – sections 65 (1) and (b) of the Equality Act 2020

28. From 6th November 2014, when the Claimant was transferred to a supernumerary temporary post, was the Claimant employed on like work, or on broadly similar terms to a comparator of the opposite sex, taking into account the equality clause? The Claimant compares herself to Mr Ajibola. See the Claimant's list of issues provided to the ET and the Respondent on 12 October 2018 [paragraph 32] – '*MI List of Issues'* page 8 of 8, which the Claimant had also clarification at previous hearings.

    It is denied that the Claimant was undertaking like work

29. If so, was there a term of the Claimant's contract of employment which was less favourable than the corresponding term in the contract of her comparator? The Claimant says that she was paid less than him? **Mr. Ajibola was (FRS B acting up as FRS D**).

The Claimant was paid more than Mr Ajibola

30. If there was such a term, then has the Respondent shown that the difference was for a material factor which did not involve treating the Claimant less favourably because of her sex, and which is a proportionate means of achieving a legitimate aim?

~~17 APRIL 2019~~
12 February 2020

10th September 2020

IN THE EMPLOYMENT TRIBUNAL
SOUTH

Case No. 2300313/2017

BETWEEN:

MAGDALENE ITULU

Claimant

-and-

LONDON FIRE COMMISSIONER

Respondent

RESPONDENT'S DRAFT LIST OF ISSUES

Jurisdiction

Discrimination

1. Have the Claimant's claims been brought within three months of the acts complained of (S 123 Equality Act 2010).
2. In respect of any complaints which are out of time, do they form part of a continuing act, taken together with acts which are in time?
3. If there is no continuing act, is it just and equitable for the tribunal to extend time in relation to earlier alleged acts of discrimination, harassment, or victimisation.

4. *Tribunal to consider Claimant's case re application of EU law and whether it makes any difference. Claimant complied with ET Order on 28 November 2019 sent to ET and Respondent timed at 17:44*

5. Are any of the Claimant's claims issue estopped or res judicata? Respondent to incorporate points in jurisdiction letter 24.1.19 re res judicata and issue estoppel once issues have been clarified.

Claims made under the Employment Rights Act 1996 – Whistle blowing

6. Has the Claimant made a qualifying disclosure within the meaning of section 43B Employment Rights Act 1996?

7. Did the Claimant disclose information which, in her reasonable belief was made in the public interest and tended to show one of the matters set out in Para 43B(1)(a-f)? The Claimant alleges that she made the following protected disclosures:

7.1 In a written grievance to Rob Bond dated 29th May 2015 (Para 30 & 35 ET1).

7.2 Orally and written document presented on 2nd June 2015 (s43B(1)(a),(b),(c),(d) & (f)) (Para 30 &35 ET1).

7.3 22nd June 2015 to Rob Bond. Respondent to clarify in the claimants list of issue where 22nd June 2015 was mentioned

7.4 1st July 2015 in a writing to Rob Bond and Sabrina Cohen-Hatton (s43B(1)(a),(b),(c),(d) & (f)) (Para 30 ET1).

7.5 17th July 2015 orally and written document presented at the hearing to Sabrina Cohen-Hatton (s43B(1)(b),(c),(d) (Para 30 ET1).

7.6 4th August 2015 orally to Rob Bond (Para 30 ET1)

7.7 28th July 2016 orally to Rob Bond (Para 30 ET1)

8. If so, has the Claimant been subjected to a detriment by the Respondent because she has made a protected disclosure? The Claimant alleges she was subjected to the following detriments:

8.1 The Respondent fabricated the report and back dated it to 23.12.13. This document was said by the Respondent to have been updated on 16 June 2015. The Respondent deliberately concealed the correct details of the accident, failed to investigate and failed to record the accident in accordance with its policy PN463, and contrary to the Health and Safety legislation (para 16 ET1)

8.2 Respondent falsely alleged that the Claimant had a pre-existing medical -condition – parties would need to identify the source of this.

8.3 The Respondent failed to determine the Claimant's appeal review about DAC Cohen Hatton's decision in October 2015

8.4 Mr Bond failed to treat the Claimant as a redeployee because the Claimant had made disclosures in 08 December 2014, 04 August 2015, 28 July and 05 August 2016.

8.5 During an ASM on 28 July 2016, the Claimant expressed an interest in an FRS C position in IT, but the Respondent refused to offer to the job to her. Mr. Bond confirmed the Respondent was not applying a transfer or redeployment policy and did not clarify the Claimant's status.

8.6 Mr Bond threatening to invoke capability procedure –(Paras 30, 74, 76-77 of ET1 – 31st August 16, 28 November 16, 16 January 17[35]

8.7 By Mr. Bond, confirming in a letter dated 04 August 2016 that following a meeting held to discuss facilitating Claimant return to work on 04 August 2015, he had no further contact with the Claimant until at a meeting on 05 August 2016 alleging management instruction for failing to take any action until new attendance management policy came into effect

8.8 If so, did the Claimant suffer detriment by Mr. Bond's act and/or omission, increasing the Claimant's level of sickness by 12 months and consequential effect on her employment?

[35] C's F&BPs para 18c p113

8.9 The manner the Respondent (Mr. Bond) left the Claimant in 'limbo, from 05 August 2015, when she attended ASM meeting on 04 August 2015, but next meeting on 05 August 2016.

8.10 The manner the Respondent required the Claimant to return to work over a lengthy period (04 August 2015 through to 15 February 2017) in the absence of a proper, fair investigation of her grievance and failure to carry out a risk assessment as Respondent's policy. The practice relied on by the Claimant was repeated by the Respondent

8.11 Mr Bond mocked the Claimant in a letter in which he stated that she had exhausted the internal process when there was in internal appeal review outstanding and

8.12 Mr. Bond's remark to the Claimant immediately Claimant complained of discrimination under EQA 2010 and ERA 1996 and before threat of capability process letter of 07 September 2016, in which he said, '*you have exhausted the Brigade's internal procedures for dealing with your perceived workplace stressors, with no findings being made in your favour'*

8.13 The Claimant alleged that Mr. Bond was seeking to smear her as a trouble- maker in an attempt to create an adverse work environment for her when the Respondent had not acknowledged or processed her grievance dated 28 November 2014

8.14 The Claimant became aware on 02 June 2015 that Respondent's mangers made false reports that the Claimant fell off her chair on 23 October 2014, and incorrect update on 16 June 2015.

8.15 The Respondent denied and deprived the Claimant opportunities of obtaining a substantive FRS C role including failing to offer her a vacant FRS C job in the IT department from October 2014 and from July 2015, onwards.

8.16 Claimant received her appeal outcome letter dated 16 October 2015, which upheld her appeal in part but alleged Claimant suffered no detriment. The Claimant alleges that the failure to uphold all of her appeal amounted to a detriment, because she had made protected disclosures and protected acts about concealing information and breaches of legal obligations.

8.17 The appeal hearing manager, DAC Cohen-Hatton failed to release the name of the employee who the Claimant alleges recorded false and inaccurate information in relation to her accident at work alleging protection under the Data Protection Act 1998.

8.18 DAC Cohen-Hatton made commitment to review her decision, in accordance with the Respondent's grievance policy but has failed to do to this day 12 October 2018. The Claimant provided a GP report requested by DAC Cohen-Hatton on 11 November 2015 – less favourable treatment.

8.19 The Claimant alleges that she is being pressurised out of her job because she has made protected disclosure and done protected acts regarding health and safety issues.

8.20 **Failure to carry out a stress risk assessment from 04 August 2015 to 29 June 2017, and so safeguard health and welfare and take action to mitigate workplace stress following suffering workplace stress linking outstanding grievance from 28 November 2014, and also interpersonal relationship at work.**

8.21 The Claimant alleges that on 08 February 2016, Assistant Commissioner (AC) Brown imposed informal action on the Claimant, because she was excluded her from employment matters which she had a right to know about and participate in.

8.22 The Claimant claims that AC Brown made adverse decisions against her without giving her the opportunity to have a meeting with a manager, and without stating in his letter dated 08 February 2016, what policy he had applied and implemented. AC Brown placed a copy of his letter dated 08 February 2016 on the Claimant's personal file.

8.23 The Claimant claims that on 11 and 28 November 2016, the then Fire Commissioner failed to process her formal grievance against AC Brown by letter dated 02 November 2016, citing time limitation despite evidence the Claimant had not received linked documents.

8.24 The Claimant alleges that she has received inconsistent treatment in the way the Respondent treat her sensitive personal data compared to other employees. The Respondent has created data and stored records referring to her personal health data without making her aware at the time. The Respondent made discrete enquiries about her to the EAT without copying her in on such correspondence.

8.25 The Respondent made decisions that were detrimental to the Claimant in relation to the application of polices and employment matters, including risk assessment, grievance, harassment and disciplinary procedures.

8.26 Rob Bond said there were no findings with regard to outcome of grievances – when a finding had been made.

8.27 In August 2016, Mr Bond told the Claimant that a review would be done within the next 10 working days

8.28 Mr Bond ignored the Claimant between 4 August 2015 to 28 July 2015 – (*Claimant to provide further details of each instance of Mr Bond ignoring her*)

8.29 Mr Bond failed to provide Claimant with notes of meeting in relation to meeting on 4 August 2015.

S44 Health and Safety detriment –

9. The Claimant asserts that she is relying on 44 (1) (c)(ii) and section 44 (1) (d) – With regard to section 44 (1) (d).

10. Did C bring to her employer's attention, by reasonable means, circumstances connected with her work which she reasonably believed were harmful or potentially harmful to health or safety?

10.1 Was the Claimant's complaint about health and safety (danger at work) of 08 December 2014 to Mr. Bond constitute danger at work?

10.2 Did the Claimant's statements about working conditions in the course of her grievance hearing on 02 June 2015 and at meetings on 04 August 2015, 28 July 2016 and 05 August 2016 with Mr. Bond constitute danger at work?

10.3 Did the Claimant's statements about working conditions in the course of her appeal hearing on 17 July 2015 to DAC Cohen-Hatton constitute health and safety concerns of danger at work?

11. Was it not reasonably practicable for the Claimant to draw this to the attention of the Respondent's health and safety representative or safety committee?

12. In respect of s44(1)(d) alleges that the "danger" was that on 11 November 2014, Mr Bond told her that she would not have to work with Mr Occitti but then went back on that assurance after the Claimant sent an email on 8 December 2014 to Mr Bond, making a complaint. – **In her email at 13.04 29th September the Claimant stated that this issue should in fact read** *In respect of s.44 (1) (d) alleges that the "danger" was that, Mr Bond failed to take into account grievance outcome letter dated 11 November 2014, and requiring the Claimant to work in the same team again with Mr Ocitti as from 08 December 2014. See page 114 paragraph (g), see also page 119 at paragraph (g)*

13. Was the Claimant subjected to a detriment on the grounds that she had taken relevant action within the meaning of s44(1)(c)(ii) or s44(1)(d). The Claimant alleges the following detriments:

13.1 The application of the sickness absence procedures to the Claimant on 4 August 2015, when previously the policy was not applied to her.

13.2 The application of the sickness absence procedure to the Claimant up to 14 January 2017 without taking into account the reasons why the Claimant was off sick

13.3 Mr Bond denied the Claimant the opportunity to apply for a substantive post because she had complained in a meeting that she was being treated in a discriminatory way (race discrimination)

Victimisation – section 27 and 39 of the Equality Act 2010

14. The Claimant relies on the following protected acts:

14.1 Claim No: 2203340/2008

14.2 Claim No: 2202003/2008

14.3 Claim No: 2201753/2008

14.4 Claim No: 2345310 /2012

14.5 Claim No: 2344543 /2013

14.6 Claim No: 2361516 /2013

14.7 Grievances dated 26th and 28th October and 28th November 2014

14.8 Claim No: 2300730/2015

15. Was the Claimant subjected to the following treatment?:

15.1 The Respondent made a false report that the Claimant fell of her chair on 23/10/13 and 16/6/15. The Respondent deliberately concealed the correct details of the accident, failed to investigate it and failed to report it to the HSE.

15.2 Claimant was denied the opportunity of obtaining a substantive role when the Respondent failed to offer her a vacant FRS C job in the IT department.

15.3 ~~On 22/5/15 Claimant raised a grievance in which she complaint about the discriminatory application of contractual sick pay in relation to her. R Bond failed to inform the Claimant of the outcome of her grievance within the time limit stipulated in the grievance policy~~.

15.4 C appealed against the outcome of her grievance. Her appeal was heard by DAC Cohen-Hatton on 17/7/15. D Amis attended the appeal hearing, but the Claimant had not been informed in advance that he would be there.

15.5 Claimant received her appeal outcome letter dated 16/10/15 which upheld her appeal in part. The Claimant alleges that the failure to uphold all of her appeal amounted to a detriment because she had made protected disclosures and she had done protected acts.

15.6 The appeal hearing manager, DAC Cohen-Hatton failed to release the name of the employee who the Claimant alleges recorded false and inaccurate information in relation to her accident at work was a breach of the Clainant's rights under the Data Protection Act 1998.

15.7 The appeal outcome letter failed to address the information provided to DAC Cohen-Hatton by the Claimant on 11/11/15, which DAC Cohen- Hatton had requested the Claimant to provide and by email to the Claimant on 12 November 2015 that she was reviewing the matter.

15.8 The Claimant claims that R Bond threated her with dismissal using the capability procedure.

15.9 The Claimant alleges that she is being pressurised out of her job because she has made protected disclosure and done protected acts.

15.10 The Claimant met with R Bond on 4/8/15, the purpose of the meeting was to discuss her return to work. R Bond promised to send minutes of the meeting for the Claimant to comment on, but he did not do this and did not provide the Claimant outcome of the meeting throughout 2015 and part of 2016

15.11 On 17/9/15, the Claimant claims that Respondent's Occupational Health service (OHS) recommended that steps be taken to resolve her work place stressors. The Claimant alleges that the Respondent failed to act on this advice and that this failure amounted to a detriment because she had made protected disclosures and because she had done protected acts.

15.12 On 17/11/15, the Claimant attended a further appointment with OHS, who recommended that the Respondent take steps to resolve the Claimant's workplace stressors. The Claimant claims that the Respondent failed to act on this advice and that this failure amounted to a detriment because she made protected disclosures.

15.13 The Claimant alleges that on 8/2/16, Assistant Commissioner (AC) Brown excluded her from employment matters which she had a right to know about and participate in when AC Brow had not advised the Claimant the policy he was

implementing against the Claimant whilst he failed to process the Claimant's grievance dated 28 November 2014 forwarded to him by Ms Patricia Oakley

15.14 The Claimant claims that AC Brown made adverse decisions against her without giving her the opportunity to have a meeting with a manager – despite the Claimant had attended meetings with the respondent's managers in 2014 and 2015.

15.15 AC Brown placed a copy of his letter dated 8/2/16 on the Claimant's personal file without advising the Claimant that it would not form part of her disciplinary records.

15.16 The Claimant claims that R Bond wrote a letter to her dated 26/8/16 in which he stated that there were no workplace stressors because no findings had been made in her favour. The Claimant alleges that R Bond was seeking to smear her as a trouble maker in an attempt to create an adverse work environment for her.

15.17 The Claimant requested a review of DAC Cohen-Hatton , decision with regard to her appeal, but to date she has not received anything from her. The Claimant alleges that this amounts to a detriment because she had made protected disclosures. In 2016, Mr Bond had advised the Claimant DAC Cohen-Hatton will provide her review decision within 10 working days

15.18 The Claimant alleges that the Respondent has deprived her of many opportunities to be placed in a substantive FRS C grade and of opportunities for career advancement from ~~July 2015~~. From 2014 October 2014 and from July 2015 onwards

15.19 During an ASM on 28/7/16, the Claimant expressed an interest in an FRS C position in IT, but the Respondent refused to offer to the job to her. Claimant claims that she asked R Bond to confirm what policy he was applying with regard to matching her with a vacant position, but she claims that she received a vague answer. The Respondent did not advise the Claimant when it advertised the job so that the Claimant could apply for the job.

15.20 Throughout 2015 and until 28 July 2016, the Respondent failed to notify the Claimant of vacancies. Having on 28 July 2016 made the Claimant aware of vacancy based at Stratford, in which the Claimant expressed interest, the Respondent by letter 29 August 2016, alleged the post had been advertised, and the Respondent had commenced interviews on 28 July 2016.

15.21 The Claimant claims that on 11 and 28/11/16, the Commissioner failed to process her formal grievance dated 2/11/16 and the excuse given had been discriminatory in the context of its own officer having a pattern of failing to process the Claimants grievance within time limit, example grievance of 28 November 2014.

15.22 C claims that she made further representations to the Commissioner was to why he should consider her grievance, C claims that the Commissioner failed to address the new issues that she raised in her representations, which was that the Claimant had not received alleged email AC Brown alleged to have sent to the Claimant's old email address, despite the email she had forwarded to Mr. Bond was with her new email address notified to the Respondent. and had failed to apply its diversity policy

15.23 On /12/16, the Claimant wrote to the Commissioner complaining about a breach of the DPA and HRA. ECHR section 8 because her private email address was disclosed the Respondent's employees and member of the public –(the email address could be seen in the address box of the envelope that was sent to C) the email envelope was attached to the Claimant's email response to the Respondent – there was no need for the post office personnel to know the details of the Claimant's personal email address.

15.24 The Claimant received a response from Mr Dominic Johnson in which he stated that there had been an administrative error. The Claimant rejects this explanation for the disclosure because she reasonably believed it was a deliberate act to spite the Claimant.

15.25 D Johnson forwarded the Claimant's letter about the disclosure of her email address to Mr David Wyatt. Mr Wyatt rejected the Claimant's request for compensation and stated that this was a minor breach which the Claimant did not accept.

15.26 The Claimant alleges that she has received inconsistent treatment in the way her personal data is treated compared to other employees. The Respondent has created data and records referring to her personal information without making her aware of the existence of this personal data. The Respondent has made enquiries about her from third parties without copying her in on such correspondence – email by the Respondent's legal department to the EAT.

15.27 The Respondent made decisions that were detrimental to the Claimant in relation to the application of its polices and employment matters [insert particulars] The

Respondent dis not advice any policy it was implementing apart from the Harassment and Complaints Policy (PN529)

15.28 If so, was she subjected to this treatment because she had undertaken protected acts?

Contractual sick pay

Did the Respondent overpay the Claimant's contractual sick pay in 2015?

Protected Disclosure and Health and Safety Detriment

16. Have the Claimant's claims been brought within three months of the acts complaints of (s48 ERA 96).
17. In respect of any complaints which are out of time do they form part of a series of similar acts or failures the last of which was presented in time.
18. If not was it reasonably practicable for the Claimant to have presented the claim in time and if the Tribunal is satisfied it was not was it presented within such period as the Tribunal considers reasonable.

~~DATED 29 APRIL 2019~~

~~6th September 2020~~

~~10th September 2020~~

7th October 2020

IN THE EMPLOYMENT TRIBUNAL **Case No. 2302421/2017**
SOUTH

BETWEEN:

MAGDALENE ITULU

Claimant

-and-

LONDON FIRE COMMISSIONER

Respondent

RESPONDENT'S DRAFT LIST OF ISSUES

Jurisdiction

1. Have the Claimant's claims been brought within three months of the acts complained of (S 123 Equality Act 2010).
2. In respect of any complaints which are out of time, do they form part of a continuing act, taken together with acts which are in time?
3. If there is no continuing act, is it just and equitable for the tribunal to extend time in relation to earlier alleged acts of discrimination, harassment, or victimisation.

4. Are any of the Claimant's claims issue estopped or res judicata?

Direct discrimination Equality Act 2010 section 13 (sex and race)

5. Did the Respondent subject the Claimant to less favourable treatment by

6. Did the Respondent treat the Claimant less favourable treatment because of the Claimant's sex and race?
7. Are there facts from which the tribunal could decide, in the absence of any other explanation that the Respondent discriminated against the Claimant?

8. Did the Respondent subject the Claimant to the following treatment?

9. By the Respondent, failing to properly implement its policies and failing to reinstate the Claimant's pay, having been on nil pay for one and half years when OHS confirmed the Claimant was fit for work from 15 February 2017.

10. Did the Respondent unilaterally vary the Claimant's contract of employment without obtaining the Claimant's agreement?

11. Did the Respondent have the power to change terms of the Claimant's contract subject to any limitations, in either a mobility clause or elsewhere, say policy?

12. By Mr. Bond, head of Employee Relations suspending the Claimant from work without pay from 15 February 2017, when the Respondent's Occupational health Service (OHS) had advised that the Claimant was fit for work following attendance of OHS appointment arranged by the Respondent.

13. By making a verbal job offer to the Claimant at a meeting, she attended with Mr. Bond on 17 February 2017, to discuss her return to work, not notifying the Claimant about intending merging of teams.

14. By Mr Chris O'Connor, head of Community Fire Safety, offering unilateral variation of the Claimant's contract in a letter dated 8 August 2017, not agreed by the Claimant, which the Claimant asserts amounted to a demotion.

15. By Dr Adrian Bevan failing to deal properly with the Claimant's grievances dated 11 May 2017, alleging HR had advised him that it had previously processes earlier grievance and appeal on the same matters, which the Respondent did not uphold.

16. By Dr Bevan accusing the Claimant of not pursuing the matter informally to taint Claimant and undermine her complaint without a just cause, inferring that Claimant was not following my employer's policies and the Acas Code of Practice.

17. By the Respondent, dismissing the Claimant's concerns raised concerns her working environment, stating the event complained of had not occurred at the time in a letter dated 12 June 2017.

18. By the Respondent, failing to provide the Claimant with a comfortable chair that supported her lumbar and the Claimant protested, refusing to attend work on 27 March 2017.

19. By denying the Claimant paid time in which to attend external counselling appointments, while providing paid time for employees who attend in-house counselling appointments.

20. By the Respondent, failing to properly implement its policies and justifying failure to reinstate the Claimant's pay from 15 February 2017 by stating the Claimant's role was 'supernumerary' while Ms Victoria Vaccarini's role was substantive.

21. By the Respondent, failing to properly implement its policies regarding grievances dated 11 May 2017(unilateral variation of the Claimant's contract), and alleging HR had offered the Claimant another job role in the North East Area, sometime in June 2017.

22. By the Respondent, Mr Nye telling lies about the Claimant, alleging he had discussed a job role in the North East Area with the Claimant shortly after a return to work interview on 30 June 2017.

23. If so, did the Respondent subject the Claimant to the treatment because she had undertaken protected acts?

a) Suspending the Claimant from work without pay from 15 February 2017, when the Respondent's Occupational health Service (OHS) had advised that the Claimant was fit for work.

b) Making a job offer to the Claimant by letter dated 8 August 2017 which the Claimant asserts amounted to a demotion.

c) Failing to tell the Claimant that the Community safety and Fire Safety team had been merged.

d) Failing to deal properly with the Claimant's grievances dated 11 May 2017.

e) Refusing to take action when the Claimant raised concerns that her working environment, work station, seating and equipment were not suitable for her.

f) Failing to provide the Claimant with a suitable chair and an ergonomic keyboard

g) Not carrying out a return to work interview with the Claimant until 30 June 2017, when the Claimant had returned to work on 27 February 2017.

h) Denying the Claimant paid time in which to attend external counselling appointments.

i) Dr Bevan dismissed concerns that the Claimant had raised about working in an open plan office with a male employee who had harassed her in the course of her employment.

j) By failing to properly implement its policies and telling lies about the Claimant

Comparators

24. **Is Victoria Vaccarini an appropriate comparators / What are the characteristics of an appropriate hypothetical comparator?]**

25. The Claimant is relying on Ms Victoria Vaccarini for direct discrimination and application of the Respondent's policies regarding job roles and unlawful deduction of wages. Further, and/or in the alternative the Claimant relies on a hypothetical comparator.

26. Was any less favourable treatment accorded to the Claimant because of the Claimant's sex and/or race?

27. Are there facts from which the tribunal could decide, in the absence of any other explanation, that the Respondent discriminated against the Claimant?

28. If so, has the Respondent proved that it did not discriminate against the Claimant?

Victimisation – section 27 and 39 of the Equality Act 2010

29. The Claimant relies on the following protected acts:

29.1 Claim No: 2203340/2008

29.2 Claim No: 2202003/2008

29.3 Claim No: 2201753/2008

29.4 Claim No: 2345310 /2012

29.5 Claim No: 2344543 /2013

29.6 Claim No: 2361516 /2013

29.7 Grievances dated 26th and 28th October and 28th November 2014

29.8 Claim No: 2300730/2015

29.9 Claim No: 2300313/2017

30. Was the Claimant subjected to the following treatment?:

30.1 Suspending the Claimant from work without pay from 15 February 2017, when the Respondent's Occupational health Service (OHS) had advised that the Claimant was fit for work.

30.2 Making a verbal job offer to the Claimant at a meeting, she attended with Mr Bond on17 February 2017, to discuss her return to work, not notifying the Claimant about the intending merger of teams.

30.3 Making a job offer to the Claimant by letter dated 8 August 2017 which the Claimant asserts amounted to a demotion.

30.4 By failing to deal properly with the Claimant's grievances dated 11 May 2017.

30.5 Refusing to take action when the Claimant raised concerns that her working environment, work station, seating and equipment were not suitable for her from February 2017

30.6 Failing to provide the Claimant with a suitable chair and an ergonomic keyboard

30.7 Denying the Claimant paid time in which to attend external counselling appointments.

30.8 By failing to properly implement its policies and telling lies about the Claimant

31. If so, was she subjected to this treatment because she had undertaken protected acts?

Section 47B ERA 1996

If so, has the Claimant been subject to a detriment because she had done a protected Act?
Alleged detriments – see examples below also paragraphs 49-63 particulars of claim.

On 09 May 2017, did the Claimant disclose information to Mr. Rob Bond, head of Employees Relations about breaches of the Respondent's legal obligations under statute by storing three employees private and sensitive health data on its intranet who employs more than six thousand employees that have access to the intranet where it had placed those data?

On 15 May 2017, did the Claimant disclose information to Mr. Bond about breaches of the Respondent's legal obligations under statute by storing three employees private and sensitive health data on its intranet that employs more than six thousand employees that have access to the intranet where it had placed those data?

On 12 July 2017, did the Claimant disclose information to Mr. Chris O'Connor, head of the Community Fire Safety about breaches of the Respondent's legal obligations under statute by storing three employees private and sensitive health data on its intranet that employs more than six thousand employees that have access to the intranet where it had placed those data?

Did the Claimant who had no need to know or have access to those private and sensitive health data of those white employees the Respondent, who is employs more than six thousand employees that had access to the intranet where it had placed those data make the disclosure in the public interest?

On 11 May 2017, did the Claimant suffer detriment by the Respondent by requiring the Claimant to remove the data from the intranet, fully aware the Claimant does not have level of access to do so?

On 13 July 2017, did the Claimant suffer detriment for the Respondent failing to investigate the complaints as required under the Respondent's whistle-blowing policy, rather blaming the Claimant; including a failure to speak/interview the Claimant prior to speaking/ interviewing staff in the Information Access team, and failure to review supporting evidence thereafter?

32. Has the Claimant made a qualifying disclosure within the meaning of section 43B Employment Rights Act 1996?

33. Did the Claimant disclose information which, in her reasonable belief was made in the public interest and tended to show one of the matters set out in Para 43B(1)(a-f)? The Claimant alleges that she made the following protected disclosures:

33.1 9th May 2017 C disclosed information to Mr Bond about breaches of the Respondent's legal obligations by storing three employee private and sensitive health data on its intranet which employees have access to.

33.2 On 15th May 2017 C disclosed information to Mr Bond about breaches of the Respondent's legal obligations by storing three employee private and sensitive health data on its intranet which employees have access to.

33.3 On 12th July 2017C disclosed information to Mr Chris O'Connor about breaches of the Respondent's legal obligations by storing three employee private and sensitive health data on its intranet which employees have access to.

34. If so, has the Claimant been subject to a detriment because she had made a protected disclosure(s);

35. On 11th May requiring C to remove data from the intranet, fully aware that she did not have the level of access to do so. In her email at 13.04 on 29th September 2020 the Claimant asserted that*: While Claimant was giving her evidence, the Claimant clarified that her complaint was that the Respondent was requiring her to take the matter up with Ms Gayle Ward, fully aware that the Claimant does not work in the team and had never had the level of access.*

36. On 13th July did the Respondent fail to investigate the complaints as required under the Whistleblowing policy, rather blaming the Claimant ; including a failure to speak/interview the Claimant prior to speaking/ interviewing staff in the information access team, and failure to review supporting evidence thereafter.

Unlawful deduction of wages – ERA 1996 section 13

Was the total wages the Claimant received from the Respondent less than the total amount of wages properly payable by the Respondent to the Claimant on that occasion in February 2017 in all the circumstances?

The Claimant alleges that the Respondent failed to reinstate her pay for the period 15 to 19 February 2017 when the Respondent's OHS said she was fit for work on 15 February 2017.

If so, did the Claimant suffer unlawful deduction of wages?

The claimant provided further particulars requested by the Respondentt to the Tribunal and Respondent on 20 March 2020 pages 123-132

Other Claims - Working Time Regulations and section 28 ERA 1996

Did the Respondent wrongfully prevent the Claimant from earning remuneration from 15 February 2017 when it imposed suspension on the Claimant at a meeting on 17 February 2017?

If so, did the act of the Respondent prevent the Claimant performing the condition precedent of rendering her services from 15 February 2017?

37. Was the total amount of wages paid by the Respondent to the Claimant less than the total amount of wages properly payable by the Respondent for the period 15th to 19th February 2017 to the Claimant on that occasion?

38. If so, has the Claimant been subjected to an unlawful deduction of wages?

39. Was the Claimant entitled to a guarantee payment within the meaning of s28 ERA 96 for the period 15-19th February 2017

Protected Disclosure

40. Have the Claimant's claims been brought within three months of the acts complaints of (s48 /s23 ERA 96).
41. In respect of any complaints which are out of time do they form part of a series of similar acts or failures the last of which was presented in time.
42. If not was it reasonably practicable for the Claimant to have presented the claim in time and if the Tribunal is satisfied it was not was it presented within such period as the Tribunal considers reasonable.

Unlawful Deduction from wages

43. Has the Claimant's cliam been brought within three months of the deduction complained of (s23 ERA 96) (Alleges the deduction was a continuing act)

44. If not was it reasonably practicable for the Claimant to have presented the claim in time and if the Tribunal is satisfied it was not was it presented within such period as the Tribunal considers reasonable.

~~7th September 2020~~

~~10th September 2020~~

~~30th September 2020~~

7th October 2020