EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Ms C Beckford **v** **Transport for London**

Heard at: **London South Employment Tribunal (via CVP)**

On: **18 May – 25 May 2021**

Before: **EJ Webster**
Ms J Jerram
Mr G Henderson

Appearances
For the Claimant: **In person**
For the Respondent: **Ms R Thomas (Counsel)**

JUDGMENT

1. The claimant's claims for direct discrimination on grounds of race are not upheld.
2. The claimant's claims for direct discrimination on grounds of sex are not upheld.
3. The claimant's claim for indirect discrimination is not upheld.
4. The claimant's claim for victimisation is not upheld.
5. The claimant's claim for trade union detriment is not upheld.

WRITTEN REASONS

The Hearing

1. The matter was for listed for 8 days. In the end evidence was finished by day 4 and submissions were on day 5 with judgment delivered orally on day 6 (25

May 2021). The claimant wrote and asked for written reasons on the same day. The Tribunal apologies for the short delay in producing those written reasons.

2. The hearing was heard via CVP, this being necessary at the time due to the pandemic. Neither party objected to the proceedings being dealt with in this way.

3. The Issues were agreed with the parties at an earlier preliminary hearing and are set out below. These were discussed at the outset of the hearing.

4. The respondent, despite being represented throughout, had not complied with its disclosure obligations regarding some redacted documents until day 2 of the hearing. This resulted in unnecessary delay and understandable frustration on the part of the claimant. As stated at the time, the documents were relevant and were accepted as evidence and added to the additional bundle. The claimant was given time to consider them and allowed to comment on them during her evidence in chief.

5. We were provided therefore with a main bundle and an additional bundle. Documents in the additional bundle have the preface B when referred to below.

6. We had written witness statements and heard oral evidence from the following witnesses:
   (i) The Claimant
   (ii) Mr Les Jackson (TU officer for the claimant)
   (iii) Mr Tim Handley
   (iv) Mr Jonathan Hawkes
   (v) Mr S Brown

7. Evidence was concluded by lunch on the fourth day. Both parties requested time to prepare their written submissions and we agreed that they could have the afternoon to prepare their submissions.

8. In our Judgment, where individuals are relevant to the facts but have not given evidence to us, we have only referred to them by their initials and identified them by their role.

<u>The Issues</u>

Equality Act Claims

9. Jurisdiction

(i) In relation to each of the acts below:
(a) Was C's claim brought within the time limit provided for in (s.123(1)(a) Equality Act 2010 (as extended by early conciliation)?

(b) If not, was the act part of conduct extending over a period, with C's claim brought within three months of the end of the period? (s.123(3) Equality Act 2010)
(c) If not, was C's claim relating to that act brought within such other period as the Tribunal considers just and equitable? (s.121(b) Equality Act 2010)

10. Direct Discrimination on the grounds of race and/or sex (s13 Equality Act 2010)

(i) Did the Respondent treat the Claimant less favourably than an actual or hypothetical comparator by:

(a) 11 May 2016 Nick Aldworth and Matthew Sercombe discussing the Claimant's sickness absence by email;

(b) From 22 July 2016 Nick Aldworth and Matthew Wilson deliberately delaying approval for Claimant's make a difference award for 5 months;

(ii) If the Respondent did treat the Claimant less favourably was it on the grounds of the Claimant's race?
(iii) the Claimant relies on an actual comparator (Maryna Baxter).
(iv) On 13 March 2017 did Nick Aldworth treat the Claimant less favourably than other Trade Union representatives in relation to the Claimant's request for a building pass by refusing to give her a building pass;
(v) If the Respondent did treat the Claimant less favourably was it on the grounds of her race or sex?
(vi) The Claimant relies on an actual comparator (Andrew Batchelor)
(vi) If the Claimant was treated less favourably than an actual or hypothetical comparator has she proved facts from which the Tribunal could conclude that it was on the grounds of race or sex
(vii) If the Claimant has proved such facts has the Respondent shown that it was not because of her race or sex?

11. Indirect discrimination on the grounds of RACE (S19 Equality Act 2010)

(i) Did the Respondent apply a provision, criterion or practice ("PCP") to the Claimant by appointing grievance Chairs who were not independent of TfL or not impartial because there was collaboration;

(ii) Did or would that PCP put others who shared the Claimant's race at a particular disadvantage when compared with persons without that characteristic by allegedly making it more likely that the outcome would be in favour of the Respondent.

(iii) Did or would it put the Claimant at that disadvantage?

(iv) If so, can the Respondent show that the PCP was a proportionate means of achieving a legitimate aim?

12. **Victimisation (s27 Equality Act 2010).**

(i) Did the Claimant undertake a protected act or acts. The Claimant alleges that she undertook the following protected acts:

a. Grievance dated 27 May 2011

b. Grievance 20 March 2014

c. Grievance 9 October 2014

d. Grievance 25 October 2018

The Respondent accepts that the grievances dated 27 May 2011 and 25 October 2018 were protected acts.

(ii) Did the Respondent subject the Claimant to the following detriments?

a) On 5 February 2015 did the Respondent fail to undertake the Claimant's Performance Review
b) On 11 February 2016 Nick Aldworth and Matthew Wilson breaching the Respondent's Attendance at Work Policy & Procedure 5.1.4
c) 11 May 2016 Nick Aldworth and Matthew Sercombe inappropriately discussing the Claimant's years of sickness absence by email.
d) From 22 July 2016 Nick Aldworth and Matthew Wilson deliberately delaying approval for the Claimant's make a difference award for 5 months.
e) On 13 and 14 March 2017 Nick Aldworth, Alan Davidson, Matthew Wilson obstructing the Claimant's application for a building pass
f) On 14 March 2017 in an email from Employee Relations in relation to requesting a building pass for TU release encouraged others to make inappropriate comments about the Claimant
g) On 30 October 2018 at a Trade Union New Framework Engagement Meeting for TFL, Jonathan Hawkes deliberately singling out the Claimant and belittling her in a formal Trade Union meeting by colluding with the TSSA full time official causing the claimant to leave the meeting.

(ii) If so, did the Respondent subject the Claimant to those detriments because she had undertaken a protected act?

13. **Trade Union Detriment (S146 Trade Union and Labour Relations (Consolidation) Act 1992).**

(i) In respect of the Claimant's complaints below was the Claim brought within the time limit (3 months) provided for in s147 TULR(C)A 1992 (as extended by early conciliation).

(ii) If not were the acts part of a series or similar acts (s147(1)(a)). If not was it reasonably practicable for the complaint to be presented in time?

(iii) Was the Claimant subjected to a detriment by:
(a) On 8 January 2015 Andy Best and Nick Aldworth failing to cover the Claimant's workload which impacted on the Claimant's health and did not allow the Claimant to functionally undertake TU duties;
(b) On 5 February 2015 the Respondent failing to conduct the Claimant's Performance Reviews resulting in the Claimant not having progressed in her career and impacting her reward and recognition;
(c) On 13 March 2017 Nick Aldworth, Alan Davidson, Matthew Wilson engaged and made inappropriate comments via email communications in relation to the Claimant's request for a building pass in order to block her application.
(d) On 22 March 2017 in an email from Employee Relations in relation to requesting the Claimant TU release Nick Aldworth and Dana Skelly sought to block the Claimant from their business area by approving the TU release.
(e) On 30 October 2018 at a Trade Union New Framework Engagement Meeting for TFL Jonathan Hawkes deliberately singled the Claimant out by colluding with the TSSA full time official forcing the Claimant to leave the meeting.

(iv) If the Claimant has been subjected to a detriment (or detriments) was the Respondent's sole or main purpose to prevent or deter her from taking part in the activities of a Trade Union at an appropriate time or penalising her for doing so (S146(1)(b)].

Facts

Background

14. The claimant is employed as a Revenue and Licensing Officer. She has worked for the respondent since 2007 and remains employed. In addition to her job she carries out union duties and is an elected representative for Unite. The claimant is black British.

15. The claimant's claim arises out of a number of incidents and issues that have occurred largely from 2014 onwards. Her witness statement covered a significant amount of background information which was not relevant to her substantive claim save for context. We have only made findings of fact that are relevant to our conclusions for the substantive claim.

16. The respondent is a large organisation which governs and provides transport for London. The team (Asset Management Directorate) which the claimant worked in at the relevant time, deals with claims by and against third parties where TfL property is damaged or causes damage.

General Observations

17. The claimant submitted a Subject Access Request in August 2018 which provided her with redacted emails, several of which were rude and derogatory about her. The respondent witnesses have accepted that the emails were inappropriate and rude and to differing extents this was dealt with during the claimant's final grievance which was submitted in October 2018 and her appeal. It is accepted by this tribunal and the respondent that the claimant has a genuine and justified sense of hurt and upset because of these emails.

18. As an overall observation we record that these emails were wholly inappropriate and indicate that whilst NA was employed by the respondent, he took part in correspondence about the claimant that demonstrates a complete lack of respect for someone who, it has been accepted, is very good at her job and a valued and long-term employee. There is no justification for that from a senior manager and the respondent has not tried to justify the content of the majority of the negative emails. The cumulative impact of the emails suggests a culture of general dislike towards the claimant by NA and some of those he worked with. We discuss the reasons for that below. It is regrettable that these views appear to have been unchallenged at the time and that so few steps appear to have been taken by the respondent since their disclosure to mitigate the understandable hurt those emails have caused the claimant.

Grievances

19. The claimant brought a number of grievances which we deal with in turn.

20. The first grievance was on 15 June 2011 and its opening paragraph states:

"I would like to raise a formal grievance against Tim Pope on the grounds of Racial Discrimination, Unfair Treatment and lack of duty of care for an employee under the Equality Act 2010."

This grievance clearly references the Equality Act and states that the claimant considers she has been discriminated against because of her race.

21. The second grievance dated 20 March 2014 says as follows**:**
"I have not been treated fair or equally I have simply been ignored and I am just wondering whether I am being discriminated against because I am a Trade Union Representative within TfL."

The claimant was a trade union activist. She said in answer to a question from the respondent that she was clear that at that time she was complaining about

treatment that she considered was occurring because of her trade union activities and not because of race or sex discrimination. We note the claimant's answer that she was suspicious that she was being treated differently from this point onwards but could not really determine why until later.

22. The third grievance is dated 9 October 2014 [pg 203]. The relevant parts are as follows:

"I hereby submit a formal grievance under the TfL Grievance Policy against my line manager Mr Dave Johnson as I believe I have been treated disproportionately in relation to other members of staff and I feel victimised as to my Trade Union duties and responsibilities.

(i) TfL Code of Conduct
(ii) Equality Act 2010 (Trade Union Victimisation)

"I feel that I am being treated differently to others and that I am being victimised due to my Trades Union duties."

23. Although there is reference to the Equality Act it is referenced specifically regarding Trade Union Activities. During submissions the claimant said that she intended the grievance to talk about how the situation and treatment was affecting her personally but perhaps did not word it correctly. However, in answer to our question she did not tell us that she felt that this personal treatment was on grounds of race or sex.

24. To determine whether her grievance was intended to refer to discrimination on grounds of race or sex we have carefully considered

(i) The notes of the informal meeting she has with Mr Best [pgs216-2018], to discuss this letter.
(ii) The part of her witness statement that dealt with this grievance; and
(iii) Her oral evidence on this point.

At no point, save for the use of the words, 'The Equality Act' in her original grievance letter (where she clearly intends to refer to treatment on grounds of Trade Union activities), has she said that she is complaining about race or sex discrimination. Her complaint is about general 'bad treatment' and in particular negative treatment relating to her trade union activities.

25. The fourth grievance is dated 25 October 2018 and clearly makes reference to the Equality Act and race discrimination. It does not however mention sex discrimination at all.

26. The respondent's grievance process states that generally grievances ought to be dealt with by line managers with support from HR. We find that the respondent dealt with all of the above grievances largely in accordance with their grievance policy [pg 706-708]. This included dealing with the second and third grievances informally with the agreement of the claimant. We appreciate that she now says that the outcome or resolution to that process was not enacted. Nevertheless, she did not bring another grievance until 2018 despite reserving her right to do so if the informal process did not work. They were dealt with by the claimant's managers which is as set out in the policy. We accept that they were largely in the same department but that was in accordance with the policy. We were provided with no evidence whatsoever that the managers colluded in the way that they dealt with them or in determining the outcomes. The first 3 grievances were all about different matters which covered some of the same issues. We accept that the same HR team may have supported the managers as they dealt with the grievances but we were provided with no evidence in that regard nor any evidence that this led to an unfair outcome. We recognise that there were delays to some of them and that the claimant had to chase outcomes on occasion.

27. With regard to the fourth and final grievance this was not dealt with by managers within the claimant's team because of the nature of her grievance and her concerns regarding the management team. In principle we see no issue with the claimant's October 2018 grievance being dealt with firstly by Mr Handley and on appeal by Mr Brown. Both were independent of the management team that the claimant was raising concerns about. There is no contractual or statutory mandate for the respondent to have to instructed entirely external managers or experts to deal with such a grievance. We accept, having heard their evidence, that both Mr Handley and Mr Brown were separate from the team the claimant was complaining about.

28. We also think it is noteworthy that both Mr Handley and Mr Brown condemned the negative emails about the claimant, demonstrating that they were not colluding with previous managers. Mr Handley felt he could not uphold the claimant's grievance because the main perpetrators had left the respondent. Nevertheless he said that the emails were unacceptable. This failure was rectified by Mr Brown who did uphold the claimant's grievance in that regard. He also suggested meeting the claimant to see how to resolve the situation. It is not clear to us why that meeting did not take place and we did not hear useful evidence on that point from the claimant or Mr Brown.

29. It is a pity that despite partially upholding the claimant's grievance, no proactive measures were taken to reassure the claimant that such behaviour was frowned on by the respondent at large and would be called out and condemned in the future. This was a missed opportunity particularly in light of the fact that both Mr Handley and Mr Brown before us accepted that all 4 of the respondent's policies on behaviour at work had been breached by these emails.

Failure to cover work

30. The claimant originally raised this matter as a cause for concern in her grievance dated October 2014 (pg 203). The claimant agreed that this grievance could be dealt with informally.

31. The evidence regarding this matter was largely in the form of emails between Mr Best and NA and NA and HR (Judi Yapp) discussing how cover ought to be sorted out. We were provided with no evidence that suggested that KK provided a proper system whereby the claimant's work was properly covered when she was on release for TU activities. We find that during this period, the claimant was not properly covered for her work whilst she was performing TU activities and probably when she was off for any reason given that there was nobody else qualified within the team to do the work at that time.

32. It was also dealt with in emails that were originally redacted but appeared unredacted before us at pages B85-88. Those emails were then referenced in the claimant's 2018 grievance and the table at page 430. The notes of the meeting with Mr Handley (31 Jan 2018) regarding this grievance are at page 432 and this matter is dealt with at page 433. The comments are as follows:

"In relation to coverage of workload whilst on TU duties something which is ongoing since 2014. Concerns were voiced to ER, HR and the Business Area regarding covering workload as it has been a continuing struggle. Email demonstrates this – also some redactions but not sure why. There was also an email on the 8th January to ER and the business area voicing concerns of work not being covered and being treated unfairly and therefore unable to complete TU duties. This all demonstrates the ongoing struggle which has been of detriment to me as well as TU."

33. No evidence was provided by the respondent witnesses to suggest that her work was appropriately covered at this time. We conclude that it was not.

Performance reviews

34. In 2014/2015, the claimant was meant to have a mid-year review and an end of year review. She complained about not having a mid-year review and as a result Mr Best carried out her mid-year review. He made several recommendations regarding her ongoing management and career development. Subsequently the obligation to carry out her final year review fell with Mr KK, her then line manager. Mr Best prepared a list of things that ought to happen to address the claimant's concerns and situation. The claimant asserts they did not happen. We have no reason to doubt that. We also have no evidence that the claimant's end of year review took place.

35. We conclude from having read the emails regarding this topic that KK was very new to the role and did not understand (amongst other things) his obligations regarding the dates for the final year reviews. He was seconded to this role for six months and we note that this secondment did not continue; suggesting that his step into management was not particularly successful at this time. The claimant has made some suggestions that his appointment to being her manager was in some way retaliation for her grievance against Mr Johnson. We were provided with no evidence that would support such an assertion. The emails we have however suggest that KK was someone who was not performing well who more senior managers such as NA were having to provide guidance to on fairly basic matters. The claimant says that she never received an annual review that year and given that no such review has been produced in evidence, we accept it did not occur. However we also accept that, on balance from the emails we have seen, KK's lack of management skill was applied to all his reports and that nobody under KK's line management had their end of year reviews carried out that year.

Record of sick leave

36. On 11 February 2016 the claimant went home from work early as she was unwell. There is an email exchange [p 282] which suggests that the claimant leaving work on 22 February 2016 amounts to sick leave and ought to be recorded as such. The relevant policy states that where someone is taken ill at work and has to go home, they should not be marked off as sick for that day.

37. Two managers (MA and MW) agree that she should be marked down as having been on ½ day sick leave. The claimant appears to be alleging that this statement suggests that managers, when considering anything to do with the claimant, felt that they ought not to follow correct procedures and policies or sought to penalise her deliberately in some way. On reading it however we find nothing offensive within the email exchange nor any suggestion that she was not genuinely unwell or not entitled to go home. Whilst we understand her sense of upset given the wording of other emails, this email does not contain any inappropriate comment save that it clearly misunderstands the policy at the time.

38. The grievance and the appeal hearing in 2018 both found, based on the claimant's sick leave record at pg B7 that she was not marked down as off sick on the relevant day and no entry was made on her absence record for 11 February 2016. We accept this evidence as demonstrating that whatever the email exchange stated, any misunderstanding by the managers of the policy was rectified before the absence was recorded. We do not accept that there is any evidence to suggest that this record has been tampered with. The claimant has therefore not suffered because of the managers' apparent ignorance of the policies during the email exchange.

39. There was subsequently an email dated 11 May 2016 from NA to MS which states as follows:

"Out of interest, Cheryl may be setting a new record for absence. In 9 years, 269 days off sick, and that was before her current, ongoing two month sickness absence. Not been managed properly in SAP til Matt W came in of course…"

We agree with the claimant, and subsequently the respondent's witnesses, that this was a wholly unnecessary and distasteful exchange regarding the claimant. It does not appear to have been 'sparked' by any particular incident or facts as it is within an email chain about something else entirely and appears to be a one-off email from NA. However it contributes to a tone and manner of talking about colleagues behind their back that has created the sense of injustice that the claimant feels.

Make A Difference award

40. On 22 July the claimant was nominated for a Make A Difference Award (pg 287). This is an award which recognised work by employees that went above and beyond what is expected of them. This nomination was sent to David Lingham, another manager within the claimant's section.

41. The nomination was subsequently forwarded to NA in October 2016. The delay is not explained in emails but was subsequently explained by Mr Lingham as being caused by the fact that he was nominating someone else at the same time. We are not clear as to why that should lead to a delay however the claimant has not sought to suggest that DL's behaviour in this situation was in some way caused by an unlawful reason. She ascribes the delay to NA and MW.

42. The emails at page 289 around the claimant's receipt of a Make A Difference Award are rude. We accept the claimant's interpretation of them that they demonstrate that NA and MW did not think she particularly deserved an award. However we also accept that these individuals did not do anything that delayed the award because they only received information about it in October. Whilst we accept that the tone is disrespectful, their emails to the senior manager were emails that suggested additional information which would justify the award. They did not attempt to sabotage the award even if they were rude about it between themselves. We therefore find that whilst they may have inappropriately felt that she did not deserve award they did not delay it or stand in its way. Any delay was caused by DL's late referral.

Building Pass

43. On 9 March 2017 the claimant submitted a written application for a building pass to the Pier Walk building. She wanted this pass to attend a trade union meeting. She was not at that time a recognised representative for this area of the business. There then ensues some correspondence around whether the pass ought to be granted between NA and various others.

44. This email exchange pgs B46-47 in the unredacted versions clearly reference 3 different union reps, TW, the claimant and Paul Small. Reference is made to baiting TW (by inference about his TU activities) and the email expresses derogatory comments about all three. It is clear that their TU activities and membership are the cause for the derision expressed. We draw this inference given the express reference to TU membership and activities and the context of the email being about the need for a pass to attend a TU meeting.

45. NA states that he delayed the application 'to be bloody minded' but the context amongst all three of these senior managers is that they are discussing the Trade union representatives and their trade union activities. The tone and informal nature of the wording suggest that this exchange builds on an ongoing conversation that they had or were having about trade union representatives.

46. NA forwards the request to Mr Hawkes because Mr Hawkes was in the Employee Relations team and could set out whether the claimant did need a Pier Walk pass at the time. We accept Mr Hawkes' evidence that whilst NA could have approved this pass, it was appropriate for him to ask Mr Hawkes because he was the person in charge of industrial relations in that sector and would have known if the claimant needed a pass at that time.

47. None of the negative comments were copied to Mr Hawkes and he does not say anything that is negative. He comments purely on when and how building passes ought to be issued. On this occasion he says that because the claimant is only asking to attend a single meeting he would not normally issue a building pass.

48. We accept that this was his genuine motivation at the time. He was not party to the negative emails. We heard in evidence that the granting of a pass to that building would have meant that the claimant then had unlimited access to that building. It was not a pass that could be issued just for a week for example. You either had a pass or you did not. Therefore we accept his logic that for attendance at one meeting, it was easiest to just sign in it at reception as opposed to being granted a 'permanent' pass to the building.

49. We do not accept the claimant's argument that the fact that the respondent now operates a one-pass system which allows entry into all buildings suggests that Mr Hawkes' denial of the Pier Walk on this occasion was unwarranted. It simply reflects the pass policy at the time.

50. The claimant compares her treatment regarding this pass with a fellow Trade Unionist, Mr Batchelor. We accept that the recognition status and TU activities of the claimant and Mr Batchelor were significantly different in area (of the business) and volume and that this is why he had a pass for that building and she did not.

51. We accept Mr Hawksworth's evidence that he did not know about the claimant's grievances including the one that had been submitted just before this set of email exchanges in October 2018. He was a member of the ER team not the HR team and had no reason to have had any involvement with the previous grievances. The claimant provided no evidence to suggest that he had. We do not accept that because the ER team and the HR team were close, that he would have had any reason, particularly after so short a time, to be aware of the claimant's October grievance. We also accept that her 2011 and 2014 grievances were very historic and that Mr Hawkes had no reason to have had any knowledge or memory of them at this time.

Seeking to block the claimant from TU release

52. In March 2017 there were email exchanges (pg 314-316) which demonstrate that DL had approved that the claimant be temporarily released to cover TU activities whilst another union rep (LJ) was off sick. Martin Boots, head of ER, had applied on her behalf and there was no dispute that the claimant agreed to this release and that its purpose was to enable her to carry out TU duties. There then followed the following email from NA to a manager,

> *"Dana*
>
> *"For info, Martin Boots requested that Cheryl be allowed release to cover for a Tech and Data Rep who is on holiday for two and a bit weeks. We've agreed. On balance I think it could be a good thing to have her occupied away from TAM for the next couple of weeks."*
>
> The manager [Dana] replied '*Indeed'.*

53. This exchange supports the claimant's assertion that there was hostility from NA that was supported by others. Within that particular department TU activitists and their activities were not treated with respect. However it is also clear that the claimant was not prevented in any way from undertaking the specific TU responsibilities that had been applied for. She was not a recognised TU representative within her actal business area (TAM) and therefore could not have taken part in the TU consultation that was due to take part there the following week.

54. Whilst we accept that this was a rude email, we do not accept that it demonstrates a desire to stop the claimant carrying out her TU activities. The outcome that she will not be in TAM is, to NA, a positive. That should not have been stated, nor should the manager have agreed and to do so was inappropriate. Nevertheless, given that the claimant would not have been undertaking TU activities in TAM had she remained; we do not consider that this email or their approval of her going

elsewhere to carry out her recognised TU duties, can be capable of amounting to preventing her from carrying out TU activities. Their actions were specifically to allow her to go and perform TU activities within her TU recognised area of the organisation.

30 October 2018 TU meeting

55. There was considerable evidence provided by Mr Hawkes, the claimant and the claimant's witness Mr Jackson regarding this meeting. It was meant to be a meeting at which a new framework agreement with the unions was to be discussed as the existing one at the time was out of date. It is of note however that it was still the framework agreement in place at the time of the meeting.

56. Prior to the meeting the claimant met with Mr Jackson and another Unite rep. It is also clear that the other unions met each other beforehand. According to the claimant and Mr Jackson the TSSA representative had been raising concerns about the capacity in which the claimant was attending the meeting. The claimant was attending in place of the Full Time Officer. However she did not have formal recognition to fulfil this role. She was entitled to replace Mr Jackson when he was unable to attend meetings but there was no existing permanent arrangement that gave the claimant permission to attend in place of the then Full Time Officer.

57. We accept that Mr Hawkes knew she was going to be in attendance before the meeting commenced but we also accept that he may not have thought about in what capacity she was attending beforehand.

58. Prior to the meeting Mr Hawkes had a conversation with the TSSA representative. We accept his account that he was asked a generic question by her about what rules were governing the meeting in terms of attendance and he stated that it was the existing framework.

59. During cross examination the claimant accepted that technically, she did not have the right to attend in place of the FTO and that to do so was in breach of the framework agreement even if she had attended in his place at other meetings previously. Given that the TSSA rep had raised concerns about who was attending we are not surprised that Mr Hawkes intended to ask everyone in what capacity they were attending. We do not consider that he was singling her out, we consider that he was checking whether attendance was in accordance with the framework agreement. It was not. What singled her out was the fact that she did not technically have the right to be there.

60. Whilst the claimant alleges collusion between Mr Hawkes and the TSSA rep, even taken at its highest, the claimant's case is that the TSSA representative

raised concerns about the claimant's right to be there (though this is not in fact what we have found happened). When Mr Hawkes raised this it transpired that she did not technically have that right.

61. The claimant states that it was the manner in which it was done i.e. in front of the other unions at the meeting as opposed to a quiet word beforehand. We do not accept that in fact the TSSA rep told Mr Hawkes exactly what her concern was beforehand though she may have raised concerns about attendance. It was therefore not possible for Mr Hawkes to raise it in advance. When the claimant and her Unite colleagues left Mr Hawkes tried to arrange a way in which the claimant and her colleagues could continue to be present at the meeting but they refused. We do not find that Mr Hawkes was trying to prevent the claimant attend this meeting, we find that he was trying to ensure that the meeting was attended in accordance with the framework agreement – something which other unions had raised as a concern. This may have felt petty, but the pettiness was created by the other unions' behaviour on this occasion, not Mr Hawkes.

The Law

Direct Discrimination

59. S9(1) Equality Act 2010 defines race as a protected characteristic under the Equality Act.

60. Section 13 of the Equality Act 2010 states that 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.

61. S 23 Equality Act 2010 states that a claimant must show that it has been treated less favourably than a real or hypothetical comparator whose circumstances are not materially different to theirs.

62. The tribunal must consider the "reason why" the claimant was treated less favourably. It must consider what the employer's conscious or subconscious reason for the treatment? (*Nagarajan v London Regional Transport and others [1999] IRLR 572 (HL)*).

63. The discriminatory reason need not be the sole or even principal reason for the employer's actions. If race was a substantial cause, a tribunal can find that the action infringed the Equality Act 2010. The EHRC Code states that for direct discrimination to occur, the relevant protected characteristic needs to be a cause of the less favourable treatment "but does not need to be the only or even the main cause" (*paragraph 3.11*).

64. S123 Equality Act states that a discrimination claim must be brought within
(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.

…..

(3)For the purposes of this section—

(a)conduct extending over a period is to be treated as done at the end of the period;

(b)failure to do something is to be treated as occurring when the person in question decided on it.

65. The claimant has to establish that there is a prima facie case that the treatment complained of was because of her race. Once she has established that prima facie case, the respondent must prove that the treatment complained of occurred for a non-discriminatory reason. The respondent's submissions on this point of law are helpful and they are

"In order for the burden of proof to transfer from the Claimant it is insufficient to show a difference in status and detrimental treatment. Showing that conduct is unreasonable or unfair would not, by itself, be enough to trigger the transfer of the burden of proof Bahl v Law Society [2003] IRLR 640, EAT per Elias J at para 100, approved by the Court of Appeal at [2004] IRLR 799.'

66. We are aware of the need for caution as set out in Igen v Wong [2005] ICR 9311, CA, and that the necessity of proof at this stage is a low bar. However mere difference of treatment is not sufficient to shift the burden. We have considered the guidance in Deman v Commission for Equality and Human Rights[2010] EWCA Civ 1279 at paragraph 19, that the "more" which is needed to create a claim requiring an answer need not be a great deal. The fact that an employer's behaviour calls for an explanation does not automatically get a claimant to stage 2 of Igen v Wong test. There still has to be a reason to believe that the explanation could be that the behaviour was "attributable (at least to a significant extent)" to the prohibited ground (B v A [2010] IRLR 400.

67. We have also noted the respondent's submissions on the law in this regard which also made reference to Igen v Wong, Madarassy v Nomura International plc and Hewage v. Grampian Health Board [2012] ICR 1054.

Indirect Discrimination

68. S19 Equality Act 2010 provides:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected

characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) …

In considering a claim of indirect discrimination it is necessary to consider the statutory test in stages.

69. The first stage is to establish whether there is a PCP. It may include formal, informal policies, rules, practices, arrangements, criteria, conditions, prerequisites, qualifications or provisions. The PCP must be neutral and apply to the relevant group, whether or not the have the protected characteristic.

70. If the Tribunal is satisfied that the PCP has been or would be applied then our next step is the analysis of whether there is a particular disadvantage for those with the relevant protected characteristic when compared to those that do not share the protected characteristic. This comparative exercise must be in accordance with s23(1) Equality Act 10.

71. If the group disadvantage is established then it must be shown that it did or would put this claimant at that disadvantage

Victimisation

72. Section 27 provides:

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

(a) B does a protected act, or

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

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

(a) bringing proceedings under this Act;

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

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

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

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

(4) This section applies only where the person subjected to a detriment is an individual.

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

73. No comparator is necessary for a victimisation claim.

Trade Union Detriment

74. S146 provides:

(1) [A worker] has the right not to [be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place] for [the sole or main purpose] of--

(a) preventing or deterring him from being or seeking to become a member of an independent trade union, or penalising him for doing so,

(b) preventing or deterring him from taking part in the activities of an independent trade union at an appropriate time, or penalising him for doing so, ...

[(ba) preventing or deterring him from making use of trade union services at an appropriate time, or penalising him for doing so, or]

(c) compelling him to be or become a member of any trade union or of a particular trade union or of one of a number of particular trade unions.

(2) In subsection [(1)] 'an appropriate time' means--

(a) a time outside the [worker's] working hours, or

(b) a time within his working hours at which, in accordance with arrangements agreed with or consent given by his employer, it is permissible for him to take part in the activities of a trade union [or (as the case may be) make use of trade union services];

and for this purpose 'working hours', in relation to [a worker], means any time when, in accordance with his contract of employment [(or other contract personally to do work or perform services)], he is required to be at work.

[(2A) In this section--

(a) 'trade union services' means services made available to the worker by an independent trade union by virtue of his membership of the union, and

(b) references to a worker's 'making use' of trade union services include his consenting to the raising of a matter on his behalf by an independent trade union of which he is a member.

75. We have noted the respondent's submissions regarding the correct approach to considering this matter as set out by the EAT in Yewdall v. Secretary of State for Work and Pensions UKEAT/0071/05/TM and pursuant to this the questions the Tribunal will have to decide are:

(i) have there been acts or deliberate failures to act on the part of the employer?

(ii) have those acts or omissions caused detriment to the claimant?

(iii) were those acts or omissions in time?

(iv) in relation to those acts proved to be within the time limit, and which caused detriment, has the claimant established a prima facie case that they were committed for a purpose prescribed by S.146?

Jurisdiction

19. S147 TULR(C)A 92 provides:

[(1)] An [employment tribunal] shall not consider a complaint under section 146 unless it is presented—

(a) before the end of the period of three months beginning with the date of the [act or failure to which the complaint relates or, where that act or failure is part of a series of similar acts or failures (or both) the last of them], or

(b) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period, within such further period as it considers reasonable.

76. Unlike the detriment rights in the ERA, the focus is not on whether the worker was subjected to a detriment because of his or her union membership or activities, but instead on what purpose the employer was seeking to achieve by subjecting the worker to the detriment.

77. In *University College London v Brown 2021 IRLR 200, EAT*, the EAT held that the question of the employer's 'sole or main purpose' is a subjective one, to be judged simply by enquiring into what was in the mind of the person or persons within the employer organisation who committed the 'act, or any deliberate failure to act' complained of. The question of whether an employee qualifies for protection in respect of paras (a)–(c) of S.146(1) is an objective one.

Conclusions

Direct Discrimination

78. 11 May 2016 Nick Aldworth and Matthew Sercombe discussing the Claimant's sickness absence by email;

We find that this incident did happen and that it could amount to less favourable treatment. However, beyond the circumstances that the two individuals are white and the claimant is black, the claimant has not provided us with any evidence that suggests why she was being discussed in this way and in particular that it had anything to do with her race. Nevertheless, we have taken

into account the claimant's submissions that she was the only black woman in the department and that given that she was good at her job she cannot understand why these managers appeared to be so negative towards her. Discriminatory treatment is frequently not overt nor is motive obviously demonstrated. However, on the basis of the other emails and correspondence we have involving NA, we consider that the motivation for his animosity towards the claimant was his apparent dislike or lack of respect for trade union activists as opposed to anything pertaining to race.

79. The claimant points to the fact that she was the only black woman in the team as being sufficient to shift the burden of proof and show that the treatment could be attributable to her race. Whilst such a situation could sometimes be sufficient to shift the burden of proof, the claimant in this has not shown anything 'more' that suggests that the difference in treatment was because of her race. She has shown instead that this treatment occurred because of her TU activities. We therefore doe not consider that the claimant has shifted the burden of proof to the respondent under s 13 Equality Act 2010.

80. The claimant compares herself to the actual comparator Maryna Baxter who did not have a significant level of sickness absence. We consider that the appropriate comparator in these circumstances would be someone who was not black but had the same levels of sickness absence on which a manager may choose to comment on. The claimant was unfortunately mistaken when choosing Ms Baxter. The claimant's argument was that Ms Baxter did not have the same level of sickness absence because she was not treated as badly as the claimant and therefore this demonstrated a difference in treatment. We do not agree that this means she can be an appropriate comparator and is a misconceived understanding of a comparator.

81. We have considered whether a hypothetical comparator (someone who was not black who had the same levels of sickness absence) would have been treated differently and find that we have no evidence on which to suggest that they would. Therefore on balance we do not uphold this part of the claimant's claim.

82. From 22 July 2016 Nick Aldworth and Matthew Wilson deliberately delaying approval for Claimant's make a difference award for 5 months;

We do not accept that this occurred. We have found that NA and MW did not delay the approval for the claimant's make a difference award. The delay was by Mr Lingham and was caused by the fact that he was also nominating someone else.

This part of the claimant's claim is not upheld and is dismissed.

83. On 13 March 2017 did Nick Aldworth treat the Claimant less favourably than other Trade Union representatives in relation to the Claimant's request for a building pass by refusing to give her a building pass;

We have found that Mr Hawkes made the decision not to give the claimant her building pass. His reasons for not granting her the pass were unrelated to race. Therefore this incident did not happen as described. However we entirely understand why the claimant is upset by these emails and consider that they were wholly inappropriate.

This part of the claimant's claim is not upheld and is dismissed.

Indirect discrimination

84. We have concluded that the respondent appointed chairs to hear the claimant's grievances in accordance with their policy. That policy dictates that generally, such grievances are dealt with by managers within the department and that entirely external individuals are not generally appointed. This practice is capable of amounting to a 'PCP' in accordance with the legislation.

85. The decision not to appoint external managers was a reasonable one particularly when they ensured that the 2018 grievance was dealt with outside the claimant's team management. The claimant provided no evidence of collusion with regard to the outcome of any of the grievances. We accept that there were delays, particularly in regard to the 2018 grievance but it was not solely caused by the respondent and any delays were not caused by collusion against the claimant. For example we accept Mr Brown's evidence that the delays on his part were because of becoming a father at around the same time. We also accept that the 2014 grievance was dealt with informally and that Mr Best's recommendations at the end of that process were not enacted properly. Nevertheless, that does not amount to collusion or impartiality. There was simply no evidence provided that even suggests that this was occurring.

86. Even if we are wrong in this, we were provided with no evidence to suggest that people of the same race as the claimant would be disproportionately affected by such a PCP. Rather, operating an ineffective and biased grievance process would negatively affect everyone who brought a grievance. No figures were provided to us to suggest that more black people bring grievances than non-black people and so we cannot conclude that such a PCP would disadvantage black people more than white people.

Victimisation (s27 Equality Act 2010).

87. The claimant relies upon her four grievances as being protected acts. It was conceded by the respondent that the grievance dated 27 May 2011 and the

grievance dated 25 October 2018 were protected acts because they make reference to discrimination prohibited by the Equality Act 2010. We agree.

88. We also find that both the 2014 grievances do not amount to protected acts. We very carefully considered the basis for both and in particular the 9 October 2014 grievance along with all the notes and discussions regarding that grievance but could not find any reference to race or sex discrimination in either grievance or the documents relating to those grievances. The claimant clearly ascribed the negative treatment to her trade union activities and did not talk about prohibited discrimination under the Equality Act 2010.

89. Given that at the outset of the hearing the claimant stated that the following incidents were victimisation that arose because of her third grievance (9 October 2014), her claim on this basis must fail because there was no protected act.

(i) On 5 February 2015 did the Respondent fail to undertake the Claimant's Performance Review
(ii) On 11 February 2016 Nick Aldworth and Matthew Wilson breaching the Respondent's Attendance at Work Policy & Procedure 5.1.4
(iii) 11 May 2016 Nick Aldworth and Matthew Sercombe inappropriately discussing the Claimant's years of sickness absence by email.
(iv) From 22 July 2016 Nick Aldworth and Matthew Wilson deliberately delaying approval for the Claimant's make a difference award for 5 months.
(v) On 13 and 14 March 2017 Nick Aldworth, Alan Davidson, Matthew Wilson obstructing the Claimant's application for a building pass
(vi) On 14 March 2017 in an email from Employee Relations in relation to requesting a building pass for TU release encouraged others to make inappropriate comments about the Claimant

90. The only act of victimisation that relies on the fourth grievance (25 October 2018) was the incident on 30 October 2018 at a Trade Union New Framework Engagement Meeting for TFL. We have found that Jonathan Hawkes did not deliberately single out the claimant or belittle her. His intention at that meeting was to ensure it was convened in accordance with the framework in place at the given time following a separate union raising a point about attendance. The claimant was not there in the 'correct' capacity that was allowed for under the framework agreement and any adjustments that had subsequently been agreed. That was the reason for her treatment. In any event we also consider that he was unaware of the 2018 grievance or any of her earlier grievances at the time of that meeting and therefore cannot have been treatment of the claimant as a result of her grievance or grievances.

91. The claimant's claims for victimisation are therefore not upheld.

<u>TU Detriment</u>

92. We accept that there was a failure to cover the claimant's work in January 2015 by AB and NA. We also accept that this would have impacted on her ability to carry out her TU duties as it would make it more difficult to spend time on them knowing that her workload was not being managed in her absence. This is capable of being a detriment.

93. We must find however what purpose the employer was seeking to achieve by subjecting the worker to the detriment. The claimant states that it was so that she would not want to carry out her TU duties because she would return to such a work backlog. Whilst there are some emails which appear to show that at this early stage NA did not hold any personal animosity towards the claimant because of her TU duties, we find on balance that NA was seeking to make it difficult for the claimant to attend to her TU duties and that this is why no appropriate method was found for covering the claimant's workload at the time.

94. We go on to consider whether the claim is in time below as we need to consider whether it was part of a series of events before determining whether it is in time.

95. We accept that the claimant's end of year performance review 2014/2015 was not carried out. However we have also found that KK did not carry out anyone's performance reviews appropriately that year and that this was because of his lack of experience and ability as a manager. We do not accept that his purpose or intent in doing this was to penalise the claimant for her TU activities. He was simply an inexperienced and poor manager at that time.

96. On 13 March 2017 Nick Aldworth, Alan Davidson, Matthew Wilson engaged and made inappropriate comments via email communications in relation to the Claimant's request for a building pass. Their comments are clearly negative and capable of being a detriment. However the claimant's building pass was not blocked because of these comments. Mr Hawkes made the decision not to grant the building pass and his decision is based on whether the claimant needed a pass to attend union meetings in that building at that time. He was not copied into the inappropriate emails and was not aware of them when making his decision. Further the claimant's application is not blocked, it was forwarded to Mr Hawkes for a decision. It was not approved, but we accept Mr Hawkes' explanation for him not granting the building pass being that the claimant was only due to attend one meeting in that building at that time and so signing in at reception was the most suitable course of action.

97. The claimant's claims is that on 22 March 2017 in an email from Employee Relations in relation to requesting the Claimant TU release Nick Aldworth and Dana Skelly sought to block the Claimant from their business area by approving the TU release.

98. We have concluded that this email exchange whilst negative and inappropriate did not seek to block the claimant from carrying out her union activities or seek to penalise her for doing so. In fact it was doing the opposite and approving her for carrying out further duties. The side effect of that was that she would not be in the business area at a time when there was a business transformation going on. However the claimant has conceded that she was not recognised in her area in any event and therefore was not going to be prevented from carrying out her TU activities. The purpose or effect of this email exchange was not to prevent her or penalise her for carrying out TU activities. At the time she was entirely unaware of this email exchange and was simply approved for attending to other TU activities which she duly carried out. There was no intention by NA that the claimant should see such correspondence and therefore be put off from undertaking TU activities. NA's attitude and approach to the claimant and her TU activities are not condoned by the tribunal and we think that his language and behaviour has caused harm on their discovery. Our role however is to decide the claim that has been brought before us.

99. We have found that the claimant was not singled out by Jonathan Hawkes at the meeting on 30 October 2018 nor did he collude with other trade unions to force the claimant to leave the meeting. He upheld the framework agreement that was in place at the time. The claimant chose to leave the meeting with her Unite colleagues. We find that Mr Hawkes made every effort to bring them back to the table and it cannot be said on any reading of that situation that he wanted to penalise or prevent the claimant from undertaking her union activities.

100. We therefore conclude that all but one of the detriments relied upon by the claimant did not occur in the way described or were not caused by her Trade Union activities. Those claims are therefore not upheld.

101. We turn then to the failure to cover the claimant's work in January 2015 which we have found was a detriment caused by her Trade Union activities. We must consider whether this claim is in time and if not whether it was reasonably practicable for the claimant to bring her claim in time. This incident was not part of a series of events. We have found that the other events relied upon in the series did not occur as described and did not amount to detriments caused by the claimant's TU activities.

102. The incident itself is clearly out of time but we accept that the claimant was unaware of it until she received the SAR papers on 3 September 2018. The claimant submitted a grievance about this matter (and others) on 25 October 2018. She did not notify ACAS about the possibility of bringing a claim until 18 December 2018. An ACAS certificate was issued on 7 January 2019. The claimant submitted her ET1 to the tribunal on 6 February 2019.

103. To comply with the statutory deadline, as amended by the ACAS Early Conciliation process, the claimant needed to have contacted ACAS on or before

2 December 2018. She states that her reason for not doing so was because she did not read the documents from the SAR request for a few weeks because she was busy. Whilst that may be the case, at the point that she read them she was still in time, was well aware of her rights and the deadlines that applied and was engaged enough with the issues to submit a grievance to the respondent on 25 October 2018.

104. A tribunal may extend time for presenting a claim where it is satisfied of the following:

(i) It was "not reasonably practicable" for the complaint to be presented in time; and

(ii) The claim was nevertheless presented "within such further period as the tribunal considers reasonable".

(*Section 111(2)(b), ERA 1996*.)

105. The claimant has provided no reason as to why she chose not to contact ACAS until 18 December 2018. She was aware of the emails and had submitted a grievance about them. She was an experienced trade union representative and accepts that she was aware of the relevant statutory deadlines that apply to such claims in the employment tribunal. She has therefore provided no explanation that demonstrates that it was not reasonably practicable for her to submit a claim in time nor an explanation for the time lag between 2 December and 18 December specifically. We therefore conclude that her claim is out of time, it was reasonably practicable for her to submit her claim in time and there has been no explanation provided to us for the delay between 2 December and 18 December. This part of her claim is therefore not upheld.

Employment Judge Webster

Date: 27 June 2021