



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss S Folarin

**Respondent:** Transport for London

**Heard at:** East London Hearing Centre (by Cloud Video Platform)

**On:** 5, 6, 7, 8, 13 and 14 October 2021

**Before:** Employment Judge Gardiner

**Members:** Mr D Ross  
Ms G Forrest

## Representation

**Claimant:** Ms Naomi Ling, counsel  
**Respondent:** Ms Rebecca Thomas, counsel

**JUDGMENT** having been sent to the parties on 18 October and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

## REASONS

1. The Claimant is currently employed by the Respondent, TfL, as an Internal Auditor. It is a role she has performed since January 2008. According to the ET1, her current salary is £59,000. The employment contract recognised that the Claimant may be required to work additional hours over and above 35 hours per week. Those in paybands 2, 3, 4, and 5 may be required to work additional hours for which they would not receive payment. Whilst the contract states that “time off in lieu may be granted and taken at the Manager’s discretion”, there is no evidence that the Claimant has sought or been granted time off in lieu in this role.
2. This is a role she has performed for many years. Her case before this Tribunal is that she has suffered various detriments over the period from March 2019 to March 2020 in relation to her work, on the grounds that she was a Trustee of the Respondent’s pension scheme. The Respondent disputes the Claimant’s claim in its entirety and argues that any detriments which occurred before 22 November 2019 are time barred.

3. The case was heard over a period of four days, starting on 5 October 2021. The Claimant was represented by Miss Naomi Ling of Counsel and the Respondent by Miss Rebecca Thomas of Counsel. We are grateful to both counsel for the professional way in which they have conducted the proceedings. The evidence was contained in a main bundle of documents which extended to 630 pages, a supplementary bundle running to 77 pages and a further additional bundle of 73 pages. At the outset the issues to be decided were discussed and a revised List of Issues was agreed as reflecting the issues in the case. Miss Ling indicated that the Claimant was no longer pursuing claims of race and sex discrimination. These claims were to be dismissed upon withdrawal.

4. The issues to be determined were as follows:

Did the following amount to detriments?

a. Questioning the Claimant regarding her standing and appointment to the Board on the following occasions:

- i. On 9 April 2019, Dili Origbo saying 'should you not have asked for permission before taking up your new trustee role?'
- ii. In a meeting on 19 May 2019 Maureen Kirk saying that the Claimant must deliver 5 audits;
- iii. By an email dated 20 May 2019, Maureen Kirk displaying underlying disapproval of the Claimant's trustee role;
- iv. In a meeting on 26 July 2019, Maureen Kirk stating that not enough audit progress had been made.

b. Informing the Claimant that she would be expected to undertake her duties in her own time:

- i. On 17 May 2019 in a meeting, Maureen Kirk stated 'you must have known when you took up your trustee appointment that some trustee work would need to be done in your own time'.
- ii. On 26 July 2019, Maureen Kirk stating that 'you have already been told about your allocation for trustee work and that the rest must be done in your own time'
- iii. On 6 September 2019, Dili Origbo stating by email that 'there was a general expectation that individual Pension Fund Trustees would need to commit their own personal time to fulfil their obligations'.

c. Placing the Claimant on an informal Performance Improvement Plan (PIP) in November 2019.

- d. Placing the Claimant on a formal Performance Improvement Plan (PIP) in February 2020.
  - e. Failing to reduce the Claimant's workload at all or to a sufficient extent following her appointment in March 2019 to reflect her additional duties as a Pension Trustee;
5. Did the Respondent subject the Claimant to the above detriments on the ground that, being a Trustee of an occupational pension scheme which related to her employment, she performed (or proposed to perform) any function as such a Trustee?
  6. Witness evidence was provided by the Claimant herself, as well as three other witnesses Paul Murphy, Mark Harding and Stephen Hedley giving evidence on behalf of the Claimant; and by three witnesses called on behalf of the Respondent. They were Mrs Maureen Kirk, the Claimant's line manager, Ms Lorraine Humphrey, who heard the Claimant's grievance and Ms Justine Curry, who heard the Claimant's appeal. All witnesses had prepared written statements which they confirmed and were cross-examined in relation to the issues. At the conclusion of the evidence, both counsel provided written closing submissions, and also made oral submissions.

### **Findings of fact**

7. The Claimant started working for TfL on 3 March 2008. She was well regarded for her abilities as an auditor. The Tribunal accepts she was diligent and produced audit reports that were of a high standard. Before the events with which this claim is concerned, she had never been placed on an informal or a formal Performance Improvement Plan (PIP) because of any concerns about the way the Claimant was performing her role.
8. Following a reorganisation completed in November/December 2017, the Claimant became part of a team of auditors. From February 2018 this team was line managed by Mrs Maureen Kirk. Mrs Kirk's role was that of Senior Internal Audit Manager (SIAM). Mrs Kirk had previously been an Auditor like the Claimant but was promoted at the time of the reorganisation. Also promoted at the same time was Mr Niraj Shah, who was also promoted to be another SIAM. The SIAMs were managed by Ms Dili Origbo, who herself was promoted to the role of Head Internal Auditor. She in turn reported to the Director of Risk & Assurance, Clive Walker.
9. At around the same time as the reorganisation, in November 2017, the Claimant was elected a Pensions Consultative Council (PCC) Counsellor. This required her to attend six meetings a year. She was permitted to take time off from her audit duties in order to attend the required meetings.
10. The complexity of a particular audit will vary depending on its scope and subject matter. Regardless of complexity, all audits are completed by following a standard

procedure. Initially the SIAM will conduct high level planning meetings with relevant management in order to gain sufficient information to inform the audit. This information will then be used to produce a draft audit scope known as a Letter of Engagement (LoE) and an Audit Work Plan, setting out in detail the work that will be undertaken for the identified areas of risk. There then follows a period of “fieldwork” where the auditor meets with key staff and reviews important documents to inform the audit review. Once the fieldwork has been completed, there will then be a closing meeting with the client to discuss the potential findings, followed by a draft report. The client will add their comments to the draft report and a formal report will then be issued in final terms. For straightforward audits, the work may engage an auditor for 25 days or less. Complex audits could take 40 days or more.

11. During the financial year 2018/2019, audits were allocated to auditors on a pool basis. This meant that auditors would choose an audit in line with their available capacity from a central pool. The work was not allocated by a line manager. Auditors would work under the direction of the particular SIAM who had had responsibility for that particular audit. The line manager remained responsible for standard line management responsibilities in relation to their employment contracts.
12. During 2018/19, the Claimant managed to complete only one audit. This was in large part because she was absent from work for a substantial period on sick leave. The sick leave started on 11 April 2018. It followed a meeting the previous day [S3] when Mrs Kirk had asked the Claimant to undertake a Fraud Risk Audit in relation to London Underground. The Claimant considered that others were better placed to do this audit rather than herself and refused to undertake the audit. She walked out of the meeting and went home. Her period of sick leave starting the next day lasted for seven months, ending on 21 November 2018. This is a period of over 7 months. At the end of the financial year, the Claimant was midway through a Bus Audit, which she was expected to complete in the next financial year.
13. There is a dispute as to whether the Claimant was expected to complete a minimum of five audits during this financial year. We find, on the balance of probabilities, that there was no such expectation. No action appears to have been taken against the Claimant for only completing one audit during the 2018/2019 financial year. Another auditor with similar experience to the Claimant, SH, had also only completed one audit. There was no evidence that SH had been criticised for the way they had managed their workload, or for failing to achieve five audits.
14. On 18 December 2018, Mrs Kirk was emailed by HR asking that the Claimant be released during the following calendar year for the six scheduled meetings of the Pension Consultative Committee, the Annual Members Meeting and a pensions training session [96].
15. In January 2019, the Claimant was nominated by the PCC to be a Pension Trustee. She sent an email to Ms Origbo on 25 January 2019, headed “Courtesy Notification” in which she stated that she had been nominated by the PCC to become a Trustee of the TfL Pension Fund Board. She said that her nomination

would go before the Trustee Board at its next meeting [S7]. There is no record that Ms Origbo responded to the Claimant to acknowledge this email. However, she forwarded it to Mrs Kirk on the same day, asking:

“Please can you make inquiries with Pensions / Pension standing orders/ guidance as to what this means in terms of  
1) process for obtaining consent from line management (any)  
2) Potential work impact if any i.e time off”

16. It is clear from this response, that Ms Origbo was not previously aware of the significance of an employee under her line management being appointed as a Pension Trustee. In particular, she did not know whether prior consent could be required from TfL before accepting such a role. She did not know whether a Pension Trustee was entitled to time off work in order to discharge their responsibilities. Mrs Kirk’s witness statement is silent as to whether she made enquiries as requested and, if so, what her enquiries revealed. Given this silence and given the absence of any documents before us revealing any such enquiries, we find that on balance she did not make any enquiries.
17. In February 2019, an audit report was prepared on Trustee Board Effectiveness in the TfL Pension Fund [F335]. It was signed by Ms Origbo in her role as Head of Internal Audit, although Niraj Shah as the Senior Internal Audit Manager was the main point of contact. From the contents of this audit report, Ms Origbo ought to have a reasonable working knowledge of the scope of the responsibilities of Pension Trustees. It did not specify how much time was required by each Trustee but did provide that all Trustees should complete the Trustee Toolkit training within six months.
18. On 7 March 2019, the Claimant was told that her appointment would be formally ratified on 29 March 2019 [99]. That duly took place, such that on 29 March 2019, at the start of the 2019/20 financial year, the Claimant was a Pension Fund Trustee with the associated responsibilities.
19. The Claimant’s case is that she had a meeting with Ms Origbo on 9 April 2019 at which she told her that she had been appointed a Pension Trustee. Her case, as set out in the Agreed List of Issues, is that Ms Origbo said to her “Should you not have asked for permission before taking up your new trustee role?” The Claimant did not refer to any such conversation with Ms Origbo in her witness statement nor was she questioned about it by Miss Thomas. It is not referred to at any point in the documents. It is not an allegation that was made within the ET1. It appears to have emerged when a list of the issues was being drawn up. As a result, there is no evidence to support this allegation. We therefore do not find that this comment was made by Ms Origbo.
20. On 24 April 2019, Mrs Kirk sent the following email to the five members of her team [102]:

“It has been decided that we will not operate the pool as we did last year and so the majority of your audits will be from the operations plan. You will be expected to complete a portfolio of 5 audits minimum for the year so please let me have your preferences if you have not already done so. There is no guarantee that you will be allocated all of the audits you have chosen but every effort will be made to do this.”

21. The natural reading of this email is that the expectation that auditors should complete a portfolio of at least five audits was a new requirement, not a continuation of the same requirement that had applied in previous years. The expectation was the same on the Claimant as on the other members of Mrs Kirk’s team, notwithstanding the Claimant’s additional responsibilities as a Pension Trustee.
22. The Chairman of the Pension Consultative Committee was Stephen Field. On 1 May 2019, Mr Field wrote to Clive Walker outlining the extent of the Claimant’s responsibilities as a Pension Trustee. He asked if Mr Walker would support the Claimant and provide her with the necessary preparation time for reading papers, undertaking appropriate training, as well as attending all the relevant meetings. He did not specify the total number of days the Claimant would need to be released in order to discharge his duties.
23. In response Mr Walker said that he “actually didn’t know about this, but Ms Origbo (copied) was fully aware. Ms Origbo will ensure that appropriate allowance is made for [the Claimant’s] necessary time commitment to this important role” [F106]
24. Mr Walker forwarded the email to Ms Origbo, asking her if she was aware of this responsibility that the Claimant had assumed. Ms Origbo replied as follows:

“I was aware she was appointed to the Trustee Board, not of the consequential time commitment. I think I have the annual timetable, but from memory, normally these meetings are 2 hours each. Training is ½ -1 day, as is the annual members meeting. She’ll will still be expected to manage her work delivery like any other member of the team.”
25. This email is revealing as to Ms Origbo’s state of mind in relation to this new responsibility. It shows that Ms Origbo had not specifically focused on the extent of the time commitment that this responsibility would require. She was not prepared to adjust the Claimant’s workload to reflect these additional responsibilities at this time.
26. Later on 1 May 2019, Ms Origbo emailed the Claimant in the following terms:

“Sonja,

Congratulations on your formal appointment I'm sure that your wealth of experience will be of great benefit to the Board.

Over the next few weeks we will need to establish an understanding of what this commitment looks like in practice to ensure the appropriate balance between audit delivery, and your Trustee responsibilities. I've asked Maureen to discuss this with you in the first instance."

27. On 10 May 2019, the Claimant emailed Ms Origbo requesting a meeting with her at which the Chair of the Pensions Consultative Committee had also asked to attend. The Claimant clarified that this was to discuss her role as a Trustee and her consequential release. Ms Origbo responded that the Claimant needed to be discuss this with Mrs Kirk, who wanted to speak to her on this topic.
28. On 16 May 2019, Ms Origbo spoke to Mrs Kirk about the implications of the Claimant's trustee role. She followed this with an email exchange the following day. Of significance, in terms of what was recorded in the emails, Ms Origbo told Mrs Kirk that she was "expected to carefully consider any release granted as it will not be an acceptable reason for non-delivery for performance assessments". She emphasised the need for Mrs Kirk to ensure that the amount of release granted was sustainable from a business delivery perspective and spoke of guidance as to the boundaries within which she could negotiate. She stated to Mrs Kirk that there was the expectation that the Claimant would also commit non-work personal time to complete any trustee obligations. From the wording of the email, we conclude that this expectation was also Clive Walker's expectation at that time. Her view and that of Clive Walker was that releasing the Claimant for 11 days was reasonable from a business perspective. In her response Mrs Kirk said she would make it clear to the Claimant that time off should not be used a reason for non-delivery of audits. Essentially the Claimant's workload would not be reduced.
29. On 17 May 2019, the Claimant submitted the Bus Safety audit report [F431].
30. On 17 May 2019, the Claimant met with Mrs Kirk to discuss her responsibilities as a Pension Trustee and its impact on her workload. The Claimant's case is that Mrs Kirk told her at this meeting that she must complete 5 audits. She also alleges Mrs Kirk told her "you must have known when you took up your trustee appointment that some trustee work would need to be done in your own time". This is disputed by Mrs Kirk.
31. The meeting was followed by a lengthy email from Mrs Kirk on 20 May 2019 [F111]. This recorded that the Claimant would be allocated 11 days for Pensions Trustee and PCC Meetings. She added "this allows attendance at all meetings and training as well as 1.5 hours preparation time for the meetings". This allocation was based on "advice from Stephen Field and Dili's experience of reviewing these packs". She added, consistent with the email from Ms Origbo to Mr Walker on 1 May "You are accountable for managing your time to ensure that work objectives for the year are met".
32. On the disputed factual issues as to what was said during the 17 May 2019 meeting, we find that Mrs Kirk did tell the Claimant that she would still be required to deliver 5 audits over the course of the year. Whilst Mr Walker and Ms Origbo had

allowed the Claimant to be released for 11 days each year, they had not at this point adjusted her workload. It is likely that her workload would have been discussed during the meeting, and Mrs Kirk would have told her that it remained unchanged. Namely that the Claimant was still expected to deliver five audits. As to whether Mrs Kirk said the Claimant would need to carry out some work in her own time, Mrs Kirk was clear in her evidence that she did not make such a comment during the meeting. We note that it is not recorded as having been made in the contemporaneous emails following this meeting. However, given that Ms Origbo had communicated to Mrs Kirk on the very morning of the meeting the general expectation that the Claimant would complete some of her trustee duties in her own time, and there had been no reduction in her duties, we find, on the balance of probabilities that Mrs Kirk did relay this expectation to the Claimant during the meeting on this date.

33. The Claimant argues that this email from Mrs Kirk displayed underlying disapproval of the Claimant's trustee role. In her email response on the same date, the Claimant wrote:

"I would also be grateful if you did not write to me in such an aggressive tone. I am not under any disciplinary procedure, have not so long ago returned from long term sickness due to stress under your management, and despite all, have just finished working successfully with another Senior Internal Audit Manager. I am also looking forward to continuing my new work as a Trustee Director of the Tfl Pension Fund, despite your underlying disapproval."

34. We will return to the issue of whether the content and tone of Mrs Kirk's email amounts to a detriment when setting out our conclusions.
35. On 29 May 2019, the Claimant forwarded Mrs Kirk's email to Mr Field. She did so, following a conversation she had had with Eddie Darroch, the Chairman of the Pension Consultative Committee. She said "Clearly the time allocated by my line manager is insufficient for me to carry out my duties and responsibilities as a Trustee member of the Board and PCC despite your email to [Mr Walker] dated 1 May 2019. I therefore currently do not believe that Internal Audit Management are supportive of my role and hope that this matter can now be concluded quickly and satisfactorily".
36. The following day, Mr Field emailed Mrs Kirk saying that "currently only 11 days have been allocated to [the Claimant] and she has raised this matter with me via the Chair of the PCC as clearly that is not sufficient for her to carry out her duties and is not the outcome of our discussion". He asked for an additional three days to be allocated to cater for the time commitment for the Claimant's work on the PCC.
37. On 10 June 2019, the final report was submitted in the Bus Safety Audit.



38. On 18 June 2019, Mrs Kirk informed the Claimant that a total of 15 days had been allocated to include the training as a new Trustee that the Claimant had carried out on 4 June 2019. She did not indicate that any adjustment would be made to the expected workload and stated that “in future please be aware that training needs to be discussed and agreed with me in advance”.
39. On 25 June 2019, Mrs Kirk emailed the Claimant following her return from a period of annual leave. She wrote that “this year” there was an expectation that each auditor would complete a minimum of five audits and manage their own time accordingly. She stated that the first three audits will be allocated now and the last two in Q3. She then specified the three that the Claimant was being allocated, which started with an audit on payments to local authorities using the Borough Portal. It is clear from this email that the recently completed Bus Safety audit would not count towards the Claimant’s five audits. No adjustment was being made to the Claimant’s workload to reflect the additional time she would need to spend on Trustee duties. At the point of allocation, almost three months of the 2019/20 financial year had already elapsed.
40. On 1 July 2019, the Claimant followed up on her email to Ms Origbo on 10 May 2019 saying “the position regarding release for my trustee duties remains unsatisfactory and takes no account of my present workload or other related matters such as ongoing training as a newly appointed trustee”. She added that she had spoken to the Chair of the Pensions Consultative Committee, “and the earlier invitation to meet with you to resolve matters remains on offer to you”.
41. That prompted the following response from Ms Origbo on the same day:
- “Since my response to you (10 May 2019) I am aware that Maureen has had a number of conversations with yourself, and the Director of Pensions. Maureen previously informed me that she has taken account of your primary work deliverables as a member of the internal audit team, and your trustee responsibilities. I am surprised that you state that this is not the case, because it’s my understanding that she has authorised approx.11 working days’ worth of ‘release’ as a result.
- Please arrange a meeting with me to discuss your concerns further (Sahar can help if needed). Given the differing messages I am now receiving, from Maureen and yourself, I may also call Maureen into the latter part of the meeting.
- Until I fully understand the source and rationale of conflict, I do not see what additional value any third party, including the Chair of the PCC can offer at this stage.”
42. During this period the Claimant had been working on the Borough Portal Audit. She had met with the Borough Portal Auditees on 1 July 2019. On 9 July 2019, Mrs Kirk asked the Claimant to provide her with a draft Letter of Engagement by close of business on 15 July 2019. It does not appear that the Claimant responded to this request, at least in an email. On 18 July 2019 [443], Mrs Kirk emailed as follows:

“I requested that you provide a draft LOE by COB Monday 15th July. You have not provided the draft nor have you provided an alternative date to do this. As you are aware you are responsible for delivering a portfolio of 5 audits and based on your current work rate I am concerned that you will be unable to achieve this objective. To achieve this you will have completed two audits from the 2019 team by the end of September.

I would like you to set up a meeting for us to discuss. Thanks.”

43. It is unclear whether the reference to the Claimant completing “two audits from the 2019 team by the end of September” was to two audits including the Borough Portal Audit, or two audits in addition to the Borough Portal Audit. The Tribunal considers, on balance, that this is likely to be two audits including the Borough Portal Audit.

44. On 26 July 2019 there was a further meeting between the Claimant and Mrs Kirk. The Claimant’s case is that Mrs Kirk told her that not enough audit progress had been made. She also alleges Mrs Kirk said: “you have already been told about your allocation for trustee work and that the rest must be done in your own time”. This is disputed by Mrs Kirk. In Mrs Kirk’s summary of this meeting, she recorded the following:

“I advised that your progress on audit work would soon become a cause for concern as the current work rate would not enable you to meet your objectives for this year of completing a portfolio of a minimum of 5 audits.”

45. There is no specific record in the subsequent note of this meeting that the Claimant was told that she would have to complete trustee work in her own time. The note did record that the Claimant had said during the meeting that “audit work and trustee work do not exist in the same space” [446]. We find it is likely that the Claimant was told during this meeting that she may have to perform work during her own time.

46. On 6 August 2019, at 16:08, Mr Field emailed Howard Carter about the Claimant’s trustee duties, saying “on release which appears to have been granted the issue now is workload and that it is unreasonable to expect [the Claimant] to complete all the audits allocated to her if she is available for less of the time, due to release for attending and performing her Trustee/PCC duties. Anything you can do to resolve the situation would be greatly appreciated or if you prefer I can go directly to Clive/Dili”.

47. Two days later, on 8 August 2019, Mr Field emailed the Claimant, copying in Ms Origbo. Since his email to Mr Carter, he had met with Ms Origbo to discuss the Claimant’s “release and workload”. His email continued:

“[Ms Origbo] confirmed and assured me that all release for the remainder of 2019 has been agreed and also that your workload is manageable even with this release. Therefore, I am satisfied that all appropriate and reasonable steps have been made to enable you to fulfil your full Trustee and PCC responsibilities”

48. He ended his email by saying that “if you wish to discuss this further that you should in the first instance speak to Maureen your Line Manager or contact Dili directly”. Mrs Kirk was not copied into this email. The Claimant’s case is that Mr Field had been “nobbled” by Ms Origbo, who had somehow ensured that he supported the stance she was taking in relation to the Claimant’s workload. In writing this email he was “washing his hands” of any further engagement on this issue, leaving the matter firmly in the hands of the Claimant’s line managers. There is no evidence to indicate that Ms Origbo had behaved inappropriately in her dealings with Mr Field in discussing the Claimant’s workload. The likelihood is that Ms Origbo assured Mr Field that they would take account of the Trustee responsibilities when assessing whether the Claimant’s workload was manageable. Suitably reassured, he considered this was now a line management issue, which he would leave to Ms Origbo to deal with.
49. On 10 August 2019, the Claimant met with Mrs Kirk to discuss her current audit. Her email on the same day said “it looks like you have made progress with your planning and are in a position to supply a draft LoE. Please can you provide this by COB on Monday”.
50. On 15 August 2019, the Claimant emailed Mr Walker stating that she would like to raise a grievance. She did not specify the nature of the grievance, indicating that she would give details of the grievance at a Hearing. In response Mr Walker asked her to take reasonable steps to resolve the matter informally, as required by the grievance policy and procedure [F132]. He asked her to meet with Ms Origbo to explain her concerns to see if the matter could be resolved informally.
51. The Claimant’s response was that she had exhausted the informal means of resolving the grievance because of her unsuccessful attempts to speak to Ms Origbo and the other conversations that had taken place. Mr Walker insisted that there should be a meeting between the Claimant and Ms Origbo [134].
52. In compliance with Mr Walker’s instruction, the Claimant agreed to meet with Ms Origbo on 3 September 2019. The Claimant referred to the complexity of the internal audit work, which we take to be a reference to the complexity of the audit in which the Claimant was currently engaged.
53. In the meeting, Ms Origbo asked the Claimant what she regarded as a reasonable amount of time to be released for trustee duties. The Claimant replied she was unable to answer. The Claimant noted (and Ms Origbo did not dispute) that her workload was the same as the other members of Mrs Kirk’s team, being a minimum of five audits to be published by 31 March 2019. As recorded in Ms Origbo’s own email, she expected that Pension Fund trustees would need to commit their own personal time to fulfil their obligations [F138].
54. Ms Origbo’s decision was that there would be an adjustment to the Claimant’s workload to in recognition of the extent to which the Claimant would be engaged in Pension Trustee duties. This was that the Claimant would not be expected to complete the fifth audit. Instead, in relation to the fifth topic, she would need to complete the audit programme, all evidence to support audit findings and conclusions, which needed to be uploaded to the audit management system, and all fieldwork meeting notes and/testing work papers must be written up and

uploaded to the audit management system. She must also have completed the stakeholder closing meeting. The Claimant would be allocated an additional one day, during the current financial year, to complete the eleven modules of the Trustee Toolkit, which must be completed on her allocated work from home day.

55. There was some debate between the parties as to whether the process improvement initiative also referred to during this meeting was a new requirement, or the continuation of an existing requirement. The Tribunal considers it is likely to be the continuation of an existing requirement, given the reference to a process improvement initiative in the earlier part of the email noting what had been discussed during the meeting. The scope of this task was not specified. Therefore, the amount of time it would need was not clear. There was nothing in this email to indicate it would be less onerous for the Claimant than for other team members.
56. On 10 September 2019, the Claimant was told by Mr Walker that Lorraine Humphrey would hear her grievance. The Claimant was asked to provide full details of the grievance in writing.
57. On 23 September 2019, the Claimant asked Mrs Kirk to approve a half day training course in her role as Trustee on "Investment Principles" [153]. Mrs Kirk appeared reluctant to authorise this training. In her response on 25 September 2019 she said she had yet to speak to Aman "to understand how fundamental this training is and how different it is from the workshop on 24 October. Perhaps you could provide more details in the meantime" [152]. The Claimant responded the following morning, but by the day before the training there had been no response from Mrs Kirk. The Claimant asked Ms Origbo for approval. Ten minutes later, Mrs Kirk sent a three word email to the Claimant and Ms Origbo : "Have approved training".
58. Although the vast majority of the Claimant's audit work at this time had been spent on the Borough Portal audit, the Claimant was still required to deal with unresolved aspects of the Bus Safety Audit. On 25 September 2019 the Claimant received an email from Niraj Shah, the SIAM for whom this work had been undertaken. The email was copied to Mrs Kirk. It was worded as follows [143]:

"I am being asked why the below actions are overdue, and what the current status of each is. I have gone to AA, and there isn't a single file or update against any of the items, so I have not been able to provide a satisfactory response.

This is the third time I am having to remind you that updates need to be added against actions in a timely manner. It is unacceptable that:

- (a) You are not keeping AA up to date.
- (b) You have to be reminded about this every few weeks.
- (c) You do not seem to be taking on feedback provided.

I need you to update all the below actions on AA, adding any relevant emails/evidence sent/received to date, by the end of this week. Please confirm to me once you have done this, so I can go in and check."

59. Mr Shah's email listed 11 action points where further work was required. Several of these were duplicated, such that there were five different areas requiring action. In

response, the Claimant said she had allocated the afternoon of Friday 27 September 2019 for this follow up audit work, after her attendance at a Trustee Board meeting in the morning. She wrote that “I currently do not have sufficient time to conduct all audit work and Trustee duties but am trying my best in the circumstances. I am feeling very stressed about the situation”. The Claimant did not copy Mrs Kirk into this email.

60. The next day, 26 September 2019, Mr Shah responded. He stated that any concerns about her workload should be discussed with Mrs Kirk. He added that TfL provided a number of support mechanisms offering advice and guidance in relation to workplace stress. He concluded “I’m not sure if you have mentioned this to Maureen, therefore I am also copying her back in. This is something she should be aware of as your line manager” [147].
61. This prompted a further response from the Claimant, which this time she copied to Mrs Kirk and to Ms Origbo. This started as follows [149]:

“The position regarding my Trustee release to undertake duties and ongoing training has not been resolved, and I remain under pressure as a result. Dili and Maureen are well aware of all these issues and the resulting impact that I continue to experience to date.”

62. The Tribunal has been shown very limited documentation in relation to the Bus Safety Audit. The only pages to which we were taken, at pages F458-460, suggest that the Claimant sent one email to Mr Pike on 21 August 2019 chasing for action to be taken by 30 August 2019, and then did not email Mr Pike again until 27 September 2019 after the matter had been raised with her by Mr Shah. From this limited material, it appears that Mr Shah’s criticisms were justified. Certainly, the Claimant has not shown us that Mr Shah was wrong to raise the matters he did. There is no evidence that the Claimant updated all of the below actions on Auto Audit (AA), which was the main action point required by Mr Shah in his email. From Mrs Kirk’s point of view, this was consistent with her own recent experience of the Claimant’s underperformance, and specifically the Claimant’s failure to issue a LoE in the Borough Portal Audit.
63. The following day, Mr Field emailed Mrs Kirk with the dates of the 2020 Pension Fund Trustee meetings. He stated that release should be for a minimum of 3.5 hours or the actual meeting duration plus 3.5 hours reading preparation” [150].
64. On 30 September 2019 the Claimant emailed Mr Walker clarifying the subject matter of her grievance - “my grievance is about release for Trustee duties, training and workload, and the way I am being treated in this department” [F169].
65. There was a further exchange of emails between Mr Field and Mrs Kirk on 1 and 2 October 2019 about the amount of time that the Claimant would need to engage in the Pension Toolkit Training. Mrs Kirk noted that Ms Origbo had authorised a further day to do this training – again indicating that it was Ms Origbo who had the authority to decide on the amount of time the Claimant should be granted. Mr Field indicated that three days would be ample, and in her email to Ms Origbo, Mrs Kirk appeared to support this. In her email of 15 October 2019 to Mr Field, copied to Mr Walker, Ms Origbo expressed herself in the following terms [F159]:

“We had previously agreed to a day (7 hours) for toolkit training and have now agreed to grant an additional 9.5 hours bringing the total to 16.5. I must say however this whole situation really needs to be looked at because it puts us, as local people managers in a difficult position where we’re pressured to comply regardless of work impact. I find it quite disturbing that we as an organisation do not seem to have a defined view on what is reasonable, and that we now find ourselves in a position where someone outside of the organisation is basically informing us on what the release should be.”

66. In response, Mr Field wrote as follows:

“The guidance issued by the Pensions Regulator on completing the toolkit is 16.5 hours on average, some people will take longer others shorter – completion of the toolkit is a requirement. As an organisation we are fully supportive of ensuring that Trustees, once appointed, have the time necessary to fulfil their duties and workload needs to be adjusted for release as necessary. Mike and Ex Co are fully supportive of ensuring release is granted for carrying out the important role of Trustee and I must admit trying to time release down to the hour is really not that productive. I am however grateful that release has now given and hopefully Sonja is aware.”

67. On 5 November 2019, Mrs Kirk confirmed to the Claimant that she had been allocated three days to complete the Trustee Toolkit Training. Even though the amount of time allocated to the Claimant to complete the Training had not been finalised, she used the same email to take the Claimant to task for not making a start on the training modules. She said that the training was to be done on the next three Mondays when the Claimant would be working from home. She was not willing to grant a block release of three days in a row in part “due to your lack of progress on your current audit” [165].

68. On 1 October 2019, Mrs Kirk emailed the Claimant inviting her to a meeting to discuss the shortfall between her current performance and the level required.

“Dear Sonja

High  
Confidential

I am sorry to hear that you are feeling stressed and hope that you are taking full advantage of the help provided by Tfl. Of course you are welcome to approach me to discuss any problems as well.

However there is on ongoing issue with your work productivity that needs to be addressed as it is impacting on the delivery of the audit plan. We have discussed your lack of progress on your current audit several times and although our last meeting we on the 12/09/19 I have seen no visible progress on the audit. There is no additional information in Auto Audit and you have not responded with an updated version of the Letter of Engagement (including dates) nor have you made any changes to the audit programme as per my comments. It is now been four months since our first

meeting with the auditees on the audit and three months since we met with the Principal Auditee. We have yet to issue a letter of engagement. I do not believe that this demonstrates an acceptable level of service for our department.

The following are not up to date

- 1) LOE -this was sent to you on 16/09/19 for review -it is still in review to you and you have not added the dates as requested
- 2) Audit programme -this has not been updated since 16/09/19
- 3) Meeting notes-there have been no meeting notes added to AA even though the meetings occurred some time in the past - this is not in line with expectations that meeting notes are added to AA as soon as possible after the meeting occur
- 4) Audit action follow up - there are a number of actions that are now overdue on the audit you did for Niraj and again there is no evidence of your follow up activity in AA.
- 5) You are behind schedule in delivering your portfolio of audits

I appreciate that you are also trying to fulfil your Pension trustee duties but a balance needs to be struck between this and audit work. Your calendar entries do not provide me with a picture of overload and therefore I am going to implement an informal Performance Improvement Plan (PIP) to address the issues. I will send you an invite for the meeting.

The purpose of the meeting is to:

- discuss the apparent shortfall between your current performance and the level required
- give you the opportunity to respond in detail
- discuss the circumstances to explain the shortfall
- look at steps to bring your portfolio back on track in line with expectations i.e. balance of audit and trustee activities as per the release agreed for this year.”

69. It appeared to Mrs Kirk that the Claimant had not uploaded any working documents to the Auto Audit system since 16 September. This was consistent with the criticism that Mr Shah had been making of the Claimant. In evidence, the Claimant accepted that she had not updated the AA system, arguing that this was not necessary given that these documents were still in draft and had not been finalised. This explanation was not in accordance with the Respondent’s standard practice. It appeared to Mrs Kirk that there was no evidence of the work that the Claimant was doing. The Claimant’s diary had simply referred to herself as “Busy” on various occasions throughout the working week. It was not possible for Mrs Kirk to tell what particular tasks the Claimant had been working on.
70. On 4 October 2019, Mrs Kirk invited the Claimant to a meeting to discuss whether the Claimant should be put on an informal Performance Improvement Plan. The Claimant did not attend this meeting. This was because her union was engaged in industrial action at the time, which involved a refusal to attend any meetings to discuss performance.

71. On 5 November 2019, the Claimant attended a grievance meeting chaired by Lorraine Humphrey to consider her grievance.
72. On 12 November 2019, the Claimant emailed Mrs Kirk in the following terms:

“With reference to your email dated 5 November 2019 below regarding Trustee training, it is not for you to instruct me or get involved in any aspect of my Trustee duties or training. In fact, Stephen Field as a Director cannot tell me what to do as a Trustee as confirmed at recent training events and in minutes of recent meetings with fellow Trustees.

Therefore, please can you refrain forthwith from instructing me about my Trustee duties and training as this is entirely outside your remit.”
73. In the middle of November 2019, the Claimant was invited to a formal meeting to discuss whether she should be put on a Performance Improvement Plan. On 13 November 2019, the Claimant’s union representative confirmed the Claimant would not be attending such a meeting due to ongoing industrial action short of strike action.
74. On 27 November 2019, in a change of tack in relation to the Toolkit Training, Ms Origbo emailed the Claimant to offer her the option of completing the Toolkit modules across consecutive days on the basis this “might be more useful” [167]. The reason for her change of tack in relation to the training is not clear, but this appears to have been a response to the Claimant’s objection to doing the training on consecutive Mondays.
75. On 6 December 2019, the Claimant attended a second grievance meeting with Ms Humphrey. In the meantime, Ms Humphrey had spoken to Mr Field, Ms Origbo and Mrs Kirk.
76. The meeting to discuss whether the Claimant should be placed on a Performance Improvement Plan was rescheduled for 11 December 2019. Again, the Claimant did not attend. A further meeting was diarised for 8 January 2020, this time not expressed to be a Performance Improvement Plan meeting. Again, the Claimant did not attend.
77. On 13 January 2020 [287], Mrs Kirk emailed the Claimant to tell her that it had been decided to grant the Claimant 20 days off per year to complete her trustee duties and training. She stated: “This will result in moving the completion date for your portfolio of audits from end of March to end of April”. This proposed solution was overtaken by the outcome of the grievance. As part of the grievance Ms Humphrey has spoken to Mr Field, Mrs Kirk and Ms Origbo and had a telephone call with Eddie Darroch, the Chair of the Pension Consultative Council. She also spoke to Paul Murphy. The grievance outcome was communicated at a face to face meeting on 29 January 2020 and confirmed in writing in a letter dated 4 February 2020. Ms Humphrey’s decision was that the grievance should be partially upheld. She recommended that guidance should be produced available to trustees and line managers that sets out the level of release that will be needed to undertake the role and related training depending on which pension sub-groups they attend. Her decision on the grievance was that line management should consider reducing the



Claimant's target for her audits for 2019/20 to three audits to be completed and one to reach a fact-finding stage [200].

78. On 7 February 2020, the Claimant chose to appeal against the grievance outcome [205]. Because the Claimant had lodged an appeal, Ms Humphrey decided not to communicate her recommendations to Stephen Field and communicated her recommendations to Mrs Kirk, with advice that they should not be implemented, pending the appeal [277]. There was a grievance appeal meeting on 5 March 2020 chaired by Ms Curry. In the course of the grievance appeal hearing, the Claimant told Ms Curry that she had taken 28.5 days on trustee duties [280], not the 20 days that the Respondent was allowing.
79. A grievance appeal outcome letter was issued on 17 March 2020 [277]. The outcome of the grievance appeal was that Ms Curry did not consider that there was any basis for her to overturn Ms Humphrey's recommendations, although she did recommend that they should be implemented with immediate effect [279].
80. By that point, the recommendation as to guidance had already been actioned. Lawyers were instructed to draw up guidelines to assist trustees and line managers in the future. The guidelines were dated 14 February 2020. This stated that there was a balance to be struck between the time off required for the employee to perform their trustee role, and the needs of the employer in running their business. It added that the amount of time off must be reasonable in all the circumstances [224].
81. The Claimant contacted ACAS to initiate Early Conciliation on 21 February 2020 and received her Early Conciliation Certificate on 28 February 2020. These proceedings were issued on 7 March 2020.

### Legal principles

82. This claim is brought under Section 46 of the Employment Rights Act 1996. That gives an employee 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, being a trustee of a relevant occupational pension scheme which relates to her employment, the employee performed (or proposed to perform) any functions as such a trustee. Under Section 48 an employee may present a complaint to an employment tribunal that they have been subjected to a detriment in contravention of Section 46. Section 48(2) provides that it is for the employer to show the ground on which any act, or deliberate failure to act, was done.
83. A detriment is shown if "a reasonable employee might consider the relevant treatment to constitute a detriment" – *Jesudason v Alder Hey Children's NHS Foundation Trust* [2020] IRLR 374. Section 46 will be infringed if the Claimant's performance or proposed performance of any functions as pension trustee was more than a trivial influence on the employer's treatment of the claimant (see *Fecitt v NHS Manchester* [2012] ICR 372 at paragraph 45). So far as the burden of proof is concerned, if the Claimant can establish a prima facie case that the detriment was influenced by her performance of her pension trustee duties, it is then for the employer to show that the Claimant's performance of her trustee role formed no part of the reason for the alleged detriment. However, a failure by a Respondent to

show positively why any action (or inaction) was taken does not mean that the Section 46 complaint succeeds by default (*Ibekwe v Sussex Partnership NHS Foundation Trust* UKEAT/0072/14/MC).

84. Time limits apply to such complaints. ACAS Early Conciliation must be initiated within three months of the acts of which complaint is made, unless it was not reasonably practicable to bring such a complaint within the three-month period. Where the act is part of a “series of similar acts or failures”, the three-month time limit runs from the last act or failure in the series. In *Arthur v London Eastern Railway* [2007] ICR 193, the Court of Appeal discussed the necessary connection between acts for them to be part of a series. At paragraph 35, Lord Justice Mummery identified some of the relevant considerations:

“In order to determine whether the acts are part of a series some evidence is needed to determine what link, if any, there is between the acts in the three-month period and the acts outside the three-month period. We know that they are alleged to have been committed against Mr Arthur. That by itself would hardly make them part of a series or similar. It is necessary to look at all the circumstances surrounding the acts. Were they all committed by fellow employees? If not, what connection, if any, was there between the alleged perpetrators? Were their actions organised or concerted in some way? It would also be relevant to inquire why they did what is alleged. I do not find “motive” a helpful departure from the legislative language according to which the determining factor is whether the act was done “on the ground” that the employee had made a protected disclosure. Depending on the facts I would not rule out the possibility of a series of apparently disparate acts being shown to be part of a series or to be similar to one another in a relevant way by reason of them all being on the ground of a protected disclosure.”

85. Given the approach in *Arthur* to considering whether an individual detriment forms part of a series of detriments, we do not find it helpful to adopt the structured sequence set out at paragraph 23 of *Yewdell v Secretary of State for Pensions* UKEAT/0071/05/TM. This requires the Tribunal to consider the issue of time limits before the issue of causation, when the guidance given in *Arthur* indicates that the cause of the detriment may be relevant to whether it is in time. We note that *Arthur* was decided after *Yewdell* and is a decision of a higher appeal court.
86. If a complaint has been issued outside the three-month limitation period, then the burden is on the Claimant to show that it was not reasonably practicable to present a claim within time. If this is established, then the Claimant must go on to show that the claim was presented within such further period of time as was reasonable thereafter. Miss Ling relies on *John Lewis v Charman* UKEAT/0079/11 to argue that it was not reasonably practicable for the Claimant to issue tribunal proceedings here until internal proceedings had been exhausted. However, we note that, unlike the present, that was a case where the Claimant was not being advised by a trade union. It was the absence of any advice from lawyers or trade unions in that case that meant, on the particular facts, the Claimant was reasonably ignorant of time limits. It was not reasonably practicable to issue proceedings until the internal appeal had been exhausted. This is to be contrasted with the present case where the Claimant was a member of a trade union and received assistance from the

trade union throughout his grievance. Mr Harding, her trade union representative, was named on the ET1 as the Claimant's representative. At no point in the Claimant's witness statement did she claim she was ignorant about applicable time limit for bringing tribunal proceedings.

## Conclusions

### Issue 1(a)(i)

87. We have rejected the Claimant's contention that she was told on 9 April 2019 by Ms Origbo that she should have asked permission before taking up her new role. We found that this allegation was unsupported by the evidence.

### Issue 1(a)(ii) and 1(b)(i)

88. We have found that the Claimant did say in the meeting on 17 May 2019 that the Claimant must deliver five audits, and also that she was told that she must have known that some trustee work would need to be done in her own time. We do not find that either comment amounts to a detriment. At this point, the Claimant was not clear on the extent of her duties and therefore on the extent to which it would impact on her ability to complete audits. The Claimant had not asked for a specific reduction to be made in her duties. Given the seniority of the Claimant's role, it was reasonable to expect her to carry out some work, on occasions, outside standard daytime working hours. This could include pension trustee duties. There was a degree of flexibility in the requirement to carry out five audits, in that some audits were less time consuming than others. The Claimant had the opportunity to ask to carry out shorter audits or select those that were less onerous. For whatever reason, she had not done so to this point.

### Issue 1(a)(iii)

89. We do not consider that Mrs Kirk's email of 20 May 2019 displayed an underlying disapproval of the Claimant's trustee role. It was a factual record of what had been discussed at the meeting on 17 May 2019. There was nothing in the language used in the email to suggest Mrs Kirk disapproved of the Claimant's role as a pension trustee.

### Issue 1(a)(iv) and 1(b)(ii)

90. We accept that Mrs Kirk stated in the meeting on 26 July 2019 that not enough audit progress had been made, and also that she told her that trustee work not covered by the agreed number of days for which she was released must be done in her own time. For the reasons already given, it was reasonable for Mrs Kirk to explain to the Claimant that there would be a need to carry out some work in her own time. At the time of the meeting on 26 July 2019, almost four months of the financial year had passed. The Claimant's case is that the Borough Portal audit was particularly complex. We accept that it was made more complex by the difficulty in arranging appointments with the relevant stakeholders who were undergoing a process of reorganisation. However, on the evidence provided, we are not in a position to evaluate the extent to which the particular requirements of

this audit would have required substantially in excess of the normal time period for such period.

91. Although the Claimant had completed the Bus Safety Audit started in the previous financial years, she had yet to complete one audit started in this financial year. She had a target of five audits to complete across the year. It was therefore reasonable for Mrs Kirk, as the Claimant's line manager, to make this comment. The Claimant did not suffer a detriment in either of the respects alleged.

Issue 1(b)(iii)

92. In the email on 6 September 2019, Ms Origbo did state that there was a general expectation that individual Pension Fund trustees would need to commit their own personal time to fulfil their expectations. For the reasons already given, the Tribunal does not consider that such a statement amounted to a detriment. At the same time as this comment was made, the Respondent was reducing the Claimant's workload in that she was being excused the requirement to write the fifth audit report, so long as the preparatory work was completed.

Issues 1(c) and 1(d) – Placing the Claimant on a Personal Improvement Plan

93. The rationale for questioning the Claimant's performance to the extent that a Personal Improvement Plan was considered appropriate was set out in Mrs Kirk's email dated 1 October 2019. In each of the respects set out in that email, there were genuine concerns about the Claimant's performance. She had not yet issued a Letter of Engagement. Without providing any good reason, she had not updated the audit programme since 16 September 2019. The Claimant has not established, contrary to the third point in the email, that she had added meeting notes to Auto Audit. Mr Shah had serious and apparently legitimate criticisms of the Claimant's performance on the Bus Safety Audit. Finally, the Claimant was, on the face of it, behind in the schedule in delivering the portfolio of audits expected over the course of the year.
94. Therefore the Tribunal finds that the only reason for putting the Claimant on a Performance Improvement Plan, whether informally or formally, was because of concerns about the Claimant's performance in her role as an auditor, rather than because of the Claimant's status or her performance of her role as a Pension Fund Trustee. Even if the Claimant has shown a prima facie case that the reason for the Performance Improvement Plan had been influenced by the performance of her pension fund trustee role, we find that the Respondent has discharged the burden of proof. No part of the reason for the informal or the formal PIP was because of the Claimant's role.

Issue 1(e)

95. There was no formal reduction in the Claimant's workload until Ms Origbo's email of 6 September 2019, in response to the informal grievance meeting held with the Claimant on 3 September 2019. That was the first occasion on which the Claimant had specifically asked the Respondent to reduce her workload as well as to release her for her Trustee responsibilities. Thereafter a further reduction in practice was proposed on 13 January 2020 when it was proposed that the deadline for

completing the Claimant's workload should be extended from the end of March 2020 to April 2020. That was overtaken by the outcome of the grievance when Ms Humphrey reduced the requirement to three audits and one in progress, albeit that this requirement was not implemented because the Claimant chose to appeal against the grievance outcome.

96. We do not consider that the failure to reduce the Claimant's workload until September and the extent of the reduction thereafter was a detriment in the following circumstances:
- a. The Claimant had no statutory or contractual right to a reduced workload to reflect the extent of her trustee duties;
  - b. The Claimant had not been asking for a specific reduction in her workload until the meeting on 3 September 2019;
  - c. It was reasonable for the Respondent to expect the Claimant to carry out at least some of her responsibilities outside core working hours;
  - d. The amount of work required to complete five audits was potentially flexible depending on the complexity of the audits;
  - e. The Respondent's understanding of the amount of the time commitment involved in being a Pension Trustee was evolving over time. Where Mr Field had indicated that further days were required for meetings, preparation or training, that was agreed.
97. To the extent that there was a delay in implementing the adjustment proposed by Ms Humphrey in the grievance outcome, this was not "on the ground that" the Claimant was a pension trustee. Rather it was the result of the potential that the workload adjustment might be further altered in the light of the appeal, and therefore a decision to await the outcome of the appeal.
98. For these reasons, each of the Claimant's detriment claims fails on their merits. As a result, we do not need to consider the issue of time limits.

**Employment Judge Gardiner**  
**Date: 23 March 2022**