# EMPLOYMENT TRIBUNALS

**Claimant:** **Miss Zarah Kamaly**

**Respondent:** **London Borough of Tower Hamlets**

**Heard at:** **East London Hearing Centre**

**On:** **15, 16 and 17 November 2022**
**14 December 2022 (in chambers)**

**Before:** **Employment Judge Barrett**
**Members:** **Mrs Blake Ranken**
**Mr D Ross**

**Representation**
Claimant: Represented herself with assistance from Mr Wahid Zaman
Respondent: Mr Benjamin Uduje of counsel

# JUDGMENT

**The judgment of the Tribunal is that: -**

1. **The Respondent victimised the Claimant by:**

   a. **Failing to reach conclusion on the Claimant's grievance as to whether the Claimant had been discriminated against; and**

   b. **Failing to implement a formal process when responding to the Claimant's grievance.**

2. **To that extent the Claimant's victimisation claim is well-founded and succeeds.**

3. **The Claimant's remaining complaints of victimisation are dismissed.**

4. **A 3-hour hearing will be listed to deal with remedy.**

# REASONS

## Introduction

1. The Claimant's employment with the Respondent began in 2008 and is continuing. After a period of ACAS conciliation between 16 July and 16 August 2019, she presented her claim on 19 November 2019, raising complaints of maternity discrimination, direct sex discrimination and victimisation. At a preliminary hearing on 8 September 2022, it was determined that the maternity and direct sex discrimination complaints were not brought within the time limit set out in section 123 (1)(a) of the Equality Act 2010 and that there were not just and equitable grounds for extending time to consider them. Therefore, the only claim for determination at this hearing has been the victimisation claim.

## The hearing

2. The hearing took place over 3 days in person at the East London Employment Tribunal. The Claimant represented herself but asked that her partner Mr Wahid Zaman could cross-examine the Respondent's witness which permission was granted. The Respondent was represented by Mr Benjamin Uduje of counsel.

3. The Tribunal was provided with a bundle of documents prepared by the Respondent of 246 numbered pages (262 electronic pages) and a supplementary bundle of documents prepared by the Claimant of 49 pages. References to numbers in square brackets below are to pages in the Respondent's bundle, and where preceded by 'Supp', to pages in the supplementary bundle. The Respondent also provided copies of its grievance and redeployment policies during the course of the hearing.

4. The Claimant provided a witness statement and gave evidence. The Respondent provided witness statements from Mr John O'Shea, Head of the SEND Team, and Ms Christine McInnes, formerly Service Head – Education & Partnerships. Ms McInnes gave evidence. Mr O'Shea did not attend due to ill-health. We read his statement but in the circumstances were able to place only limited weight on it.

5. At the outset of the hearing both parties confirmed that the issues for determination were those set down at the preliminary hearing conducted by Employment Judge Burgher, namely:

- *'The Claimant relies on the protected act whereby:*
    - *She brought an informal grievance to Christine McInnes on 11 June 2019;*
    - *The Respondent believed it was likely that she would bring a sex discrimination claim.*
- *Was the Claimant treated unfavourably because the Claimant made a protected act, in the following respects:*

- *By Ms McInnes suggesting that her grievances be resolved informally on 26 July 2019;*
- *By inadequately investigating her grievances, in particular:*
  - *Failure to clarify and confirm when the Claimant was informed and consulted;*
  - *Failure to clarify and confirm when the new structure/ reorganisation was introduced;*
  - *Failure to clarify and confirm when the new SC4 and PO2/3 posts were introduced;*
  - *Failure to clarify and confirm the differences between the Claimant's role pre and post maternity leave;*
  - *Not sourcing and providing the relevant job descriptions for the new posts.*

- *By rejecting the Grievances by the Respondent's outcome letter dated 30 September 2019.*
- *By not reaching a conclusion of discrimination in the informal grievance investigation decision.*
- *By the Respondent failing to implement the formal process.'*

**Findings of fact**

*Commencement of employment*

6. The Claimant was employed by the Respondent from 2008, initially as a Trainee Administrator. In 2010 she joined the Special Educational Needs ("SEN") team as a SEN Admin Officer, which was graded at scale SC4. She was employed on a one-year fixed-term contract which was extended from year to year.

7. The Claimant had her first child in 2014 and took maternity leave from 2014 to 2015.

*Sick leave and maternity leave 2017-2018*

8. The Claimant had her second pregnancy in 2017, complications of which required her to take sick leave from April 2019 [Supp 23]. At that time, she was the only SEN Admin Officer in the SEN team. She commenced her maternity leave on 10 October 2017 [61a].

9. On 17 April 2018, the Respondent's HR department wrote to the Claimant that her fixed-term contract would be extended to 31 March 2019 [75].

10. The Claimant's maternity leave ended on 9 October 2018, and she thereafter took accrued annual leave.

11. At that time, the Claimant's line manager was Mr Doug Kieran, Business and Finance Officer in the SEN team. On 31 October 2018, the Claimant emailed Mr Kieran and asked to come into the office to meet the new Head of Service, Mr

John O'Shea [Supp 17]. That meeting took place on 6 November 2018 [Supp 17]. They discussed briefly what work the Claimant would be doing on her return and Mr O'Shea told the Claimant he would like her to conduct annual reviews of Education Health and Care Plans ("EHCPs").

12. In around November 2018, the Claimant's line manager Mr Kieran left the Respondent. The Claimant returned to work on 19 and 20 December 2018, then took leave over the Christmas break, and was in work again from 4 January 2019.

*Changes to the SEN team*

13. During the Claimant's maternity leave, the SEN team had experienced some difficulties. Ms McInnes described the service as "*completely dysfunctional*" with concerns arising about not meeting statutory duties and financial non-compliance. Two additional grade SC4 Admin Officers, Ms Shuhena Khatun and Ms Tasnim Khanom, were recruited to provide administrative support to improve the service. They had generic job descriptions and took on some of the responsibilities which had been the Claimant's before she went on sick leave followed by maternity leave.

14. The Claimant was not told about their recruitment, the reasons for it or the proposed division of responsibilities between the expanded team. She was not told whether, and if so how, her own role had changed. She was also not told who would take over her line management following Mr Kieran's departure. She assumed it would fall to Mr O'Shea who had been Mr Kieran's line manager.

15. The Claimant's maternity cover, Ms Tangina Khatun, was also retained in the team after the Claimant's return to work. Ms Khatun had been employed by the Respondent prior to joining the SEN team and had been moved to cover the Claimant's maternity leave because her previous fixed-term contract was otherwise due to expire.

16. The Respondent does not dispute that there was a failure to keep the Claimant informed of these changes to the team, although it disputed the Claimant's use of the word "*restructure*" to describe the changes.

*Interactions between the Claimant and Mr O'Shea*

17. On 7 January 2019, the Claimant requested a meeting with Mr O'Shea to ask about flexible working to accommodate her childcare commitments. They met on 9 January 2019. The Claimant's unchallenged evidence is that the meeting only lasted for 3 minutes, and that Mr O'Shea told her that her request would not be suitable for the team structure. She found this response to be vague and unsatisfactory. The Claimant subsequently followed the matter up with her union and the Respondent's HR department and was granted the adjustment to her hours she sought.

18. On 28 January 2019, Mr O'Shea submitted a request to extend the Claimant's contract for a further 6 months from 31 March 2019 to 30 September 2019 [76]. In the event, a 12-month extension to 31 March 2020 was approved on 7 March 2019 [77].

19. On 7 February 2019, the Claimant wrote to Mr O'Shea in an email:

"**Following on from our team meeting yesterday, and as discussed I would like to put myself forward to take on extra responsibilities to cover Ergin's role whilst is he on leave.**

**It would be a good opportunity for me to learn specifics with regards to case work and at the same time it will be beneficial for the team as the work will get done.**

**I want to broaden my skill set beyond what I currently have and I see this as a great opportunity**." [Supp 8]

20. The Claimant says she received no reply to this email, and the Tribunal has seen no evidence to the contrary.

21. On 27 March 2019, the Claimant emailed Mr O'Shea asking for her Personal Development Review ("PDR") to be brought forward. She wrote:

"**The main item I would like to discuss in the PDR meeting is my development, I have previously noted my intention and willingness to undertake additional training courses / qualifications to help further advance my knowledge and career.**

**I have seen the email sent from HR regarding apprenticeships and have also been reviewing the Tower Hamlets intranet and have found a couple of suitable courses which I wanted to run by you for your feedback. In order to enrol on a course I will have to make an application by 30/04/19**." [Supp 2]

22. The Claimant attached a training request form asking to attend a 24-month Children, Young People and Families Practitioner level 4 course [Supp 4]. She received no reply to this email.

23. The Claimant says that when she asked Mr O'Shea verbally whether he had reviewed her emails, he told her that he thought her requests for additional training showed she wanted to leave the organisation and so he would not agree. Mr O'Shea's witness statement says that he had asked the Claimant whether childcare was an area she was interested in moving into, and that he refused approval for the course because it was not relevant to her role with the Respondent. The Respondent was entitled to refuse this particular request for training as it did fall outside the remit of the Claimant's role. However, we accept the Claimant's account as to the manner in which that refusal was communicated and find that it caused her some frustration.

*Recruitment to a new SC6 role in the SEN team*

24. On 24 April 2019, Ms Khatun emailed the Claimant requesting her payroll number. The Claimant supplied it but queried the basis for the request. Ms Khatun replied:

"**So I've been managing the admin team. But as we had the same post number you couldn't be put under me on hr but it's changed now so I can.**

**I'll be doing your sickness and approving your leave once this is all up and running**." [Supp 11]

25. This was the first indication to the Claimant that Ms Khatun, who had previously undertaken her maternity cover, would assume managerial responsibilities over her. It was an inappropriate and insensitive way for the Respondent to communicate this unexpected change.

26. On 1 May 2019, Mr O'Shea wrote to the SEN team:

"**I have been meaning to write to let you all know that Tangina went through a recruitment process towards the end of last term - just before Easter and has been successful in securing a post with us to continue the work that she has been doing.**

**I am sure that you will want me to congratulate Tangina on behalf of the team and that individually you will all be pleased for her.**

**Now that we know that Tangina is staying I will be looking for her to support me to put in place regular team meetings and training opportunities for colleagues so that we can move things even further forward**." [Supp 13]

27. The Claimant was upset to receive this email because she had not been aware that the role secured by Ms Khatun had been created or available as a vacancy. The role was at scale SC6, two grades higher than her own, with a commensurately higher salary. Had she been aware, she would have wished to apply for it. The vacancy had only been made available for applications to employees in the Respondent's redeployment pool. It was open for applications from 21 March 2019 to 1 April 2019 [Supp 19]. The Claimant was not in the redeployment pool at that time because her contract had been extended on 7 March 2019 up to 31 March 2020. However, this distinction in timing was never explained to the Claimant. The Respondent has not explained why Ms Khatun as a redeployee had priority for appointment to a role 2 salary grades higher than her contracted role.

28. On 9 May 2019, the Claimant was unwell and emailed Mr O'Shea to report her sickness absence. He asked her to report sickness absence to Ms Khatun in future. She replied:

"**For my awareness and clarity, as per the absence policy we are required to report to our direct line managers/supervisors. Ami reporting to Tangina from here on?**" [Supp 14]

29. Mr O'Shea replied that Ms Khatun would be processing absences for the admin team and conducting return to work meetings.

30. On 13 and 16 May 2019, the Claimant emailed the Respondent's HR team to request a copy of the team structure for her team [Supp 31-32]. That request was passed to Mr O'Shea to respond to. On 7 June 2019 the Claimant emailed Mr O'Shea directly to renew her request to him [Supp 30]. There is no evidence that he replied.

31. On 20 May 2019, the Claimant's GMB union rep Ms Kate Jenkins replied to Mr O'Shea's team email of 1 May 2019. She wrote:

"**Following on from the email you sent all staff on the 1st of May, I have received a number of queries regarding Tangina's new role.**

**Can you answer the following questions to assure me there was a full and transparent recruitment process.**

**• What is Tangina's role**

**• A structure chart confirm this role**

**• Was the job offered to redeployees first**

**• Was the post advertised**

**• How was it advertised**

**I look forward to your response on this matter**." [Supp 48]

32. Mr O'Shea replied that Ms Khatun's role was that of EHC Needs assessment Co-ordinator, the job had been offered to redeployees first, Ms Khatun was in the redeployee pool, and the post had been advertised.

33. On 10 June 2019, an issue arose between the Claimant and Ms Khanom, when the Claimant objected to having been logged in to receive calls to the department through the Respondent's switchboard by Ms Khanom without having been informed, resulting in calls going unanswered [Supp 9]. The Claimant noticed that Ms Khanom's email signature stated she was the SEN Finance Admin Officer. Prior to her maternity leave, the Claimant's role had included finance support. She believed this responsibility had been taken away from her.

*The Claimant's grievance*

34. The Claimant put in a grievance on 11 June 2019 under cover of an email to Ms Christine McInnes, Divisional Director (and Mr O'Shea's line manager), which read:

"**Dear Christine,**

**I trust you are keeping well.**

**I am writing you this email to express my concerns with the way I have been treated since my return from maternity leave.**

**Attached is my formal CHAD letter.**

**Can I kindly ask that you please review this letter and take my concerns forward through to the appropriate channels.**

**Thank you**

**Zarah Kamaly**".

35. The acronym 'CHAD' was a reference to the Respondent's 'Combatting Harassment and Discrimination' policy (discussed further below). In the attached letter, the Claimant wrote by way of introduction:

"**In this letter I would like to outline the behaviour of John O'Shea towards me which I believe amounts to not only a breach of Tower Hamlets internal recruitment policy by way of negligence but also amounts to maternity discrimination against me personally**." [173]

36. The Claimant complained that on her return from maternity leave, her work responsibilities had changed, and Mr O'Shea had not responded to her requests for clarification and for additional training and responsibilities. She criticised his response to her flexible working request, the way she had learned that her maternity cover had been given line management responsibilities over her, and the lack of response to her requests for a copy of the team structure. She objected to the way Ms Khatun's SC6 post had been created and recruited to and that she had not been given the opportunity to apply for it despite her 11 years' experience with the Respondent. She said she felt she was being ostracised from the team and given menial work to do. She felt that she was:

**"being discriminated against simply due to the fact that I have been on maternity leave" and concluded by stating: "I have sought support from GMB on this matter, I will be taking this forward to ACAS and may also be seeking legal representation as this is clearly a case of maternity discrimination under section 18(4) of the Equality Act 2010."**

*Initial acknowledgement of the grievance and relevant policies*

37. Ms McInnes acknowledged the grievance by email of 13 June 2019, saying that she would be in touch in the near future to discuss it further [Supp 35]. On the same day, she forwarded the grievance to Ms Michelle Vincent, HR Business Partner Practitioner, asking her to organise a meeting with the Claimant [164].

38. Ms Vincent replied on the same day:

"**You need to meet with the individual to explore with the individual the concerns they have raised and what resolution they are seeking. They have the right to be accompanied by a TU Rep.**

**Here is the relevant stage extract from the Grievance procedure**

***Day-to-day issues should normally be resolved through dialogue between employees and their manager. Most issues can be resolved in this way, sometimes by acknowledging that although a matter may have created annoyance, it can best be handled by simply talking it through and then taking no further action. This procedure only comes into play when the employee is not satisfied with the outcome of the dialogue with their manager***

**However, I can understand why the individual doesn't feel able to approach John directly. Therefore, the first stage outlines what you need to do.**

***First Stage***

***2.1 The employee must register the grievance formally in writing with their immediate manager.***

***Where the grievance is against the manager, it must be raised in writing with the manager's immediate line manager with a copy sent to the HR & WD Business Partner.***

***2.2 The manager will:***

***· register the issue as a grievance providing that the employee has tried to resolve the issue informally with their manager***

***· record the issues of concern, and check with the employee that this record is accurate;***

***· investigate/ look into the issue as appropriate; (this does not necessary mean a formal investigation at this stage)***

***· convene a meeting with the employee to explore possible resolutions to the grievance, notifying the employee of the date and of the right to be accompanied by a trade union representative or work colleague. This will normally be done within two weeks of the registration of the grievance;***

***· reply to the employee within a week describing the action which they propose to take and the time-scale. This reply can be oral, in which case it will be confirmed in writing within a further week. If it is not possible to respond within these periods, the employee must be given an explanation of why, and told when a reply can be expected*.**

**Hope this is of help.**"

39. This was an extract from the Respondent's grievance procedure. As noted above, the Respondent also has a 'Combatting Harassment and Discrimination' ("CHAD") policy, to which the Claimant had referred in her cover email. The relevant part of the CHAD policy states:

"**2.1 Informal or formal action are options available to the person who feels that they have been the subject of discrimination or harassment, or have witnessed it.**

**2.2 Informal action**

**2.2.1 It is preferable for all concerned to try to resolve matters informally if possible. This is likely to produce solutions which are speedy, effective and restore positive relations in the workforce. It will also help to minimise embarrassment and the risk of breaching confidentiality.**

**2.2.2 Where possible, the employee should tell the person who is causing the problem that the conduct in question is unwanted and/or offensive and must stop. This may be all that the victim of discrimination or harassment wants.**

**2.2.3 Alternatively, the complaint can be raised informally with their HR & OD Business Partner or with a more senior member of management so that an informal solution can be achieved. Such approaches may be particularly helpful where the complaint is about the employee's immediate manager.**

**2.2.4 The benefits of an informal solution should not discourage employees from taking formal action. Additionally, if the Council becomes aware of a serious complaint which warrants disciplinary action, and possible criminal proceedings, senior management may need to take formal action even though the employee who has been the subject of the discrimination or harassment may not prefer this approach. In these circumstances, the CHAD procedure will be stopped and action commenced under the**

**disciplinary procedure. Wherever possible, however, the complainant's preference in this respect will be followed, and confidentiality maintained.**

**2.3 Formal Action**

**2.3.1 The employee should raise the complaint with their immediate supervisor unless this manager is the person whom the employee feels is perpetrating the discrimination or harassment, in which case the complaint should be referred to that manager's immediate supervisor.**

**2.3.2 The complaint must identify the alleged perpetrator and give details of the specific actions that the employee feels constitute discrimination or harassment. It must be put into writing if at all possible.**

**2.3.3 The manager should then act immediately to:  determine if the complaint is feasible  acknowledge the complaint in writing and outline the reasons why the complaint may not be considered feasible inform departmental Human Resources staff of the complaint  consider whether to arrange work so that contact between the parties is minimised or eliminated (this should be done in a way which does not prejudge the allegations).**

**2.3.4 The manager will then as soon as possible, and following discussions with the Senior HR & OD Business Partner:  take steps to conciliate where, after discussion, both parties agree it is acceptable,  investigate the allegation, or where he or she does not feel able to investigate, refer the matter to the Corporate Director or nominated representative. The Corporate Director or nominated representative will appoint an investigator, normally within 5 working days. If that is not possible, reasons will be given to the member of staff concerned.**

**2.3.5 It is recognised that compliance with this procedure will be facilitated if sufficient time is given to the completion of the investigation.**

**2.3.6 Where there is an investigation:  the investigator, who will have received formal training, can ask for the advice and/or participation in the investigation of other staff;  the investigator should judge who is required to be interviewed;  the investigation must be objective and handled with due respect for the rights of both the complainant and the alleged perpetrator, who will both be entitled to be accompanied by a trade union representative or work colleague at meetings to discuss the allegation with the investigator;  the alleged perpetrator must be given details of the complaint in writing;  the investigation must be completed within four weeks unless there are exceptional circumstances;  a report of the investigation must be made by the investigator. This report must set out the findings made by the investigator on the specific complaints made by the employee. It must be given to the employee, but must be kept confidential. If there are parts of the report that contain statements etc. from third parties (e.g. other employees) which would identify the third party in spite of their reasonable expectation to the contrary, these parts shall not be given to the employee;  the manager will decide from the investigation either that standards for future conduct need to be set, which could involve training, to use the disciplinary procedure in respect of the alleged**

**perpetrator, or - that the allegation does not amount to discrimination or harassment under the policy.  the manager will notify all concerned promptly, and in writing, of the decision within two weeks of receiving/completing the investigation report. The manager will be prepared to discuss the decision with them and/or their trade union representative or work colleague).**"

40. In sending her email of 11 June 2019, the Claimant was following the formal steps set out in the CHAD policy, which provided at 2.2.4 that the complainant's preference as to level of formality should be followed.

41. On 14 June 2019, Ms Khatun emailed the Claimant about the lunch rota. The Claimant noticed that her email signature stated she was PA to the Head of Special Educational Needs & Educational Psychology [Supp 10].

42. On 19 June 2019, Ms Jenkins in her capacity as the Claimant's union rep emailed Ms McInnes asking if she was in a position to discuss the Claimant's complaint yet [Supp 35].

43. On 24 June 2019, Ms Jenkins emailed Ms McInnes again saying:

"**It's been 2 weeks now since Zara's sent you her complaint. I chased a response up a week ago and received no response.**

**Given the serious nature of the complaint (discrimination) I would appreciate if you could treat this complaint with the urgency it deserves and advise me of the date by which you envisage a response will be provided to my Member**." [Supp 34]

*Grievance investigation process*

44. Ms McInnes and Ms Vincent met with the Claimant and her union rep Ms Jenkins on 9 July 2019. Although the meeting invitation letter is missing, the date is confirmed in an email from Ms Vincent to a colleague in HR dated 15 July 2019 in which she wrote *"Christine is meant to be sending ZK an outline of what was discussed when we met on 9th July, but I've not seen anything to date"* [176].

45. The Tribunal was not provided with a copy of the minutes of this meeting. Ms McInnes' evidence was that she did not have a note-taker in the meeting due to lack of administrative support. She said that *"when you go into the process you are planning for an Employment Tribunal, although sometimes it doesn't end up in Employment Tribunal",* implicitly accepting that it would have been desirable to have a note-taker present. She said that her administrative support had been cut by 50% and her PA was shared with another person and that was the reason minutes had not been taken or drafted appropriately. It is unclear why Ms Vincent was not able to take a note. Ms McInnes did take her down handwritten notes in a notebook, but gave evidence that her notebooks were lost around the time when she left the Respondent's employment on 28 February 2021.

46. There is a dispute between the parties as to what was said at the 9 July 2019 meeting regarding whether an informal process would be followed in investigating the Claimant's grievance. The Claimant in her email of 11 June 2019 asked for a formal process to be followed. The grievance outcome letter (discussed further below) stated "*We agreed in the meeting that we are currently following the*

*informal process as outlined in the council's policy*." However, that was not the policy approach advised in Ms Vincent's email of 13 June 2019. There are no notes or minutes to show that the Claimant ever assented to an informal process being adopted, and she denies having done so. Ms McInnes' evidence on whether the Claimant agreed to an informal process was internally contradictory. She said that she would have checked with the Claimant and her union rep, and then that she could not confirm whether she had spoken to the Claimant and her union rep about whether it would be formal. When pressed, she then said she specifically remembered that she did ask the Claimant and her union rep who did not object. We prefer the Claimant's consistent evidence that she was not asked; she wished to raise a formal grievance and understood that she had done so by sending her written grievance under cover of an email which stated, "*please see attached my formal CHAD letter*".

47. Ms McInnes accepted when giving evidence that during the 9 July 2019 meeting, she did not ask the Claimant what resolution she was seeking from the grievance process.

48. The Claimant and her representative asked for information which Ms McInnes did not have to hand and she adjourned the meeting to conduct further investigation. Ms McInnes told us when giving evidence that the information requested related to when the scale SC6 post was advertised. She later corrected herself and stated that the information requested concerned the scale SC4 posts. In any event, the grievance letter clearly set out that the Claimant was concerned about the creation of and recruitment to the scale SC6 post.

49. Ms McInnes stated in oral evidence that there was an additional meeting with the Claimant on a date in between 13 June and 9 July 2019. This had not been mentioned in her written statement and there is no documentary evidence that such a meeting occurred. To the contrary, the draft grievance outcome letter (discussed further below) referred to the singular "*time when we met following my receipt of your letter*" and not to multiple meetings [Supp 40]. The Claimant strongly disputes that an earlier meeting took place. The Tribunal finds that the Claimant's account has been more consistent and her recollection is more accurate.

50. On 15 July 2019, Ms Vincent sent Ms McInnes information from the Respondent's Employee Resourcing Team providing information about the recruitment process to Ms Khanom and Ms Shuhena Khatun's scale SC4 posts [165]. She had not sought the equivalent information regarding Ms Tangina Khatun's scale SC6 post. Follow-up emails were exchanged regarding the two SC4 posts on 26 July 2019 [183] and 29 July 2019 [184].

51. On an unknown date, Ms McInnes also met with Mr O'Shea to discuss his response to the Claimant's complaint. This was not referred to in her witness statement and Mr O'Shea's witness statement merely said he "*did provide Ms McInnes with some background information to deal with the grievance*". In response to the Tribunal's questions, Ms McInnes stated that they met in the Respondent's offices without HR or a union representative present. (The Tribunal notes that given a grievance had been submitted accusing Mr O'Shea of being a perpetrator of discrimination, it was unusual that the Respondent did not issue a formal meeting invitation, facilitate Mr O'Shea to be accompanied and have an HR representative present to take a note and provide procedural support.) To Ms

McInnes' recollection of the meeting, Mr O'Shea acknowledged that there had been insufficient management cover and a lack of clarity about what was happening in the team. They discussed the pressures on his time and Ms McInnes had concerns about his wellbeing. No notes of that interview have been provided. Ms McInnes says she took notes of the meeting but that they were lost around the time when she left her job on 28 February 2021.

52. On 16 July 2019, the Claimant notified ACAS of her prospective potential Tribunal claim. The Tribunal notes that the Respondent would have been aware from around this time that the Claimant was doing what she foreshadowed at the end of her grievance letter by taking the matter forward to ACAS.

53. On 25 July 2019, Ms McInnes met with the Claimant again. On this occasion Ms Vincent was not available and her colleague Ms Rosie Erysthee covered for her. The Claimant was accompanied by Ms Jenkins. At the meeting, Ms McInnes handed the Claimant a draft outcome letter. She explained that she was going to make some corrections before finalising the outcome. The Respondent has lost this draft outcome letter, but a copy was retained by the Claimant. The letter stated:

"**Thank you for your time when we met following my receipt of your letter.**

**We agreed in the meeting that we are currently following the informal process as outlined in the council's policy.**

**The discussion was quite wide ranging but in summary, my understanding of your concerns are as follows**

**• On returning to work following a two year absence which included a period of sickness, followed by maternity leave and accrued leave you did not feel you had been kept fully informed of changes in the team over that period.**

**• You were not provided with an induction to brief you on the current position and ways of working, despite asking for a meeting. As a consequence you have not had appropriate cpd opportunities.**

**• There were issues with finalising your request for part time hours and your pay.**

**• Your request for a meeting with the head of service, John O'Shea, made on the 7th of January 2019 did not take place until the 16th of January 2019.**

**• During your absence, new posts had been created in the team, including a P06 post which the person who had covered you maternity leave, Tangina Khatun, was recruited to and you questioned the process around this.**

**• There was no open or transparent process followed to recruit Tangina or 2 new members to the team, Shuhena Khatun and Tasnim Khanom.**

**• You have been asked to report sickness and other absences to Tangina Khatun.**

**• Other administrative staff have been given additional responsibilities and these are included in their titles, whereas you have not had the opportunity**

**to take on additional responsibilities but have been asked to focus on working on annual reviews and case work.**

**• Previously work was rotated within the team and this no longer happens.**

**• A new structure chart for the team has not been provided.**

**• Current work undertaken by staff is not in line with titles and JDs.**

**• There is a lack of consistency about the implementation of the lunchtime rota and this is unfair.**

**• As a consequence of the matters outlined above, you feel ostracised and victimised by other staff.**

**Firstly, I will apologise on behalf of the council for any distress caused to you over the time you re-entered the workplace.**

**You will be aware that the SEND system was not statutorily compliant in a number of areas when you went on leave and changes had to be made to the way the team worked to address these concerns. I am sorry if you were not kept fully informed of the changes by your then line-manager, who himself left the council in December 2018.**

**A full induction should have been organised for you on your return and it is unfortunate that this did not happen as it may have made matters easier for you.**

**However, I understand that John O'Shea did meet with you on a Keeping in Touch day, prior to your return to work. At that meeting you discussed the fact that Annual Reviews were not compliant and there was a need to manage them. You were asked to play a role in making the SEND service compliant on Annual Reviews by logging them on Synergy and ensuring that parents received a letter in a timely way. Your training needs were also discussed and refreshers on Synergy and support from the admin team to go through the work that had been started on the Annual Reviews were both agreed.**

**With regard to your request to do an NVQ Level 4 in Childcare, John O'Shea rightly questioned how this relates to your role in the team. The service head has to make management decisions about appropriate investment in cpd for staff and I fully support his position on this. I am sorry that you viewed John's response as questioning your commitment to the council or the SEND service; there is no entitlement for staff to do any training they want. I am sure that HR and/or your union representative would be happy to discuss this further and provide clarity on access to appropriate cpd.**

**The issue of your hours and salary were both resolved following a short period of time when necessary advice was being sought from HR and these matters were settled quickly. You requested a meeting with the head of service, John O'Shea which took place 8 working days later. Given that you are working part-time, this does not seem an unreasonable length of time to wait for a meeting. During your absence, Tangina Khatun, a redeployee covered your post. A number of changes took place in the team structure,**

**including the creation of a new p06 post which Tangina was recruited to. It was explained in our meeting that as a redeployee under the council s procedures, Tangina had precedence to be considered for this post and correct procedure was followed.**

**With regard to recruitment to the two P04 posts, HR has provided the following information:**

**[*Information supplied.*]**

**With regard to your line management arrangements, as we discussed it is not possible for John O'Shea to directly manage or respond to all staff directly. The post of your former line manager was not recruited to and is currently vacant which means that temporary arrangements have been put in place. You should have formally been notified of this by the head of service.**

**As we discussed, it was entirely appropriate that as a P04 officer you report to a P06 officer. I think the issue here is that you were not formally informed of this arrangement or the rationale for it by the head of service and I apologise for that. With regard to sick leave and medical appointments, it is normal practice for evidence in the form of a letter or appointment card to be provided by the employee when making this request. This is the practice in all other services.**

**With regard to work being rotated between team members, whilst this may have made the work more interesting it was not necessarily an effective way of delivering the business of the team and this was quite clear from, for example, the amount of time it took to complete EHCPs and the quality of EHCPs. However, I understand that following discussions with you where you said you found the work on annual reviews to be boring, you have had the opportunity to undertake a variety of other jobs within the service. I understand from John O'Shea, for example you completed a very good piece of work around finding out about a child the SEND team had received a notification for as having moved into LBTH who you discovered had not done so.**

**While there is a level of flexibility with regard to the way work is allocated and there is evidence that your views were sought and taken into account in allocated work the head of service does have to ensure the service fulfils its statutory work within the national requirements. I think the head of service has done as much as he can to accommodate your views in relation to the allocation of work.**

**With regard to the lunchtime rota, I understand this following you raising your concerns, the matter was resolved within the same week. Whilst I understand your concern, I think the time taken to resolve the concerns is reasonable.**

**With regard to the other points you raised, I have asked John O'Shea to**

**• Circulate a structure chart**

**• Ask staff to consistently use their substantive job titles**

**• Ask staff that they apply any agreed procedures consistently**

**• Have further discussions with you what additional responsibilities you would have happy to undertake which are required by the service for business reasons.**

**I do hope that this addresses all of your concerns.**

**If it would be helpful I am happy to speak with John about arranging some sessions to build up better relationships between staff. Do let me know if this is of interest.**

**I am sorry your return to work has been less than satisfactory and do hope that you feel able to use your skills and talents to the full going forward**."

54. Other than handing the Claimant the letter which referred to the process being informal, the Tribunal finds there was no discussion at this meeting either of whether the process should be formal or not. The Claimant's union rep had the opportunity to read the draft outcome letter and did not object to the characterisation in the letter of the process as informal.

55. As can be seen, despite addressing some of the Claimant's concerns in depth, Ms McInnes' letter did not fully deal with the Claimant's concerns about the recruitment process to the SC6 post. Neither did she refer to or set out any findings on the Claimant's core allegation that she had been discriminated against because she went on maternity leave. Ms McInnes' evidence in response to the Tribunal's questions was that she had omitted this by oversight and the omission had not been pointed out to her by HR. She said that she had been concerned about maternity discrimination as well as having concerns about poor communications in the team, concerns about the relationship to maternity leave, and concerns about the way the team way managed as a whole. When asked why her concerns about the relationship to maternity leave were not reflected in the outcome letter, she said it was because the concerns were generalised, and she did not articulate concerns specifically about maternity leave in the letter.

56. The Respondent contends that the Claimant was sent a finalised outcome letter on 30 September 2019. This is strongly disputed by the Claimant. The Respondent has not retained any copy of such a letter, or any evidence it was created or sent. The only evidence for its existence is that the Claimant is said to have mentioned it during a preliminary hearing in the course of this litigation. That is reflected by the date being included in the list of issues. We find on the balance of probabilities no letter was sent on that date and if it had there would be some record at least of its creation in the Respondent's HR system. The Claimant did either refer to or accept this date at the preliminary hearing, but we find the more likely explanation for this was a confusion as between September 2019 and September 2020.

57. A finalised outcome letter dated 11 September 2020 was received by the Claimant. It is materially the same as the draft outcome letter provided on 25 July 2019 save for some minor corrections and that the introductory section reads:

"**We discussed the contents of this letter at a subsequent meeting and I am providing an updated version to confirm the actions which have been taken.**

**We initially agreed in the meeting that we are currently following the informal process as outlined in the council's policy, but since then you have submitted an application for an Employment Tribunal**."

58. Ms McInnes left the Respondent on 28 February 2021.

59. On 31 March 2021, the Interim Divisional Director covering Ms McInnes' former post emailed the Claimant a copy of the 11 September 2020 outcome letter and offered her, for the first time, a right of appeal. The Claimant says this was email was sent unilaterally by the Respondent and she had not requested the outcome letter to be re-sent.

## Submissions

60. For the Respondent, Mr Uduje in oral and written closing submissions invited us to find that the case fell within the guidance provided in *A v Chief Constable of West Midlands Police* EAT 0313/14, discussed further below. He also reminded us of the importance of not departing from the agreed list of issues, as considered in *Parekh v Brent LBC* [2012] EWCA Civ 1630, although he accepted that when considering whether the burden of proof shifted to the Respondent, the Tribunal was entitled to look at all the evidence and not solely matters which formed part of the listed allegations of victimisation.

61. The Respondent accepted that the Claimant's grievance of 11 June 2019 constituted a protected act for the purposes of s.27 Equality Act 2010. However, Mr Uduje said that the Claimant was not treated less favourably because she had done that protected act. In respect of the alleged detriments: the CHAD policy provided that the grievance would be resolved informally and in fact there was no material difference in the procedure followed; Ms McInnes had conducted an adequate investigation into the concerns raised and upheld some of them; and while the Claimant was unhappy with the outcome, that was not the same thing as the outcome being because or influenced by her having complained about discrimination. In response to the Tribunal's questions, Mr Uduje submitted that should the burden of proof shift, Ms McInnes' evidence was sufficient to displace any inference that the reason the Respondent made no finding about discrimination in the grievance outcome was because the Claimant had performed a protected act.

62. The Claimant said that she felt and continued to feel victimised. She outlined the matters that led her to believe she had been discriminated against on grounds of sex and maternity, leading to her submitting her grievance on 11 June 2019. She said that the Respondent had been unable to present evidence of an adequate grievance investigation to the Tribunal. Dates had been inaccurate, there had been long delays, and Ms McInnes' explanation that problems were due to inadequate administrative support did not tally with her own knowledge of the staffing numbers in the admin team. She believed she had been pushed to the side and forgotten about despite making every effort to contact Mr O'Shea and resolve her concerns.

## The law

63. Section 27 Equality Act 2010 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.**

64. A "detriment" exists if a reasonable employee would or might take the view that the treatment was in all the circumstances to his or her disadvantage: *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 §34.

65. The burden of proof provisions are contained in s.136(1)-(3) Equality Act 2010:

> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**

66. In *Royal Mail Group v Efobi* [2021] ICR 1263, the Supreme Court confirmed that a claimant is required to prove, on the balance of probabilities, facts from which, in the absence of any other explanation, the employment tribunal could infer an act of unlawful discrimination (or victimisation). So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense. Where it was said that an adverse inference ought to have been drawn from a particular matter, the first step had to be to identify the precise inference which allegedly should have been drawn. Even if the inference is drawn, the question then arises as to whether it would, without more, have enabled the Tribunal properly to conclude that the burden of proof had shifted to the employer.

67. The Court of Appeal in *Anya v University of Oxford* [2001] ICR 847 at §2, 9, 11 held that the Tribunal should avoid adopting a 'fragmentary approach' and should

consider the direct oral and documentary evidence available and what inferences may be drawn from all the primary facts.

68. In *Hewage v Grampian Health Board* [2012] ICR 1054 at §32, the Supreme Court held that the burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other. Nonetheless, the importance of paying due attention to the burden of proof provisions was recently emphasised by Tayler J in the EAT in *Field v Steve Pye and Co (KL) Ltd* [2022] IRLR 948 at §33-45.

69. It is sufficient for the protected act to be a "significant influence" on the outcome (i.e., the same causal test as in direct discrimination): *Nagarajan v London Regional Transport* [2000] 1 AC 501, 513 HL. If the burden shifts, a respondent must show that the impugned treatment was not influenced (other than minimally or trivially) by the protected act(s).

70. It is well-established that unfair treatment is not to be equated, as such, with discriminatory treatment (*Glasgow City Council v Zafar* [1998] ICR 12). Discrimination (or victimisation) may, however, be inferred if there is no explanation for unreasonable behaviour (see the discussion in *The Law Society v Bahl* [2003] IRLR 640 (EAT) at §93–98, upheld by the Court of Appeal [2004] IRLR 799 at §100–101).

71. The question whether the alleged discriminator acted 'because of' a protected characteristic (or protected act) is a question as to their reasons for acting as they did; the test is subjective (*Nagarajan v London Regional Transport* [2000] ICR 501, per Lord Nicholls at 511). Lord Nicholls considered the distinction between the 'reason why' question from the ordinary test of causation in *Chief Constable of West Yorkshire Police v Khan* [2001] ICR 1065 at §29:

> **'Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the "operative" cause, or the "effective" cause. Sometimes it may apply a "but for" approach…The phrases "on racial grounds" and "by reason that" denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.'**

72. The Court of Appeal in *Coyne v Home Office* [2000] ICR 1443 makes clear that the employer will not be guilty of discrimination if an inadequate response to a grievance was demonstrably unrelated to the relevant protected characteristic of the Claimant. Similarly, an employer's failure to investigate a complaint of discrimination or harassment will not constitute victimisation under s.27 unless there is a link between the fact of the employee making the complaint and the failure to investigate it: *A v Chief Constable of West Midlands Police* EAT 0313/14. In that case, Langstaff J held at §22:

> **'…in some cases — and I emphasise that the context will be highly significant — a failure to investigate a complaint will not of itself amount to victimisation. Indeed there is a central problem with any careful analysis and application of section 27 to facts broadly such as the present. That is that, where the protected act is a complaint, to suggest that the detriment is not to apply a complaints procedure properly because a complaint has been made, it might be thought, asks a lot and is highly unlikely. The complaints procedure itself is plainly embarked on because there has been a complaint: to then argue that where it has not been embarked on with sufficient care, enthusiasm or speed those defects are also because of the complaint itself would require the more careful of evidential bases.'**

## Conclusions

73. As the Respondent accepts, the Claimant did a protected act by submitting her grievance to Christine McInnes on 11 June 2019. It specifically and repeatedly alleged in terms that she had suffered maternity discrimination, and additionally alleged matters that would constitute post-maternity leave sex discrimination.

74. Did the Respondent believe that the Claimant may do a future protected act, namely bring a maternity or sex discrimination claim? The Claimant's grievance letter stated explicitly that she would take the matter forward to ACAS and may seek legal representation. Ms McInnes' evidence was that going into a grievance process like the Claimant's it was normal to be 'planning' for an Employment Tribunal. The Tribunal's unanimous view is that this evidence is a sufficient basis for us to find that Ms McInnes thought the Claimant may bring an Employment Tribunal claim. When considering the nature of any potential claim, we looked at the grievance, which complained about maternity discrimination and post-maternity leave sex discrimination, and infer that the possible claim which Ms McInnes had in mind was a claim under the Equality Act 2010, and hence she thought the Claimant may do a protected act in future.

75. The Tribunal next considered whether the Claimant was treated detrimentally by Ms McInnes in the following respects:

    75.1. Suggesting that her grievances be resolved informally on 26 July 2019?

    The Tribunal understands that this allegation should be properly read as a reference to the meeting on 25 July 2019. On 25 July 2019, Ms McInnes handed the Claimant a draft grievance outcome letter stating that "*We agreed in the meeting that we are currently following the informal process as outlined in the council's policy*."

    The Tribunal has found that Ms McInnes did not suggest to the Claimant that her grievance should be resolved informally, but simply took that approach. Her evidence was this was approach was adopted on HR advice, but the email from Ms Vincent on 13 June 2019 shows HR advising on a formal process [162-163]. What Ms McInnes did seems to have been an unclear mixture of the informal and formal stages of the CHAD procedure, which was unhelpful and did not provide a clear path to resolving the Claimant's concerns.

The potentially detrimental effect of the procedure adopted can more appropriately be considered in relation to the allegation of detriment at paragraph 75.5, below.

75.2. Inadequately investigating her grievances, in particular:

75.2.1. Failure to clarify and confirm when the Claimant was informed and consulted;

Ms McInnes upheld the allegations in the grievance that the Claimant was not kept informed of the changes to her team when she was on maternity leave or regarding Ms Khatun's promotion to her line managerial role. Given that these failures to inform and consult were acknowledged, the Tribunal does not find this detriment occurred.

75.2.2. Failure to clarify and confirm when the new structure/ reorganisation was introduced;

Ms McInnes did ascertain when the two new scale SC4 posts were added to the Claimant's team's structure. She acknowledged in the outcome letter that a new scale SC6 post had been created and that Ms Khatun had been recruited to it but did not make a finding as to when this occurred. This is properly considered as a potential detriment under paragraph 75.2.3 below. There was no separate failure to confirm when a restructure or reorganisation occurred, because the relevant changes to the team related to the introduction of these new posts.

75.2.3. Failure to clarify and confirm when the new SC4 and PO2/3 posts were introduced;

The Tribunal understands the reference to a PO2/3 post is different terminology to refer to Ms Khatun's scale SC6 post. As noted in the paragraph above, Ms McInnes confirmed in the draft grievance outcome letter when the new scale SC4 posts were introduced. However, she did not clarify when the new scale SC6 post was introduced. It was an important part of the Claimant's grievance that she had not been afforded the opportunity to apply for this role, and that exclusion was discriminatory. It was therefore incumbent on Ms McInnes as the grievance investigator to make relevant findings. Whether the post was created and advertised before or after the Claimant went on maternity leave, and before or after the Claimant's own fixed-term contract was extended (taking her out of the redeployee pool) was material to grievance. Ms McInnes said (by way of correction to an earlier answer) that the Claimant did not specifically request this information in relation to the scale SC6 post in the meeting of 9 July 2019. However, the allegations contained in her grievance letter were sufficient to raise the matter for investigation. The Respondent's failure to so investigate was detrimental to the Claimant.

75.2.4. Failure to clarify and confirm the differences between the Claimant's role pre and post maternity leave;

Ms McInnes in her draft grievance outcome letter did address the allegation that the Claimant's work changed as a result of more Admin Officers with a specialist focus being recruited to the SEN team [175-176]. However, she did not address the Claimant's concern that it was during her maternity leave that

her role changed [161]. The Claimant alleged that she was given menial work, and the rest of the admin team more fulfilling work, because she went on maternity leave. The Tribunal concludes that the Respondent failed to investigate this aspect of the grievance sufficiently, and that this failure was detrimental to the Claimant.

75.2.5. Not sourcing and providing the relevant job descriptions for the new posts?

Ms McInnes did not source and provide the job descriptions for the new posts but was not specifically asked to do so. There is no sufficient basis for finding that Ms McInnes ought to have sourced job descriptions and therefore not doing so did not in the Tribunal's view amount to a detriment.

75.3. Rejecting the grievances by the Respondent's outcome letter dated 30 September 2019?

The Tribunal has found there was no outcome letter dated 30 September 2019. There was a draft outcome letter dated 25 July 2019 and a final outcome letter dated 11 September 2020. The Claimant's grievance was not rejected. Some aspects of her concerns were acknowledged by Ms McInnes and an apology made for the mishandling of her return from maternity leave. Other aspects of her grievance were not addressed, including her core allegation of discrimination and her concerns about recruitment to the scale SC6 post. The Tribunal finds this detriment did not occur as alleged.

75.4. Not reaching a conclusion of discrimination in the informal grievance investigation decision?

Given that the Claimant's claim for maternity and sex discrimination was struck out because it was brought out of time, the focus of the evidence during the hearing was properly on whether the Claimant was victimised after 11 June 2019, and not whether she was discriminated against on her return from maternity leave. The Tribunal is not in a position to properly reach a conclusion as to whether the conclusion of a reasonably thorough grievance investigation would have been a positive finding that the Claimant had been discriminated against.

However, the Tribunal has found that the Respondent failed to reach a conclusion about discrimination one way or the other. Ms McInnes' evidence was that she had concerns about maternity discrimination which she did not include or reflect in the grievance outcome letter. Given that the central allegation raised in the Claimant's grievance was that she had been subject to maternity or sex discrimination, this failure to answer her core concern amounted to detrimental treatment of the Claimant.

The Tribunal has carefully considered Mr Udeje's submission on the importance of following the list of issues and has unanimously concluded that implicit in the question posed it is open to us to find there was a detriment to the Claimant in Ms McInnes not reaching a conclusion of discrimination, or of no discrimination. She simply did not reach a conclusion. By failing to look into whether there had been discrimination she precluded any possibility of reaching a positive conclusion in the Claimant's favour on this allegation.

75.5. By the Respondent failing to implement the formal process?

The Tribunal has found that the Claimant invoked a formal process by her email of 11 June 2019 and did not consent to her grievance being resolved informally. The Respondent argues that there was no difference in substance between the formal and informal route. The Tribunal does not accept that submission and concludes that failing to implement a formal process was detrimental in the following respects:

75.5.1. There was no headline outcome as to whether the grievance was upheld. Ms McInnes stated that had a formal grievance outcome been provided, it would have been partially upheld.

75.5.2. There was no action taken in relation to Mr O'Shea, as there may well have been had findings been made against him in a formal grievance investigation report.

75.5.3. There was no right of appeal afforded to the Claimant, until March 2021.

75.5.4. There was a lack of enforceable follow-up actions to take as a result of matters of concern found to be substantiated in the grievance.

76. To summarise, the Tribunal concludes that the Claimant was treated detrimentally in four respects:

76.1. Ms McInnes failed to clarify and confirm when the new scale SC6 post was introduced;

76.2. Ms McInnes failed to clarify and confirm the differences between the Claimant's role pre and post maternity leave;

76.3. Ms McInnes failed to reach a conclusion of discrimination (or alternatively of no discrimination);

76.4. The Respondent failed to implement a formal grievance investigation process.

77. The Tribunal must next consider whether the four instances of detrimental treatment were done because the Claimant had done, or because the Respondent believed she may do, a protected act? In order to reach a conclusion on this issue the Tribunal has applied the shifting burden of proof at s.136 Equality Act 2010.

78. Are there facts from which, in the absence of any other explanation, the Tribunal could infer a causal link between the protected act and the unfavourable treatment? The facts the Tribunal considers relevant to this question are:

78.1. The absence of meeting notes for any of the grievance investigation meetings, including with the Claimant and with the alleged perpetrator of discrimination. The Tribunal notes that senior managers at the Respondent, given the highly regulated nature of its statutory functions, would have been well aware of the need to document formal meetings.

78.2. The fact no invitation letters or meeting notes were retained even though the Claimant notified ACAS on 16 July 2019, prior to the second meeting

and draft grievance outcome, and presented her claim on 19 November 2019, well before Ms McInnes left the Respondent's employment and her handwritten notes were lost.

78.3. The Claimant's email of 11 June 2019 asked for a formal process and Ms Vincent advised Ms McInnes to follow a formal process by email and yet an informal process was adopted.

78.4. The Respondent's failure to address the central allegation, which was of discrimination, even though less serious complaints were acknowledged to have merit.

78.5. The lack of investigation into the concerns the Claimant raised about the recruitment to the scale SC6 post, including how Ms Khatun was appointed and why the Claimant had not been able to apply for it.

78.6. The absence of investigation into the recruitment to the scale SC6 post following Ms Jenkins' email raising concerns on behalf of GMB members.

78.7. The failure to ask the Claimant what resolution she sought from the grievance process.

78.8. The lack of a formal process meant there was no disciplinary consequence for Mr O'Shea. Mr O'Shea was Ms McInnes' direct report, and she was worried about his wellbeing.

78.9. The absence of a formal grievance outcome meant there was no record that the Claimant's grievance was partially upheld.

78.10. The Claimant was not afforded a right of appeal.

78.11. Ms McInnes' evidence showed that she had in mind the possibility the Claimant would bring a Tribunal claim for discrimination.

78.12. Ms McInnes accepted that she did have a concern that the Claimant may have been discriminated against.

79. Reviewing the totality of the evidence and, for the purposes of this first stage, disregarding any explanation from the Respondent, the Tribunal unanimously concludes that there is sufficient evidence from which it could be inferred on the balance of probabilities that there was a causal link between the Claimant having complained about discrimination and the detrimental treatment. Downgrading the investigation to an informal one, overlooking the central allegation of discrimination, and failing to keep proper records meant that the Respondent avoided gathering evidence which could potentially be disadvantageous in a future Tribunal claim for maternity or sex discrimination. Ms McInnes did conduct a reasonably thorough investigation into and accepted some of the Claimant's concerns. Therefore, the omission of any acknowledgement whatsoever that the grievance was a complaint about discrimination, is striking. The facts of this case are distinguishable from those of *A v Chief Constable of West Midlands Police* because there is evidence from which it could properly be inferred that the defects found in the investigation process were because of the complaint itself.

80. The Tribunal must therefore go on to consider at the next stage, has the Respondent shown that the treatment was not influenced by the Claimant having

done a protected act or a belief that she may do so in the future? We have considered each of the detriments in turn.

80.1. Ms McInnes failed to clarify and confirm when the new SC6 post was introduced; has the Respondent shown this was not because of a protected act? Ms McInnes' explanation was that she accepted HR advice that the Respondent's redeployment policy had been followed. The Tribunal considers this was a cursory response to what on its face was an unusual situation; the staff member in question was redeployed to a role two grades above her contracted role while the Claimant was not given the opportunity to apply for it. However, it is accepted that Ms McInnes was conducting her investigation in the context of an understaffed and pressurised service. The Tribunal is prepared to accept on the balance of probabilities that the Respondent has shown the reason for this failure was a lack of thoroughness and not because the Claimant had done a protected act or might do so in future.

80.2. Ms McInnes failed to clarify and confirm the differences between the Claimant's role pre and post maternity leave; has the Respondent shown this was not because of a protected act? Ms McInnes did conduct some investigation into the Claimant's job role, although she failed to investigate the link between the job change and her maternity leave. The Tribunal considered whether the Respondent has done enough to dispel an inference that the reason the link to maternity leave was not investigated was because that was connected to the Claimant's complaint of maternity discrimination. The Tribunal is prepared to accept on a fine balance of probabilities that the Respondent has shown the reason for this failure was a lack of thoroughness, in the context of under-resourcing, and not because the Claimant had done a protected act or might do so in future.

80.3. Ms McInnes failed to reach a conclusion on whether the Claimant had been discriminated against; has the Respondent shown this was not because of a protected act? In relation to this detriment, Ms McInnes' explanation was that it was simply an oversight. However, it was the core allegation highlighted repeatedly the in the Claimant's grievance letter. Ms McInnes' evidence showed she did have in mind that the Claimant might have been discriminated against. In the circumstances, it is implausible she simply overlooked to address the allegation in her investigation and outcome letter. The Respondent's explanation is not accepted, and the Tribunal concludes this was an act of victimisation. On the balance of probabilities, it is likely that Ms McInnes chose to close her eyes to the possibility of discrimination because of the adverse consequences that might flow from such a finding for Mr O'Shea (in the form of disciplinary sanction) and the Respondent (in the form of adverse evidence in future litigation). The absence of formal meeting minutes or notes is consistent with an employer with eyes closed to the possibility of discrimination.

80.4. The Respondent failed to implement a formal grievance investigation process; has the Respondent shown this was not because of a protected act? There has been no adequate or consistent explanation from the Respondent as to why this approach was adopted. Ms McInnes says it was on HR advice, but that is contradicted by the email from Ms Vincent outlining

a recommended formal route. If there was a subsequent conversation with HR where the advice changed, the Tribunal has not been told about the content of that discussion or the reasons for changing tack. The Respondent's explanation is not accepted, and the Tribunal concludes this was an act of victimisation. On the balance of probabilities, it is likely that the Respondent adopted an informal route because it made it easier to avoid formal findings of discrimination which could lead to the adverse consequences referred to above. The delay in providing a finalised outcome letter and the fact the Claimant was not afforded a right of appeal at the time the outcome was reached, is consistent with such an avoidant approach.

81. The Tribunal therefore concludes that the Respondent victimised the Claimant in two respects, first by failing to reach a conclusion of discrimination (or no discrimination), and secondly by failing to implement a formal grievance process.

**Employment Judge Barrett**
**Dated: 14 December 2022**