EMPLOYMENT TRIBUNALS

Claimant: Mrs S Lalli

Respondent: Derby City Council

Heard at: Nottingham **On:** 30 May 2023 (Tribunal reading day), 31 May, 1 June, 2 June, 5 June, 6 June, 7 June and 13 June 2023

Before: Employment Judge McTigue
Tribunal Member Newton
Tribunal Member Hill

Representation
Claimant: Litigant in person
Respondent: Mr Zaman, Counsel

JUDGMENT having been sent to the parties on 26 June 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The claimant was employed as an operator within the facilities management department at Derby City Council. She claims that she was subjected to pregnancy and maternity discrimination, victimisation and sexual harassment whilst working in that department.

Claims and Issues

2. The claimant brought claims for pregnancy and maternity discrimination contrary to section 18 of the Equality Act 2010, direct pregnancy discrimination contrary to section 13 of the Equality Act 2010, victimisation contrary to section 27 of the Equality Act 2010 and sexual harassment contrary to section 26 of the Equality Act 2010. The tribunal was required to determine a list of issues which had been agreed between the parties. Those issues were:

Preliminary time limit issues - applicable to all claims listed below for the tribunal to consider.

1. The claimant commenced ACAS early conciliation on 13 August 2021. In respect of the claims brought by the claimant, did any or all of the matters complained of occur before the primary limitation period, starting on 14 May 2021?

2. In respect of any which are not, is it nonetheless just and equitable under section 123(1)(b) Equality Act 2010 to permit the claimant to pursue her claims brought under the Equality Act 2010?

3. In the alternative, did any of those acts amount to conduct extending over a period ending within the primary limitation period?

The allegations

4. The claimant alleges that the following acts took place:

4.1. That the claimant made a request to adjust her working hours on 14 August 2019 and she was informed of the outcome on 3 October 2019. The claimant complains that this was a delayed outcome.

4.2. That on 18 September 2019, Helen Higginbottom referred the claimant to Occupational Health without conducting a call with the claimant beforehand to discuss the referral. Helen Higginbottom said that she had done so on the referral form.

4.3. That in October 2019, following the request to change ours was approved, the claimant was told that her 121 meetings would take place weekly. (sic)

4.4. On 1 October 2019, Sandra Flannery complained to Helen Higginbottom about the claimant out of office reply. Ms Flannery complained that the out of office reply was not meaningful enough.

4.5. On 1 October 2019, during a meeting with Helen Higginbottom, Sandra Flannery and union rep, Richard Hemstock, Helen Higginbottom was very intimidating and aggressive with her behaviour and mannerisms towards the claimant.

4.6. On 7 October 2019, Helen Higginbottom said “which one of you to is at front desk” in a loud, very rude, intimidating and aggressive tone to the claimant.

4.7. On 8 October 2019, Helen Higginbottom asked the claimant in a very rude and aggressive manner why she was logged onto a Wyse terminal and not a laptop.

4.8. On 10 October 2019, Helen Higginbottom interrogated the claimant in an aggressive tone about who and why the printing key from the reception desk had been taken. (sic)

4.9. On 10 October 2019, Helen Higginbottom interrogated the claimant in an aggressive tone about papers printing on the printer.

4.10. That on 10 October 2019, during a 121 meeting, Helen Higginbottom questioned the claimant about her trousers and asked if she was wearing jeans. The claimant explained that they were black cotton maternity trousers, at which point Helen Higginbottom lowered her head and body towards the claimant’s legs, thighs and groin to lean in under the table for a closer inspection.

4.11. That in the 121 on 10 October 2019, Helen Higginbottom asked the claimant why she had not filled the teabags in the refreshment lounge.

4.12. That the claimant was excluded from the Christmas party in December 2019 by Alison Taylor.

4.13. That the respondent with the claimant during her maternity leave. In particular, that Mohammed Basharet and Sandra Flannery failed to contact the claimant during her maternity leave. Including that Sandra Flannery used the claimant’s work email address to invite her to team meetings.

4.14. That Helen Higginbottom did not sign the card sent to the claimant in early 2020 after the birth of her daughter.

4.15. That Sandra Flannery did the following things:

4.15.1. she did not address the points listed at 4.1 - 4.14 above in the first grievance outcome letter dated 12 December 2019;

4.15.2. in the grievance outcome letter dated 12 December 2019, she stated that as there was a team WhatsApp group, she did not find evidence of bullying and harassment;

4.15.3. in the grievance outcome letter dated 12 December 2019, she stated that Helen Higginbottom was very upset about the grievance but there was no mention or consideration of the claimant's upset; and

4.15.4. on 12 October 2020, she stated to independent investigator Anjula Nath that the claimant and her colleague Danielle Mortimer would talk to each other about Botox, nails and general chit chat but they wouldn't talk to each other about what was to getting done. (sic)

4.16. That Steve Caplan did the following things:

4.16.1. He did not address the points listed at 4.1 - 4.15 above in the second grievance outcome letter dated 21 January 2021 and

4.16.2. on 13 May 2021, during the grievance appeal hearing, he admitted that he had not read all of the grievance paperwork.

4.17. That Simon Riley did the following things:

4.17.1. he did not address the points listed at 4.1 - 4.15 in the grievance appeal outcome that he sent to the claimant on 30 June 2021 and

4.17.2. he did not have an explanation to delays in him communicating the grievance appeal outcome letter sent to the claimant on 30 June 2021.

Pregnancy and maternity discrimination – section 18 Equality Act 2010

5. The protected period was March 2019 – 29 November 2020. The claimant relies on the acts listed above at 4.1 to 4.15 as the alleged unfavourable treatment. Is any of the alleged unfavourable treatment out of time?

6. Does the tribunal find that the alleged unfavourable treatment occurred as a matter of fact?

7. In respect of any acts which the tribunal finds occurred as a matter of fact, does the tribunal find that it took place because the claimant was pregnant?

8. In respect of any acts which the tribunal finds occurred as a matter of fact, does the tribunal find that it took place because the claimant was on compulsory maternity leave?

Direct pregnancy discrimination – section 13 Equality Act 2010

9. the claimant relies on the acts listed above at 4.16 to 4.17 as less favourable treatment. (These are the allegations that fall outside of the protected period).

10. Is any of the alleged unfavourable treatment out of time?

11. Does the tribunal find that the alleged less favourable treatment occurred as a matter of fact?

12. The claimant relies on the following actual comparators:-

12.1. Charlotte Ruane - Job Role Operator in Facilities Management - at Derby

City Council

12.2. Danielle Mortimer - Job Role Operator in Facilities Management - at Derby City Council

12.3. Or in the alternative a hypothetical comparator.

13. Are there material differences between the circumstances of the claimant and the comparators identified (section 23 (1), Equality Act 2010)?

14. Was any less favourable treatment, if found, because of the claimant's pregnancy?

Victimisation claim – section 27 Equality Act 2010

15. Did the claimant carry out any protected act(s)? The claimant relies on the following:

15.1. her request to change her hours as a pregnancy reasonable adjustment in August 2019;

15.2. submitting the first grievance on 4 November 2019;

15.3. submitting the first grievance appeal on 23 December 2019;

15.4. commencing ACAS early conciliation; and

15.5. submitting the second grievance appeal on 31 January 2021.

16. Does the tribunal find that the alleged treatment set out above at 4.1 - 4.17 occurred as a matter of fact?

17. Are any of the acts out of time?

18. In respect of those matters which the tribunal does find as a matter of fact occurred and are in time, does the tribunal find that such treatment amounted to a detriment?

19. Was any detriment to which the claimant was put because she had done a protected act?

Sexual harassment – section 26 Equality Act 2010

20. Does the tribunal find that the following alleged unwanted conduct occurred? That on 10 October 2019, during a 121 meeting, Helen Higginbottom questioned the claimant about her trousers and asked if she was wearing jeans. The claimant explained that they were black cotton maternity trousers, at which point Helen Higginbottom lowered her head and body towards my legs, thighs and groin to lean in under the table for a closer inspection. (sic)

21. If so, was this unwanted conduct?

22. If so, was the unwanted conduct of a sexual nature?

23. If so, did the unwanted treatment have the purpose or effect of violating the claimant's dignity and/or creating a hostile, degrading, humiliating or offensive environment for the claimant?

24. Was it reasonable for the conduct to have that effect?

For the sake of clarity, it should be noted that issue nine of the original agreed list of issues referred to the fact that the claimant relied on the acts listed above are 4.15 to 4.17 as less favourable treatment. At the tribunal hearing, it was agreed by both parties that issue nine should in fact refer to the acts listed above at 4.16 to 4.17 instead.

Procedure, documents and evidence heard

3. The tribunal heard evidence from the claimant. Evidence on her behalf was also given by Nathan Rennocks and Richard Hemstock. Evidence was also heard from the following witnesses on behalf of the respondent; Alison Taylor, Helen Higginbottom, Mohammed Basharet, Sandra Flannery, Steve Caplan and Simon Riley. There was a tribunal bundle of 558 pages. Oral submissions were made by both parties.

Fact-findings

4. The respondent is a Local Authority. The claimant commenced employment with the respondent in June 2017. From June 2017 until October 2021 the claimant's role was that of an Operator within the Facilities Management Department at Derby City Council. It was whilst the claimant was working in that role that the facts which give rise to this claim took place. The claimant claims that she was subjected to pregnancy and maternity discrimination, victimisation and sexual harassment whilst working in that department. The claimant is still employed by the respondent albeit in a different department which she moved to on 4 October 2021.

5. In June 2019 claimant notified her manager, Helen Higginbottom, that she was pregnant. A meeting took place between the claimant and Helen Higginbottom on 6 August 2019. During this meeting, the claimant made a verbal request to adjust her working hours. The claimant asked that their working hours be changed so rather than starting work at 1.24 pm and finishing at 6.30 pm, she would start work at 1.24 pm and finish work at 6pm. The claimant repeated their request in writing, by way of an email to Higginbottom, on 14 August 2019 (page 82 of the bundle).

6. Helen Higginbottom was on annual leave between 15 - 16 August 2019 and 26 - 30 August 2019. The claimant was absent due to sickness between 21 - 23 August 2019. On 22 August 2019 Helen Higginbottom responded to the claimant's email stating that she was planning to discuss the claimant's request at their next one to one meeting on 2 September 2019. In the meeting of 2 September 2019, Helen Higginbottom informed the claimant that a referral would need to be made to occupational health regarding the proposed change to working hours. Helen Higginbottom was then on annual leave between 5 - 16 September 2019.

7. On 18 September 2019 Helen Higginbottom referred the claimant to Occupational Health. She did this by completing a referral form (pages 85-90). She did not provide a copy of the referral form to the claimant or seek approval before the form was sent to occupational health, instead she ticked a box which stated, "If employee is currently off and unable to sign please tick to confirm discussion over the phone". At this point in time, the claimant was at work and no discussion had taken place either over the phone or in any other manner regarding contents of the referral form.

8. On 19 September 2019 the claimant emailed Helen Higginbottom to ask whether a decision had been made regarding the proposed change to her working hours (page 81). Helen Higginbottom responded by email later that day stating, "I returned from leave yesterday as discussed previously no decision will be made until you have been to Occupational Health. I believe your appointment is next Friday, we will meet in due course."

9. On 24 September 2019 Sandra Flannery, Head of Facilities Management Services, sent an email to the claimant. Sandra Flannery received an out of office message from the claimant stating, "I am currently out of the office. For any urgent issues please call facilities management…". A telephone number for facilities management was also

provided in the claimant's out of office email. Upon receipt of this email, Sandra Flannery immediately emailed Helen Higginbottom stating, "Is this out of office because she works part-time? Can you have a look at it and make it more meaningful please. At present it doesn't indicate when she is back so if it isn't urget people have no idea when hey might get a response (sic)". Helen Higginbottom spoke to the claimant to request that she alter her out of office reply which the claimant did so without complaint. Helen Higginbottom emailed Sandra Flannery on 25 September 2019 to inform her that the claimant's out of office reply had been changed as requested (pages 91 – 92).

10. On 25 September 2019 Helen Higginbottom informed the claimant, Sandra Flannery and Nathan Rennocks via email that she would shortly be sending out a meeting invite for the 26 September 2019 in order to discuss the proposed change to the claimant's working hours (page 93). By way of explanation, Nathan Rennocks was a trade union representative of Unite who provided the claimant with support. On 26 September 2019 Nathan Rennocks formed Sandra Flannery that he would be unable to attend the meeting scheduled for later that day. The meeting was rescheduled for 1 October.

11. The meeting to discuss the proposed change to the claimant's working hours eventually took place on 1 October. In attendance at that meeting was the claimant, Sandra Flannery, Helen Higginbottom and Richard Hemstock. Richard Hemstock was the claimant's trade union representative at this meeting. At this meeting both the claimant and Helen Higginbottom attempted to speak over one another. This resulted in Sandra Flannery having to intervene and challenge the behaviour of both of them.

12. Sandra Flannery wrote to the claimant by way of a letter dated 3 October 2019 (page 364-365). This letter informed the claimant that a request to change her working hours had been agreed. The letter contained Sandra Flannery's notes of the meeting which took place on 1 October 2019. These notes were a nearly contemporaneous record and stated, "you requested your shift pattern be slipped so that you finish half an hour earlier i.e. 1800 hrs rather than your current finish time of 1830hrs. We discussed that there is no evidence of pregnancy related illness included in your risk assessment or return to work interviews and no additional reasonable adjustments (on top of those already in place) have been requested or made. You cancelled your occupational health appointment which I explained to you was at my request so that we could be sure you had the opportunity to discuss any medical issues you may not be sharing with us. Your choice of 1800 hrs is based on when the building had to close at 1800hrs recently for works to be done as you said it felt better for you. I expressed my concern that if you are so tired, maybe just slipping your shift by half an hour might not have enough of an impact on your tiredness - maybe we should be looking at more adjustments. I offered you the option to consider reducing your working day by half an hour and taking the half hour from flex or annual leave. At this point I left the room so you could discuss with your union rep. When I returned to the room you confirmed that you did not wish to reduce your working hours, just to move the shift so that you finish at 1800hrs and that no other adjustments are required. I asked you to confirm the activities you undertake between 1800hrs-1830hrs - all of which you described as activities that have to be done in situ at Keddleston Road. I explained that I need to be able to go away and think your request through as there are operational impacts of you finishing earlier - you are 1 of 2 people on shift at that time, with the other being based at the council house - there is no one else available to come across and cover for you. Your representative said that you would be willing to be flexible and maybe do an 1830hrs if we had an issue"

13. In the letter dated 3 October 2019 Sandra Flannery also provided her decision to the claimant in respect of her request to alter her working hours. She stated, "I am willing to support your request with the following parameters:- your working hours will become 1324 – 1800 hrs with the adjustment in place from Monday, 7 October 2019 until you start your maternity leave. Upon your return to work, following your maternity leave, your hours will revert to 1354-1830 hrs. You will meet with Helen on Monday 7th of October at 1330 hrs and look at your duties so that we continue to ensure that

everything is covered during the time you are on site. You will meet with Helen for a 1-2-1 on a weekly basis to ensure that this adjustment is working and ensure we are able to continue to review this."

14. A scheduled one to one meeting between the claimant and Helen Higginbottom took place on 10 October 2019 (pages 113-117). In this meeting Helen Higginbottom informed the claimant that jeans could not be worn at work. This led to the claimant becoming upset as she felt that she was dressed appropriately for work. The following day the claimant commenced sick leave and she did not return to work until 8 November 2019.

15. On 4 November 2019 the claimant submitted a grievance to Sandra Flannery (pages 184-192). The grievance made a number of allegations, many of which appear in the agreed list of issues this case. In the grievance the claimant stated, inter alia, "bully and harassment treatment from both Helen Higginbottom and Alison Taylor has been happening for many months…The attitude and unwanted behaviour from both Keddleston management toward myself and other team members is poor on a regular basis whether this be in their mannerism, emails received, face-to-face communication, whispering from management whilst myself and other colleagues are present in the room as well as body language such as barging past and blocking passage. I feel this unwanted behaviour toward myself has increased since being pregnant especially since and my request to change my working times due to my pregnancy. (sic)" The grievance also stated that the claimant felt that the respondent was not adhering to the Equality Act 2010.

16. On 12 November 2019 the claimant completed her maternity leave application form, this was countersigned by Mohammed Basharet the following day. The form proposed that the claimant commenced her maternity leave on 27 December 2019. The claimant's expected date of delivery was 28 December 2019 (page 119-122).

17. From 14 November 2019 to 26 December 2019 the claimant was absent due to sickness. She did however attend the meeting regarding her grievance which was held on Monday 2 December 2019. Also in attendance at that meeting were Nathan Rennocks, Sandra Flannery, and Sara Clarke, an HR advisor. The outcome of this meeting was communicated to the claimant by way of a letter dated 12 December 2019 (pages 194 – 196). The letter stated, "I do not find evidence of bullying, harassment or discrimination for being pregnant. I do find that there appears to be issues across the team around relationships and communication that we should work together to repair. As you are currently on sick leave we will work with the rest of the team on relationships and communication. Upon your return to work, I suggest that we will hold a team meeting for you to participate in so that you can have a voice in how we improve communication and relationships across the team." This letter also advised the claimant of her right to appeal the decision.

18. The claimant appealed the decision by way of an email dated 23 December 2019 (pages 198 – 201). The grievance again made a number of allegations, many of which appear in the agreed list of issues this case. In her appeal, she also stated:

> "I wish to appeal the outcome of the grievance as I feel important facts have not been addressed, there has been a lack of evidence provided to support the conclusion and I feel that the investigation has not been conducted fairly in a unbiased, impartial manner as detailed above including the lack of looking into historical complaints regarding Helen and Alison.
>
> I also wish to appeal the outcome actions suggested by Sandra. I feel working on communication alone does not address issues of bullying and harassment at Keddleston Rd site. I feel Sandra has not addressed issues of poor management and how manager communicate to staff with the lack of dignity and without prejudice.

> Finally I would also like to mention that the treatment I have received from DCC staff within FM management has caused me stress and anxiety and has impacted my mental health as well as my pregnancy health. I would like to point out that in the 20 years of my working life I have never before obtained a fit note so this is the first time I have ever obtained one and it has been for work related stress.(sic)"

19. On 27 December 2019 the claimant commenced her maternity leave.

20. On 27 May 2020 Sandra Flannery wrote to the claimant to apologise the delay in arranging for the claimant's grievance appeal hearing to take place (page 142). The reasons for the delay were expressed as a need for Sandra Flannery to clarify the claimant's grounds of appeal and ensure that she understood them correctly. In addition, it was explained that there was a delay due to of the Covid-19 pandemic.

21. On 28 July 2020 Sandra Flannery wrote to the claimant to confirm that she was making arrangements for the claimant's grievance appeal hearing to take place and also to discuss the claimant's health and well-being prior to the meeting taking place (page 143 – 144).

22. Around 31 July 2020 the respondent suggested to the claimant that her grievance could be reconsidered as part of an independent investigation into the facilities management team. This suggestion arose as by this point in time allegations of poor management within the facilities management team had been made by other employees including by a co-worker of the claimant, Danielle Mortimer. On 31 July 2020 Nathan Rennocks wrote to the respondent in the following terms:

> "Hi both
>
> having spoken to both SL and DM my members both agree with the case is being looked at as part of a wider issue within FM, furthermore SL is agreeable to her initial grievance being re looked at with a view to conducting a thorough investigation. I am of course covering both my members best interests by launching an early conciliation form with ACAS in case we need to proceed to an ET.
>
> Regards
>
> Nathan" (page 145)

The effect of this was that the claimant's grievance appeal hearing did not take place. Instead, the claimant agreed in conjunction with her trade union representative that her grievance should be reheard as part of a wider investigation into the culture of the facilities management team.

23. In early August 2020 Steve Caplan was appointed to be the designated officer to hear the grievance submitted by the claimant, together with the grievances submitted by two other employees of the respondent. All grievances concerned issues regarding the management of the facilities management team. Prior to this, Mr Caplan had no prior involvement in the claimant's grievance.

24. Mr Caplan wrote to the claimant on 11 August 2020 informing her that a decision had been made to undertake an independent investigation into the wider context of the issues raised in her grievance and appeal. He also informed the claimant that her grievance appeal would be paused whilst this investigation was undertaken (page 146 – 147).

25. Prior to the grievance meeting Mr Caplan had with the claimant, he was provided with an investigation report which had been prepared by Anjula Nath of the respondent's human resources team (pages 148 -365). Anjula Nath prepared this investigation report as they had been appointed to be the investigating officer into the issues regarding the management style present within facilities management. Anjula Nath completed an investigation report and met and interviewed a number of different individuals involved in the facilities management team including the claimant,

Mohammed Basheret, Alison Taylor, Helen Higginbottom and Sandra Flannery. An investigation statement was prepared by Anjula Nath in respect of their meeting with the claimant which took place on 28 August 2020 and 1 September 2020 (page 215 – 223). The claimant's investigation statement primarily refers to matters which now form part of the list of issues in this case. The claimant investigation statement also states:

> "The environment at Keddleston Road is not very nice or welcoming and we are not a team. It's very "tit for tat" and you don't know what mood HH or AT are going to be in that day. It can be hot and cold, some days you are spoken to and other days you are ignored. I have raised this with Mohammed Basharat (MB) and I have said to him that I am not sure if this is due to ageism (DM and I are younger) or gradism (we are a lower grade). It brings you down when you get that cold response and you start to think you have done something wrong."

26. In order to ensure that his decision outcome was completely independent from that of Sandra Flannery, Mr Caplan deliberately did not read Sandra Flannery's outcome letter which was included as an appendix to the investigation report he had been supplied with. The tribunal also finds as a fact that, apart from that letter, he read the entire investigation report including all other appendices in its entirety.

27. On 29 November 2020 the claimant's maternity leave came to an end. However, she did not return to work as she was absent due to sickness. The claimant eventually returned to work on 4 October 2021 when she commenced a new role with the respondent as a corporate investigation officer.

28. On 23 December 2020 Mr Caplan held the claimant's grievance meeting. The claimant attended together with her union representative, Nathan Rennocks. Anjula Nath was also in attendance as was the respondent's HR policy and strategy lead, and Mr Caplan's PA in order to take notes. The respondent's notes of this meeting appear at pages 379 - 384. The claimant's notes of this meeting appear at pages 376 - 378.

29. In this meeting, Mr Caplan summarised the areas that he wished to explore further with the claimant as follows,

> "1. Bullying and harassment,
>
> 2. pregnancy maternity discrimination
>
> 3. HR issues Historical issues general information mentioned in report." (page 382)

No objection was received from the claimant with regard to grouping and examining the issues associated with her grievance in this manner. This is apparent from both the claimant's notes of this meeting and the respondent's notes of this meeting.

30. On 14 January 2021 Mr Caplan wrote to the claimant to inform her that there had been a delay in reaching a decision in respect of her grievance. He stated that he anticipated he would be able to contact her with the outcome by 29 January 2021 (page 386).

31. On 21 January 2021 Mr Caplan provided his decision in respect of the claimant's grievance to both the claimant and her union representative, Nathan Rennocks (page 399-401). Mr Caplan structured his grievance outcome letter in accordance with the 3 areas that he explored with the claimant in the meeting of 23 December 2020, namely bullying and harassment, pregnancy/maternity discrimination and other historical issues. Mr Caplan did not uphold the claimant's grievances in respect of the alleged bullying and harassment. He also did not uphold the claimant's grievance in respect of a number of historical complaints that she had raised regarding communication and management style within the facilities management team. Mr Caplan did partially uphold the claimant's grievance in respect of pregnancy/maternity discrimination. He stated:

> "It is my finding that the council has failed in its duty to fully support Sabreena during the pregnancy with a timely and reasonable response to the request for an adjustment in working hours. The evidence provided suggests from the request to

the decision was in excess of five weeks and in the context of the pregnancy this duration is unacceptable and has the potential to cause additional stresses. I understand that there may have been a delay due to absence and inability to contact various people, but time is clearly of the essence in this situation. I will ensure that my finding in this matter is shared with the Head of Service and I offer a full apology to Sabrina for the distress that this delay caused her.

I do not find any evidence to support the claim of management style and meetings of the discrimination nature during the pregnancy. The issues of communication in this team are clearly poor and must now be subject to detailed review/Action Plan and "achieving change" protocol to improve and repair the communication line to management and operation of this team in accordance with the Derby City Council cultures and behaviours. This will need to be improved through working with HR and OD on behaviours and a culture across the whole team." (page 400)

32. On 31 January 2021 the claimant appealed against the outcome of this grievance (pages 404 - 417). Mr Caplan formally acknowledged receipt of the claimant's appeal on 12 February 2021 (page 418). There was then some delay in arranging the appeal hearing due to administrative issues or the unavailability of relevant individuals. In the event, the claimant's appeal hearing was held on 13 May 2021. The claimant was invited to this letter by way of a letter from Mr Caplan dated 28 April 2021 (pages 451 – 452). In this letter the claimant was also informed that Mr Simon Riley would hear the appeal. Mr Riley had no previous involvement in the matter. Prior to the grievance, he was provided with, and read, the investigation report which had been prepared by Anjula Nath of the respondent's human resources team (pages 148 -365).

33. The claimant's grievance appeal hearing was held on 13 May 2021. The claimant, Mr Riley and the following individuals attended; Nathan Rennocks, Steve Caplan, Sara Clarke and Sau Fung, a note taker who attended via MS Teams. Notes of this meeting was taken not only by the respondent but also by the claimant and Mr Rennocks. The notes taken by these individuals in respect of this meeting can be found at pages 454 - 488 of the bundle. It is apparent that the claimant mentioned breaches of the Equality Act by the respondent during this meeting. At the end of this meeting, Mr Riley informed the claimant that he would not be able to inform her of his decision within the 10 day period as stipulated in the respondent's policy.

34. In the event, Mr Reilly's outcome was delayed by significantly more than 10 days. Mr Riley did however write to the claimant on 28 May 2021, 11 June 2021, 18 June 2021 and 25 June 2021 informing her that the decision was delayed (pages 489 – 492). Mr Riley eventually wrote to the claimant on 30 June 2021 informing her of the outcome of her grievance appeal hearing. Mr Riley structured his outcome letter to the claimant based upon the individual points that she had raised in her grievance appeal meeting. Mr Riley did not uphold the claimant's allegation that Steve Caplan and Sandra Flannery failed to deal with her grievance in a fair manner. With regard to pregnancy/maternity discrimination, whilst Mr Riley did agree that the claimant's request to change her hours of work was not dealt with in a timely manner, he did not find that there had been any discrimination by the respondent or any breach of law.

35. With regard to the issues of poor management style and communication, Mr Riley acknowledged that the claimant's line manager, Mr Basharet, should have maintained better contact with her while she was on maternity leave. This part of the claimant's appeal was upheld. Mr Riley did not agree however that the claimant should had maintained better contact with the claimant during her period of sickness absence or that Helen Higginbottom subjected the claimant to sexual harassment on 10 October 2019. Mr Riley was also of the opinion that there had been a breach of the respondent's bullying, harassment and victimisation policy and that the claimant had experienced harassment. Again, this specific part of the claimant's appeal was upheld.

36. ACAS was notified using the early conciliation procedure on 13 August 2021. ACAS issued an early conciliation certificate on 16 August 2021. The ET1 was presented on 24 August 2021.

37. On 4 October 2021 the claimant returned to work with the respondent in her new role as a corporate investigation officer.

Law

38. In respect of the claim for direct pregnancy and maternity discrimination, section 13 of the Equality Act states:

> **A person (A) discriminates against another if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.**

39. Direct discrimination under section 13 is about less favourable treatment. It requires comparison. Where a claimant does not have an actual comparator to rely on, then it is possible to rely on a hypothetical comparator, one who resembles the claimant in all material respects, except for the relevant protected characteristic. In making this comparison section 23(1) of the Equality Act 2010 provides:

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

There is no requirement for a comparator in relation to the complaints made under section 18, which the Tribunal now turns its attention to.

40. In respect of the section 18 claim for pregnancy and maternity discrimination, a woman who is pregnant or on maternity leave is protected from discrimination by S.18 of the Equality Act 2010. Such discrimination occurs where an employer treats a woman 'unfavourably' because of the pregnancy or maternity leave - S.18(2)(a) and 18(3) and (4).

41. Section 18 EQA 2010 protects women from unfavourable treatment because of any of four reasons. These are as follows:

> **(2) A person (A) discriminates against a woman if, in the protected period in relation to a pregnancy of hers, A treats her unfavourably—**
>
> **(a) because of the pregnancy, or**
>
> **(b) because of illness suffered by her as a result of it.**
>
> **(3) A person (A) discriminates against a woman if A treats her unfavourably because she is on compulsory maternity leave.**
>
> **(4) A person (A) discriminates against a woman if A treats her unfavourably because she is exercising or seeking to exercise, or has exercised or sought to exercise, the right to ordinary or additional maternity leave.**

42. The statutory protection arising from this section applies to a woman during what is called the protected period. This is defined by 18(6) which provides:

> **(6) The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends—**
> **(a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period or (if earlier) when she returns to work after the pregnancy;**
> **(b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy.**

43. The Claimant will bear the burden of proving discrimination for all her claims made under the Equality Act 2010 subject to the burden of proof provisions contained in section 136 Equality Act 2010. This provides, inter alia, that**:**

> **"(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."**

44. When considering whether the claimant has satisfied the initial burden of proving facts from which a Tribunal might find discrimination, the Tribunal must consider the entirety of the evidence, whether adduced by the claimant or respondent; see **Laing v Manchester City Council [2006] IRLR 748 EAT.**

45. In addition, a simple difference in treatment as between the claimant and his comparators and a difference in protected characteristic will not suffice to shift the burden; see **Madarassy v Nomura [2007] IRLR 246 CA.**

46. In practice this means that the Claimant must prove a basic case which is more than simply showing, in pregnancy case for example, that she was pregnant and that she was treated unfavourably in the protected period, and that the employer knew that she was pregnant.

47. In respect of the claim for sexual harassment, section 26(2) of the Equality Act 2010 provides that a person (A) harasses another (B) if A engages in unwanted conduct of a sexual nature, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

48. In deciding whether the conduct has the relevant effect, section 26(4) provides:

> **(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—**
> **(a) the perception of B;**
> **(b) the other circumstances of the case;**
> **(c) whether it is reasonable for the conduct to have that effect.**

49. The test therefore has both subjective and objective elements to it. The subjective part involves the tribunal looking at the effect that the conduct of the alleged harasser (A) has on the complainant (B)). The objective part requires the tribunal to ask itself whether it was reasonable for B to claim that A's conduct had that effect.

50. Victimisation is defined in section 27 of the 2010 Act. Section 27(1) and 27(2) provide:

> **(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.**

The causal connection required is the same as in a direct discrimination claim. It is not a "but for" test but an examination of the real reason of for the treatment. As such, it is necessary to consider the employer's motivation (conscious or unconscious). There is no need for the claimant to rely upon a comparator to make out a claim of victimisation.

51. The Tribunal now turns its attention to the law relevant to the time limit issues. Section 123 of the Equality Act 2010 provides:

> **(1) Subject to sections 140A and 104B proceedings on a complaint within section 120 may not be brought after the end of—**
> **(a) the period of 3 months starting with the date of the act to which the complaint relates, or**
> **(b) such other period as the employment tribunal thinks just and equitable.**

52. Under section 123(3)(a), conduct extending over a period is to be treated as done at the end of that period.

53. The 3-month period allowed by section 123(1)(a) is extended by the legislation governing the effect of Early Conciliation (see section 140B of EA Act 2010). The period from the day after "Day A" (the day early conciliation commences) until "Day B" (the day the Early Conciliation certificate is received or deemed to be received by the claimant) does not count towards the 3-month period, and the claimant always has at least one month after Day B to make a claim.

54. In this case the claimant's claim form was presented on 24 August 2021 and the claimant entered early conciliation with ACAS on 13 August 2021. The effect of this is that claims relating to acts prior to 14 May 2021 are made out of time, unless time is extended.

55. There is no presumption that time will be extended. In respect of this, we note the following passages from the Court of Appeal judgment in the case of **Robertson v Bexley Community Centre [2003] IRLR 434**:- **"If the claim is out of time there is no jurisdiction to consider it unless the tribunal considers it is just and equitable in the circumstances to do so." (para 23) "…the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time, so the exercise of discretion is the exception rather than the rule."** (para 25). These comments have been supported in **Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT** and **Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327 CA**.

56. The words "just and equitable" give the Tribunal a broad discretion in deciding whether to extend the time allowed for making a claim. A summary of the case law and was given by the EAT in **Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] ICR 283** per HHJ Peter Clark:

> **11. A useful starting point is the judgment of Smith J in British Coal Corpn v Keeble [1997] IRLR 336. That was a case concerned with the just and equitable extension of time question in the context of a sex discrimination claim. Smith J, sitting with members, in allowing the employers' appeal and remitting the just and equitable extension question to the employment tribunal, suggested that in exercising its discretion the tribunal might be assisted by the factors mentioned in section 33 of the Limitation Act 1980, the provision for extension of time in personal injury**

cases. The first of those factors, as Mr Peacock emphasised in the present appeal, is the length of and reasons for the delay in bringing that claim.

12. However, as the Court of Appeal made clear in Southwark London Borough Council v Afolabi [2003] ICR 800, in deciding the just and equitable extension question, a tribunal is not required to go through the matters listed in section 33(3) of the Limitation Act 1980, provided that no significant factor is omitted. That principle was more recently reinforced in a different context by the Court of Appeal in Neary v Governing Body of St Albans Girls' School [2010] ICR 473, where the leading judgment was given by Smith LJ. There, it was held that a line of appeal tribunal authority requiring a tribunal to consider the factors in the CPR, rule 3.9(1), as it then was, when deciding whether or not to grant relief from sanction following non-compliance with an unless order, was incorrect. Following Afolabi it is sufficient that all relevant factors are considered.

13. Section 33(3) of the 1980 Act does not in terms refer to the balance of prejudice between the parties in granting or refusing an extension of time. However, Smith J referred to the balance of prejudice in Keeble, para 8, to which Mr Peacock has referred me. That, it seems to me, is consistent with the approach of the Court of Appeal in the section 33 personal injury case of Dale v British Coal Corpn, where Stuart-Smith LJ opined that, although not mentioned in section 33(3), it is relevant to consider the plaintiff's (claimant's) prospect of success in the action and evidence necessary to establish or defend the claim in considering the balance of hardship. That passage neatly brings together the two factors which, Mr Dutton submits, were not, but ought to have been, considered by this tribunal in the proper exercise of its discretion: prejudice and merits. I shall return to those factors in due course.

14. What has emerged from the cases thus far reviewed, it seems to me, is that the exercise of this wide discretion (see Hutchison v Westward Television Ltd [1977] ICR 279) involves a multi-factoral approach. No single factor is determinative.

57. The Court of Appeal considered the discretion afforded to Tribunals in **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640** at paragraphs 18 and 19, per Leggatt LJ:

18. First, it is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see British Coal Corporation v Keeble [1997] IRLR 336), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see Southwark London Borough Council v Afolabi [2003] EWCA Civ 15; [2003] ICR 800, para 33. […]

19. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of, and reasons for, the delay and (b) whether the delay has prejudiced the

respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

58. Underhill LJ commented in **Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23**, that a rigid adherence to any checklist of factors (such as the list in section 33 of the Limitation Act 1980) can lead to a mechanistic approach to what is meant to be a very broad general discretion. He observed in paragraph 37:

    The best approach for a tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time including in particular …"The length of, and the reasons for, the delay".

59. As for the rule in section 123(3)(a) that conduct extending over a period is to be treated as done at the end of the period, the essential question is whether the alleged acts are continuing acts or separate distinct acts. This was considered by the Court of Appeal in **Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96**, per Mummery LJ:

    52. The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of 'an act extending over a period'. [...]Instead, the focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed.

60. In **Aziz v FDA 2010 EWCA Civ 304**, the Court of Appeal noted that, in considering whether separate incidents form part of an act extending over a period, 'one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents'. In **Greco v General Physics UK Ltd EAT 0114/16**, the EAT held that despite six of seven acts of sex discrimination involving a particular manager, that involvement was not a conclusive factor and the employment tribunal was justified in finding that the allegations concerned different incidents treated as individual matters. Accordingly, they were not considered as part of a continuing act and, in consequence, some were out of time.

Legal Submissions

61. Both the claimant and respondent provided the tribunal with oral submissions. In accordance with the case management directions given by my colleague Employment Judge Adkinson on 11 April 2022, these were limited to 30 minutes each. The respondent did not address the tribunal to any specific case law or legislation that it wished the tribunal to have regard to. The claimant referred the tribunal to the case of **(1) Wells Cathedral School Ltd (2) Mr M Stringer v (1) Mr M Souter (2) Ms K Leishman: EA-2020-000801-JOJ (Previously UKEATPA/0836/20/JOJ)**. When questioned by the tribunal about which specific legal principle which arose from this case, that she wished the tribunal to have regard to, the claimant was unable to provide an answer. Notwithstanding this, and having regard to the overriding objective, the tribunal took the case of Wells Cathedral school into account when arriving at this decision. The Wells Cathedral school case is a decision of the Employment Appeal Tribunal. In Wells, it was decided that the employment tribunal did not err in deciding that it was just and equitable to extend time in respect of the presentation by the

claimants of their respective discrimination claims, in all the circumstances. It should be stated, that Wells was a decision which rested upon of that particular case of their particular cases.

The circumstances of the claimant's case are not directly analogous to the claimants in the Wells Cathedral school case. In addition, the initial employment tribunal in the Wells Cathedral school case had made no findings of fact. That is very much not the case here.

62. From a legal perspective, the fact that a complainant has awaited the outcome of an internal grievance procedure before making a complaint is just one matter to be taken into account by a tribunal considering the late presentation of a discrimination claim. In **Apelogun-Gabriels v Lambeth London Borough Council and anor 2002 ICR 713**, CA, the claimant presented a race discrimination claim that was out of time due to the fact that he had been seeking redress through the employer's grievance procedure. The Court of Appeal dismissed his appeal but took the opportunity to clarify the case law in this area. It held that the correct approach to whether it is just and equitable to extend the time limit for presenting a discrimination complaint that is out of time because the claimant was using an internal procedure was laid down in **Robinson v Post Office 2000 IRLR 804, EAT**, rather than **Aniagwu v London Borough of Hackney and anor 1999 IRLR 303, EAT**. There is no general principle that it will be just and equitable to extend the time limit where the claimant was seeking redress through the employer's grievance procedure before embarking on legal proceedings. The general principle is that a delay caused by a claimant awaiting completion of an internal procedure may justify the extension of the time limit but it is only one factor to be considered in any particular case.

63. Neither party addressed the tribunal in relation to the rule in in section 123(3)(a) that conduct extending over a period is to be treated as done at the end of the period. The tribunal has however considered that issue in its reasoning below.

Conclusions

64. In order to reach its conclusions, the tribunal returns to the agreed list of issues.

Issue 1. The claimant commenced ACAS early conciliation on 13 August 2021. In respect of the claims brought by the claimant, did any or all of the matters complained of occur before the primary limitation period, starting on 14 May 2021?

65. In relation to issue one, the tribunal finds that the acts complained of as set out at paragraphs 4.1 to 4.16 of the list of issues occurred before the primary limitation period of 14 May 2021 which is the primary limitation period in this case. They are, on the face of it, out of time. The only act which the tribunal has jurisdiction to hear complaint in respect of, is the act set out at 4.17 of the list of issues.

Issue 2. In respect of any which are not, is it nonetheless just and equitable under section 123(1)(b) Equality Act 2010 to permit the claimant to pursue her claims brought under the Equality Act 2010?

66. Turning our attention to issue two, the tribunal shall now consider whether it is just and equitable to permit the claimant to pursue her claims brought under the Equality Act 2010. The claimant provided no explanation as to why there was a delay in bringing her employment tribunal proceedings. In addition, there is evidence that the claimant was well aware of her legal rights. She refers to the Equality Act in her correspondence with the respondent, and the fact that she believes that the respondents have failed to comply with their obligations under the Equality Act. This can be seen for example in her grievance statement of November 2019 at page 186 of the bundle.

67. The delay in this case is considerable especially when looking at issues 4.1 to 4.15. By way of example, issue 4.1 is approximately 20 months out of time. Issue 4.14 is approximately 17 months out of time. Even issue 4.16.1 is approximately four months out of time. The claimant did not receive incorrect legal advice rather quite the opposite. At various points throughout the grievance process she was assisted by members of her trade union namely Mr Hemstock and Mr Rennocks. In his witness statement Mr Rennocks stated that he provided support to the claimant not as a trade union representative but rather as a supportive colleague. That assertion is inconsistent with the evidence before the tribunal, most notably Mr Rennocks's email of 31 July 2020 (page 145) where he writes to the respondent in his capacity as a senior steward of the union and refers to the claimant as one of his members. In this email, Mr Rennocks also states that he will be lodging an early conciliation form with ACAS in case the matter needs to proceed to an employment tribunal. It is apparent to the tribunal that Mr Rennocks was assisting the claimant in a formal capacity.

68. The tribunal has carefully considered the prejudice that would be suffered to the respondent if an extension of time were allowed and balanced that against the prejudice that would be suffered by the claimant if she were not able to bring certain aspects of her case. Taking these factors into account, the tribunal does not consider it just and equitable to admit the claimant to pursue her claims brought under the Equality Act 2010 in respect of the acts set out at 4.1 to 4.16 of the agreed list of issues.

Issue 3. In the alternative, did any of those acts amount to conduct extending over a period ending within the primary limitation period?

69. The tribunal shall now consider issue three, namely do any of the acts amount to conduct extending over a period ending within the primary limitation period. The only act which occurs after the primary limitation period is that set out at issue 4.17 of the agreed list of issues. This relates essentially to Mr Riley's handling of the claimant's grievance appeal and his outcome letter, together with his failure to provide an explanation for the delay in responding to the claimant.

70. On the facts of this case, the tribunal finds no evidence that Mr Riley's acts were the continuation of a course of conduct. Mr Riley had played no part in the other alleged acts set out in the list of issues. The tribunal accepts Mr Riley's evidence that he had no involvement with the claimant's grievance prior to August 2020 and that he did not commence employment with the respondent until December 2019. The tribunal is satisfied Mr Riley acted independently and that applying from the case of **Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96**, his actions cannot be said to represent the culmination of conduct extending over a period of time.

71. For the sake of clarity, the effect of this is that all of the alleged acts contained in issues 4.1 to 4.16.2 are out of time. Only the alleged acts as set out in 4.17 are in time. Having said that however, the tribunal will now address the allegations set out at point 4 of the agreed list of issues and reach a decision in respect of the same.

Issue 4 - The claimant alleges that the following acts took place:

4.1 That the claimant made a request to adjust her working hours on 14 August 2019 and she was informed of the outcome on 3 October 2019. The claimant complains that this was a delayed outcome.

72. This is an act which occurred within the protected period. The tribunal finds that there was a considerable delay in making the adjustment to the claimant's working hours. It was argued by the respondent that this delay was caused in part by reasons such as

Helen Higginbottom taking annual leave, the claimant taking annual leave and the fact that there was no overlap between the claimant and Helen Higginbottom's shift patterns. The tribunal is not persuaded by such explanation and considers that the delay in making the adjustment to the claimant working hours amounted to unfavourable treatment of the claimant. In reaching this conclusion the tribunal was particularly swayed by the evidence of Mr Steve Caplan who gave evidence to the tribunal that in cases of managers taking annual leave of a week or more it was normal practice that managers would brief their colleague so that matters could be dealt with in their absence. There is no evidence that Helen Higginbottom attempted to do this. In any event, there was a considerable delay to adjusting the claimant's working hours without any reasonable explanation.

73. The tribunal also takes into account that pregnancy concerns a finite time period and consequently there is a need to act swiftly to put adjustments into place. We find that the claimant had made their tiredness known to the respondent and that the adjustment in question was of a minor nature. We also find that this unfavourable treatment took place because the claimant was pregnant. In reaching this decision it appears to us that the reason for the delay was intrinsically linked to the respondent's stated need to undertake an occupational health assessment. Not only did we find this an overbearing approach to deal with adjustments of a minor nature related to pregnancy but we also take into account that, on the facts of this case, an occupational health assessment did not in fact occur prior to the change being made. This aspect of the claim would succeed if it were within time. However, it is not.

4.2 <u>That on 18 September 2019, Helen Higginbottom referred the claimant to Occupational Health without conducting a call with the claimant beforehand to discuss the referral. Helen Higginbottom said that she had done so on the referral form.</u>

74. With reference to allegation 4.2, this is an act which occurs within the protected period. It is not in dispute between the parties that Helen Higginbottom referred to occupational health without conducting a call with the claimant beforehand. The tribunal considers that this does however amount to unfavourable treatment of the claimant and that such treatment was because the claimant was pregnant. The fact that Helen Higginbottom did not conduct a call with the claimant beforehand meant that the claimant did not have the opportunity to address the contents of the occupational health referral form. Helen Higginbottom's failure to let the claimant see this form amounted to poor management and demonstrated an unsympathetic approach to the claimant's pregnancy. The fact that the claimant was not able to see the occupational health form resulted in a number of questions being asked which were of little relevance to the claimant's condition, for example "is she a suitable candidate for ill-health retirement or redeployment on medical grounds?" (page 89). Not only was the referral itself disproportionate and concerned with and adjustment of a minor nature but it must also be borne in mind that the claimant was never seen by occupational health. The purported referral to occupational health delayed the adjustment to the working hours of the claimant. We consider that to be unfavourable treatment because of the claimant's pregnancy. This was treatment which was intrinsically linked with her pregnancy. This aspect of the claim would succeed if it were within time. However, it is not.

<u>4.3.That in October 2019, following the request to change ours was approved, the claimant was told that her 121 meetings would take place weekly.</u>

75. With reference to allegation 4.3, The Tribunal does not find the claim to be made out. It is not in dispute that following the change in the claimant's hours one-to-one meetings took place weekly. However, the tribunal does not consider that this amounted to unfavourable treatment by the respondent. The respondent provided a plausible explanation as to why such meetings were to take place weekly. The

respondent stated that it needed to keep the claimant's health under review and also monitor the operational impact of the claimant's adjusted hours. This was evidenced in the letter from Sandra Flannery to the claimant dated 3 October 2019 and evidence was also heard in respect of this matter from Helen Higginbottom. The tribunal found the respondent's evidence credible on this issue and the claimant's claim fails. The claim is in any event out of time.

4.4. On 1 October 2019, Sandra Flannery complained to Helen Higginbottom about the claimant out of office reply. Ms Flannery complained that the out of office reply was not meaningful enough.

76. With reference to allegation 4.4, again, there is no dispute between the parties that this matter was raised by Sandra Flannery to Helen Higginbottom. We do not however accept that Sandra Flannery's complaint amounted to unfavourable treatment of the claimant because of her pregnancy. We fully accepted the evidence of Sandra Flannery to the effect that upon sending an email, she received the claimant's out of office reply which was somewhat vague in relation to when the claimant might next be available. It was in relation to receiving that out of office reply from the claimant that Sandra Flannery made contact with Helen Higginbottom. Sandra Flannery gave evidence, which we accepted, that she commenced employment with the with the respondent on 24 September 2019 and so this was probably the first out of office email she had received from the claimant. It is therefore clear to the tribunal that the reason Sandra Flannery's complaint was raised was due to the content of the claimant's out of office reply and not for any other reason. This claim does not succeed and is in any event out of time.

4.5.On 1 October 2019, during a meeting with Helen Higginbottom, Sandra Flannery and union rep, Richard Hemstock, Helen Higginbottom was very intimidating and aggressive with her behaviour and mannerisms towards the claimant.

77. With reference to allegation 4.5 there was a clear conflict of evidence in relation to this point. The tribunal is not however satisfied that Helen Higginbottom was intimidating and aggressive towards the claimant in this meeting with either her behaviour or her mannerisms. The tribunal accepted the evidence of Sandra Flannery in relation to this issue. Sandra Flannery's evidence was that at this meeting both the claimant and the respondent started talking and that she had to interrupt to stop both individuals. Sandra Flannery also gave evidence that she did not consider Helen Higginbottom's behaviour to be intimidating or aggressive which the tribunal accepted. In addition, Helen Higginbottom gave evidence that she did not shout, raise her voice or act in an intimidating or aggressive manner at this meeting. Taking all of these points into account, the claimant's case is not made out on this issue. There was no unfavourable treatment because of pregnancy and the claim fails. In any event, it is out of time.

4.6. On 7 October 2019, Helen Higginbottom said "which one of you to is at front desk" in a loud, very rude, intimidating and aggressive tone to the claimant.

78. In relation to this act, there is insufficient evidence to support the claimant's assertion that she was treated unfavourably because of her pregnancy by Helen Higginbottom. Helen Higginbottom gave evidence, which the tribunal accepted, that she was unable to recall this incident. Notwithstanding this, if the incident did happen, which we do not accept, it appears to the tribunal that Helen Higginbottom adopted a confrontational management approach with everyone in the facilities management department and not just the claimant. The treatment of the claimant in respect of this issue cannot be said to be because of the claimant's pregnancy. This is clearly demonstrated at page 155 of the bundle where the claimant stated that, "Keddleston Road is not a happy place due to management behaviour". The claimant also stated, "I am not sure if this is due to ageism (DM and I are younger) or gradism (we are on a lower grade)." The tribunal finds it illuminating that the claimant does not make any explicit link between

her pregnancy and maternity with the treatment she received from management. The claimant's case fails on this issue and, in any event, is out of time.

4.7. On 8 October 2019, Helen Higginbottom asked the claimant in a very rude and aggressive manner why she was logged onto a Wyse terminal and not a laptop.

79. With reference to 4.7, we find that there is insufficient evidence to support the claimant's allegation that this treatment by Helen Higginbottom amounted to unfavourable treatment because of her pregnancy. On balance, the tribunal prefers the evidence of Helen Higginbottom in relation to this issue. At paragraph 50 of her witness statement, Helen Higginbottom states that she did not raise her voice and was not rude or aggressive in her manner or tone. Helen Higginbottom also stated that she wished to make the claimant's work easier as the Wyse terminals were not fully working. We can find no link between Helen Higginbottom's treatment and the claimant's pregnancy. The claimant's case fails on this issue and, in any event, is out of time.

4.8. On 10 October 2019, Helen Higginbottom interrogated the claimant in an aggressive tone about who and why the printing key from the reception desk had been taken.

80. With reference to 4.8, again there is insufficient evidence to support the claimant's allegation that this treatment amounted to unfavourable treatment because of their pregnancy. We accept the evidence of Helen Higginbottom on this point. Helen Higginbottom gave evidence that she went to reception and asked the claimant to pass her the master key. Helen Higginbottom states that she did not ask who had taken the key or why the key had been taken as it was normal practice for people to take the key. Helen Higginbottom also stated that she did not interrogate or talk to the claimant in an aggressive manner or raise her voice. The claimant's case fails on this issue and, in any event, is out of time.

4.9. On 10 October 2019, Helen Higginbottom interrogated the claimant in an aggressive tone about papers printing on the printer.

81. With reference to 4.9, again there is insufficient evidence to support the claimant's allegation that this treatment amounted to unfavourable treatment because of their pregnancy. We accept the evidence of Helen Higginbottom on this point. Helen Higginbottom's evidence is that she cannot recall this event. We accept that. The claimant's case fails on this issue and, in any event, is out of time.

4.10.That on 10 October 2019, during a 121 meeting, Helen Higginbottom questioned the claimant about her trousers and asked if she was wearing jeans. The claimant explained that they were black cotton maternity trousers, at which point Helen Higginbottom lowered her head and body towards the claimant's legs, thighs and groin to lean in under the table for a closer inspection.

82. With reference to issue 4.10, we note that the claimant alleges that this amounts to both an act of pregnancy and maternity discrimination, pursuant to section 18, and also an act of sexual harassment, pursuant to section 26(2). The tribunal is unable to determine exactly what type of trousers the claimant was wearing on 10 October 2019. However, the mere fact that an individual is wearing maternity trousers, does not mean that any criticism of those trousers will automatically equate to unfavourable treatment because of pregnancy. Pregnancy clothing comes in a variety of forms. Although Derby City Council has no specific dress code for employees in the claimant's position, employees are expected to dress appropriately when in a public facing role. On balance, we accept the evidence of Helen Higginbottom that she thought the claimant was wearing jeans and accordingly she questioned the claimant about this matter. It is entirely legitimate for managers to question their employees about clothing if they think that the clothing is unsuitable for work. We do not accept that Helen Higginbottom

lowered her head and body towards the claimant's legs, thighs and groin to lean in under the table for a closer inspection. There is insufficient evidence.

83. We also note that the claimant does not describe Helen Higginbottom's alleged behaviour as sexual harassment in the original grievance that she raised in November 2019. This can be seen on page 189 of the bundle and appears to suggest that the allegation of sexual harassment has been attached to this alleged event at a later date by the claimant in order to make the allegation appear more serious. The claimant's case on this issue fails in relation to the pregnancy and maternity discrimination claim and also the sexual harassment claim.

4.11. That in the 121 on 10 October 2019, Helen Higginbottom asked the claimant why she had not filled the teabags in the refreshment lounge.

84. With reference to issue 4.11 there is quite simply insufficient evidence that the alleged actions of Helen Higginbottom amounted to unfavourable treatment of the claimant because of her pregnancy. We prefer Helen Higginbottom's evidence in relation to this matter, which is recorded at paragraph 56 of her witness statement. This was simply a case of Helen Higginbottom raising with the claimant concerns from other members of the facilities management team as to why refreshments had not been replenished. This was something the claimant had responsibility for and it was entirely due to legitimate for Helen Higginbottom to raise these concerns. The claimant's case fails on this issue and, in any event, is out of time.

4.12.That the claimant was excluded from the Christmas party in December 2019 by Alison Taylor.

85. With reference to 4.12, that the claimant was excluded from the Christmas party in December 2019 by Alison Taylor. The claimant deals with this allegation at paragraph 19 of her witness statement. She stated that on 10 October 2019 she was notified by her co-worker, Danielle Mortimer, that a discussion was had by management about the Christmas meal booking. Danielle Mortimer advised the claimant that Alison Taylor had informed her that because the claimant had not given a deposit, she should not go to the Christmas party. The claimant alleges in her witness statement that this comment was made by Alison Taylor to directly discriminate her, victimise her and harass her due to her pregnancy. There is insufficient evidence to support this allegation. The tribunal did not hear evidence from Danielle Mortimer and the evidence given by Alison Taylor, which we accept, was that the only reason why the claimant did not attend the Christmas party was because she had failed to pay the deposit. There is no evidence that Alison Taylor's alleged comments contravened the relevant provisions of the Equality Act 2010 in any manner. There is also insufficient evidence to support the claimant's allegation that she was excluded from the Christmas party and certainly none to suggest that her pregnancy was in any way involved. The claimant's case fails on this issue and, in any event, is out of time.

4.13.That the respondent with the claimant during her maternity leave. In particular, that Mohammed Basharet and Sandra Flannery failed to contact the claimant during her maternity leave. Including that Sandra Flannery used the claimant's work email address to invite her to team meetings.

86. We do not find this allegation made out. Mr Basharet gave evidence, which we accepted, that some employees of the respondent prefer not to be contacted at all during their maternity leave. In addition, there is evidence in the bundle on page 367, which indicates that the claimant should have agreed with her manager prior to commencing her maternity leave how she wished to be kept in touch with. That evidence also makes it clear that the claimant did not have to work keeping in touch days and the council does not have to offer them. Mr Basharet also gave evidence

that there was a reluctance on his part to contact the claimant due to the fact that she had raised a grievance which concerned him. We also note, that on page 366, the claimant is recorded as having told Mr Basharet that although she was disappointed regarding the lack of contact around keeping in touch days, she was very unlikely to return to work unless there was a major breakthrough in the grievance she had submitted. Taking into account both the fact that the claimant had not engaged sufficiently with the keeping in touch policy and that even if she were offered days to keep in touch she was unlikely to attend, we do not find that the claimant was treated unfavourably because of her pregnancy.

87. We also find that the team meetings sent to the claimant by Sandra Flannery were a genuine attempt by Sandra Flannery to involve the claimant in future team discussions and resolve the communication difficulties that the Keddleston Road site had experienced. We do not find that sending the emails to the claimant's work email address amounted to unfavourable treatment. There is no evidence that the claimant had expressly indicated to the respondent that she wanted communication via her personal email address whilst she was absent from work, The claimant's case fails on this issue and, in any event, is out of time.

4.14.That Helen Higginbottom did not sign the card sent to the claimant in early 2020 after the birth of her daughter.

88. In relation to issue 4.14 it is not in dispute between the parties that Helen Higginbottom did not sign the card. There was no policy or procedure in place at the respondent that managers must sign cards for members of staff upon birth of their children. Put simply, there are numerous reasons why an individual might not sign a card. To say that the actions of Helen Higginbottom on this occasion amount to unfavourable treatment of the claimant because of pregnancy is not borne out by the evidence. Helen Higginbottom's evidence, which we accept, is that she was not aware that there was a card or collection for the claimant. The claimant's case fails on this issue and, in any event, is out of time.

4.15.That Sandra Flannery did the following things:
4.15.2. in the grievance outcome letter dated 12 December 2019, she stated that as there was a team WhatsApp group, she did not find evidence of bullying and harassment;

89. Turning to issue 4.15, the tribunal first proposes to deal with issue 4.15.2. What is represented in the list of issues is a misleading interpretation of what Sandra Flannery said in her letter dated 12 December 2019. The tribunal acknowledges that Sandra Flannery referred to the existence of a WhatsApp group for the Keddleston Road team but to say that that was the sole or motivating reason she found no evidence of bullying and harassment is not true. Sandra Flannery refers to a number of other issues in her letter including discussions with a team member and also the fact that members of the Keddleston Road team have on occasion socialised together. The tribunal is not persuaded this is unfavourable treatment. Although the term 'unfavourable treatment' is not defined in the Act, employment tribunals have interpreted it in line with the familiar concept of 'detriment' that applies in discrimination cases. In **Porcelli v Strathclyde Regional Council 1986 ICR 564**, the Court of Session's said that 'detriment' simply meant 'disadvantage'. However, the employee must have at least some reasonable sense of grievance. This was emphasised by the EAT in **Singh v Cordant Security Ltd 2016 IRLR 4, EAT**. To include such facts in a letter does not amount to a detriment or unfavourable treatment. The claimant's case fails on this issue and, in any event, is out of time.

4.15.That Sandra Flannery did the following things:
4.15.1. she did not address the points listed at 4.1 - 4.14 above in the first grievance outcome letter dated 12 December 2019;

90. Turning to issue 4.15.1 the tribunal finds that Sandra Flannery did not address all the points listed at 4.1 to 4.14 in the first grievance outcome letter dated 12 December 2019. This is something which Sandra Flannery accepts in her witness statement at paragraph 21. The tribunal does however accept Sandra Flannery's evidence that whilst she considered all the points raised in the grievance, she did not address them each individually in this letter. Sandra Flannery had sought advice from HR that her letter needed only to be a summary, rather than a point-by-point response to the claimant's allegations. Before the tribunal, Sandra Flannery also accepted that she would write the letter differently if she had to do so today. We accepted that evidence. The letter of 12 December 2019 does not address all of the points listed at 4.1 to 4.14 and could be more detailed, however the tribunal does not accept that the letter's failure to address all points amounts to unfavourable treatment of the claimant because of her pregnancy. The tribunal does not accept that the brevity of this letter was in any way linked to the claimant's pregnancy. There is no evidence to support this allegation. The claimant's case fails on this issue and, in any event, is out of time.

4.15.That Sandra Flannery did the following things:
4.15.3. in the grievance outcome letter dated 12 December 2019, she stated that Helen Higginbottom was very upset about the grievance but there was no mention or consideration of the claimant's upset

91. Turning to issue 4.15.3, again, there is no dispute between the parties that this occurred. It is clear from the letter, as seen on page 195 of the bundle, that it contains the following line, "when I spoke to Helen about the grievance she was very upset." The tribunal does not however accept that the inclusion of this one line in the letter amounts to unfavourable treatment of the claimant. Further, the tribunal does not accept that inclusion was in any way linked to the claimant's pregnancy. The claimant's case fails on this issue and, in any event, is out of time.

4.15.That Sandra Flannery did the following things:
4.15.4. on 12 October 2020, she stated to independent investigator Anjula Nath that the claimant and her colleague Danielle Mortimer would talk to each other about Botox, nails and general chit chat but they wouldn't talk to each other about what was to getting done.

92. With regard to issue 4.15.4, this issue concerns the statement that Sandra Flannery provided to the independent investigator Anjula Nath on 12 October 2022. In this document, at page 349 of the bundle, Sandra Flannery is recorded as saying, "from what I found , SL and DM would talk to each other about Botox, but they wouldn't talk to each other about what was not getting done; it doesn't work as DM was not communicating properly with SL and vice versa." Taking into account the case of **Singh v Cordant Security Ltd 2016 IRLR 4, EAT,** the Tribunal does not consider that the act listed in 4.15.4 amounts to unfavourable treatment. There is certainly no evidence that Sandra Flannery made these comments to Anjula Nath were because of the claimant's pregnancy. The claimant's case fails on this issue and, in any event, is out of time.

4.16.That Steve Caplan did the following things:
4.16.1. He did not address the points listed at 4.1 - 4.15 above in the second grievance outcome letter dated 21 January 2021

93. Turning to issue 4.16.1, as this issue falls outside of the protected period, it is being brought as a direct pregnancy discrimination claim pursuant to section 13 of the Equality Act 2010. We find that Steve Caplan did not address all the points listed 4.1 to 4.15 in his letter. However, we note that it would be impossible for Mr Kaplan to address all of the points listed at 4.1 to 4.15. This is because 4 .13 refers to the respondent's lack of contact with the claimant during her maternity leave. It was not

plausible for the claimant to expect a response to this issue as she had not raised that issue either in the statement she had provided to Anj Nath at this stage of the process (page 215 of the bundle). The claimant had also not mentioned the respondent's of lack of contact with her during her maternity leave in the grievance meeting that was held with Steve Caplan on 23 December 2020. This is evidenced by both her minutes of the meeting and the respondent's minutes of this meeting (pages 376 – 384). In addition, we accepted Mr Caplan's evidence where stated that he had not addressed every single issue but rather that he had attempted to address the broad themes of the claimant's grievance. This was an approach which the claimant did not object to when the matters were grouped under those headings and discussed in that manner at the grievance meeting that took place on 23 December 2020. Taking these issues into consideration, the tribunal is not persuaded that Mr Caplan's failure to address the points listed at 4.1 to 4.15 of the list of issues amounts to less favourable treatment of the claimant on the grounds of pregnancy. The claimant's case fails on this issue and, in any event, is out of time.

4.16.That Steve Caplan did the following things:
4.16.2. on 13 May 2021, during the grievance appeal hearing, he admitted that he had not read all of the grievance paperwork.

94. Turning to issue 4.16.2, we accept that Mr Caplan admitted during the grievance appeal hearing that he had not read all of the grievance paperwork. Mr Caplan gave evidence, which the tribunal accepted, that in order to ensure that his decision outcome was completely independent from that of Sandra Flannery, he deliberately did not read Sandra Flannery's outcome letter which was included as an appendix to the investigation report he had been supplied with. The tribunal also accepts that, apart from that letter, he read the entire investigation report including all other appendices in its entirety. Mr Caplan said that the reason he did this was because he did not want in any way to prejudge the outcome of the grievance he was dealing with. We fully accepted Mr Caplan's evidence in respect of this matter and found him to be a credible witness. The tribunal is not persuaded that Mr Caplan's statement that he had failed to read all the grievance paperwork amounts to less favourable treatment of the claimant's on the grounds of pregnancy. His failure to read all of the grievance paperwork was because he wanted to ensure that the claimant had a fair hearing. The claimant's case fails on this issue and, in any event, is out of time.

4.17.That Simon Riley did the following things:
4.17.1. he did not address the points listed at 4.1 - 4.15 in the grievance appeal outcome that he sent to the claimant on 30 June 2021

95. Turning to issue 4.17.1 the tribunal notes that the actions in respect of this allegation are brought in time. The allegation is that Simon Riley did not address the points listed at 4.1 to 4.15 in the grievance appeal outcome that he sent the claimant on 30th of June 2021. That allegation is correct. We do not however find that this failure to address all the points amounts to unfavourable treatment on the grounds of the claimant's pregnancy. Mr Riley gave evidence that he attempted to deal with the main thrust of the claimant's argument and that he structured his outcome letter to the claimant based upon the individual points that she had raised in her grievance appeal meeting.

96. Although Mr Riley's letter was brief in relation to the size of the grievance raised, it did not in our opinion amounts to less favourable treatment on the grounds of the claimant's pregnancy. We were presented with no evidence from the claimant that Mr Riley would have treated a grievance from a hypothetical comparator in a different manner. We also did not find that he would have treated a hypothetical comparator in a different manner. There is also no evidence that he would have treated a grievance from the actual comparators that are named at 12.1 and 12.2 of the list of issues in a different manner. The claimant's case fails on this issue.

4.17.That Simon Riley did the following things:
4.17.2. he did not have an explanation to delays in him communicating the grievance appeal outcome letter sent to the claimant on 30 June 2021

97. Turning to issue 4.17.2 it is apparent to us that Mr Riley did not offer an explanation for the delay in communicating the grievance appeal outcome letter to the claimant to the claimant in the letters that he sent. The tribunal is not however satisfied on the evidence that this amounts to less favourable treatment of the claimant on the grounds of her pregnancy. This treatment was not because of the claimant pregnancy, rather it was because of poor practice on the part of the respondent. Mr. Riley gave evidence that the letters in question were standard form letters which would have been sent out automatically by a member of his team on a weekly basis. We accepted Mr Riley's evidence that part of the delay in responding to the claimant's grievance was due to the fact that it was his first time dealing with a grievance at Derby City Council. We also accepted that part of the delay was because Mr Riley had to seek advice from human resources and the council's legal department with regard to the format and drafting of this letter. The failure to provide an explanation for the delay was poor practice but we do not accept that that it was because of the claimant's pregnancy. The claimant's case fails on this issue.

98. With regard to issues 5 to 14 in the agreed list of issues, the tribunal has addressed these issues in paragraphs 65 to 97 above.

99. The tribunal now turns its attention to issues 15 onwards and the claim of victimisation.

15. Did the claimant carry out any protected act(s)? The claimant relies on the following:
15.1. her request to change her hours as a pregnancy reasonable adjustment in August 2019;
15.2. submitting the first grievance on 4 November 2019;
15.3. submitting the first grievance appeal on 23 December 2019;
15.4. commencing ACAS early conciliation; and
15.5. submitting the second grievance appeal on 31 January 2021.

100. The tribunal finds that the matters listed at 15.1 to 15.5 are protected acts.

16.Does the tribunal find that the alleged treatment set out above at 4.1 - 4.17 occurred as a matter of fact?

101. With regard to issue 16, the tribunal has addressed this issue in paragraphs 65 to 97 above. In particular, the alleged treatment set out at 4.1 and 4.2 occurred as a matter of fact.

17.Are any of the acts out of time?

102. For the reasons given earlier in judgment at paragraphs 65 to 72, the claim of victimisation is out of time. As the claimant victimisation is at a time, the tribunal need not address issues 18 or 19.

Sexual harassment – section 26 Equality Act 2010
20. Does the tribunal find that the following alleged unwanted conduct occurred? That on 10 October 2019, during a 121 meeting, Helen Higginbottom questioned the claimant about her trousers and asked if she was wearing jeans. The claimant explained that they were black cotton maternity trousers, at which point Helen Higginbottom lowered her head and body towards my legs, thighs and groin to lean in under the table for a closer inspection.

103. As outlined at paragraphs 83 and 84 there is insufficient evidence to find that the alleged unwanted conduct occurred. Accordingly, the tribunal need not address issues 22, 23 and 24.

_____

Employment Judge McTigue

_____

Date 4 August 2023

REASONS SENT TO THE PARTIES ON

.....

.....

FOR THE TRIBUNAL OFFICE