EMPLOYMENT TRIBUNALS

Claimant: **Miss AB**

Respondent: **Royal Borough of Kingston upon Thames**

Heard at: **London South in person. On:** **17-21& 24 July 2023**
Before: **Employment Judge Mclaren**
Members: **Ms J Cook**
Ms G Mitchell

Representation
Claimant: In Person
Respondent: Ms. R White, Counsel

JUDGMENT

The unanimous decision of the employment tribunal is as follows: –

1. The respondent did not contravene section 13 of the Equality Act 2010 in relation to issues 3.1, 3.3, 3.8, 3.9, 3.11, 3.12, 3.13, 3.18, 3.20, 3.21, 3.22, 3.23 and 3.24
2. The respondent contravened section 13 of the Equality Act 2010 in relation to issues 3.4, 3.5, 3.6, 3.7, 3.10, 3.14, 3.15, 3.16, 3.17, and 3.19.
3. The claimant is awarded £ 21,000 as compensation for injury to feelings together with £4,423 interest.

<u>Evidence</u>

1. We heard evidence from the claimant and from 4 witnesses for the respondent. These were Ayanna Bailey, Senior HR Business partner, Christopher Smith, Team Manager, David Grasty, Corporate Head of Digital Strategy and Portfolio and the Assistant Director Highways, Transport and Regulatory Services.
2. We were provided with a bundle of 1739 pages. We were also assisted by helpful submissions from both parties.
3. The findings of fact set out below were reached by the tribunal on a balance of probabilities, having considered all the evidence given by witnesses during the hearing, including the documents referred to by them, and taking into account the tribunal's assessment of the witness evidence.
4. Only findings of fact relevant to the issues, and those necessary for the

tribunal to determine, have been referred to in this judgement. It would not be necessary, and neither would it be proportionate, to determine each and every fact in dispute. If the tribunal has not referred to every document it has read and/or was taken to in the findings below, that does not mean it was not considered if it was referred to in the witness statements/evidence.

Issues

5. Having spent the first day reading the papers we had a concern that the issues list with which we were presented, which identified a claim of direct discrimination only, might not reflect the claims as set out in the claim form. It appeared to us that it was possible the claimant had intended to bring a claim for victimisation in relation to the request for an apology by one line manager, and claims for harassment in respect of some of the matters being brought as direct discrimination. We are conscious of the fact that the respondent is entitled to know the case it has to meet, but nonetheless, a list of issues is not a pleading and we wished to be satisfied that the claimant had made conscious choices and the issues reflected the claim that had been brought. We therefore explored the subject with the parties and reviewed the relevant documents.
6. The claim form suggested that the claims being brought were discrimination, harassment and victimisation. They were not particularly clearly set out. At a case management hearing on 30 September 2022 Employment Judge Fowell ordered that the claimant provide further information about the claim by 28 October 2022. In particular the difference between harassment and direct discrimination were set out and the claimant was asked to provide a list of each significant act of harassment, giving certain information each case. The claimant was also asked to list any additional acts of discrimination, giving the same details. The claimant sent a detailed document to the tribunal and respondent on 14 October which was said to be a categorisation of her complaints. This lengthy document made reference to direct discrimination, indirect discrimination, harassment and victimisation, but did not identify how she categorised her particular complaints.
7. On 14 March the claimant sent in what was said to be a list of documents which identified, for each of her complaints, how she was bringing them, identifying some as direct discrimination and some as harassment. On 14 March the claimant sent a further document which was a table which identified all the matters that she complained of as direct discrimination.
8. Counsel for the respondent then prepared a draft list of issues and a further case management preliminary hearing was held on 29 March 2023 by Employment Judge R Russell. The note of the preliminary hearing provides that some time was spent clarifying the claims of direct discrimination and the aspects of the claim that the claimant wished to bring. The claimant was again ordered to provide information about each incident of direct discrimination or harassment setting out details.
9. It was agreed that the claimant, with her friend supporting her, and the respondent’s Counsel and instructing solicitor, met to discuss the list of issues. Ms White said that, while she of course remains the respondent’s representative, she had explained the legal basis on which discrimination claims could be brought and this included the difference between direct discrimination, victimisation and harassment. The claimant agreed that Ms

White had gone through these matters with her.

10. We asked the claimant about what she intended to bring as her claim. While as a layperson she found the different legal labels unclear, she accepted that the question of what issues she was bringing and their appropriate description had been discussed at two preliminary hearings and for a number of hours in a meeting with the respondent. She confirmed that she was satisfied as to the issues that she was bringing and she had made a conscious choice to categorise all of her complaints as direct discrimination. On that basis we therefore accept that the issues list does reflect the parties common understanding of the case we must decide, and more importantly, reflects the claimant's intention of the claim she wishes to bring. We note that in closing submissions the claimant confirmed that she felt that discrimination was the correct claim.
11. The agreed issues list is therefore as set out below. There is not intended to be any claim for victimisation or for harassment. The events set out in the claim form are being brought by the claimant as direct discrimination.

Introduction

1. The Claimant claims only Direct Discrimination on the grounds of gender reassignment.

Gender Reassignment

2. It is admitted that the Claimant had and has the protected characteristic of gender reassignment at all material times.

Direct Discrimination

3. Did the Respondent: -
3.1 Fail to implement the Equalities Act as a protected characteristic on 1.7.20.
3.2 DELETED
3.3 Fail to undertake a risk assessment for gender transition at work on or by 1.7.20.
3.4 Fail to update the Claimant's name and so deadname her in respect of pension records from 1.7.20 to 8.8.22.
3.5 Fail to update the name on her door pass and so deadname her from 1.7.20 to 28.4.22.
3.6 Fail to update the name on the CRM Highways Complaints System and so deadname her from 1.7.20 to 22.2.22.
3.7 Fail to update her name in the RBK/Sutton staff directory on google so deadnaming her from 1.7.20 to 9.3.23.
3.8 Remove her from contact with Aquiva from 21.9.20.
3.9 Remove her from work on the Wayfinding Project lighting scheme from 20.8.20.
3.10 Remove her from a number of works as listed in Appendix 1 that had previously been part of her role on 30.10.20, 3.12.20, & 15.2.21 as set out in her grievance of 30.4.21.
3.11 Remove her from direct contact with Councillors as set out in an e-mail from Mr C on 03.12.20.
3.12 Reprimand given to her on 10.12.20 by her line manager Mr C for

contacting Councillor Wehring directly.
3.13 Did Mr C escalate her unofficial complaint (made on 10.12.20) to Mr D , Mervyn Bartlett and Julie Bygrave within about 20 minutes of receiving the complaint?
3.14 Did Mr C demand an apology from her on 10.12.20 for raising her unofficial complaint.
3.15 Deadname her on a vehicle pass obtained on 4.1.21.
3.16 Manager Mr E demanding an apology from Claimant on to Mr C 1.2.21.
3.17 Manager Mr D delaying escalating a complaint by the Claimant from 1.2.21 to 14.4.21.
3.18 Review of highways service structure by Mr D on 6.5.21.
3.19 Not making arrangements for the Claimant's new name for data security training so deadnaming her on 28.5.21.
3.20 Being signed off sick on 25.6.21 with stress due to alleged suspected victim of bullying.
3.21 Kept away from works she would normally have done as listed in Appendix 2 from 15.02.21 to 29.04.22 and a majority haven't returned to the present day.
3.22 David Grasty moves informal meeting for grievance investigation to formal on 7.7.21 at request of Kemeshimi Ikheloa HR.
3.23 Informed by Steve Mulloy of ACAS that RBK had turned down ACAS intervention on 19.7.21.
3.24 Mr D informed claimant moved investigation of grievance from David Grasty to Arif Sain an external person on 14.12.21.

Comparator.

4. The Claimant compares herself with herself before transition. No other comparators are available.

Reason

5. Was any of the above treatment because of the Claimant's gender reassignment?

Time limits

6. Given that the Claim form was presented on 3.9.21 and early conciliation was started on 16.8.21 and the EC Certificate was issued on 20.8.21, claims about anything happening before 16.5.21 are formally out of time.

7. Should the tribunal extend time because any conduct complained of was 'conduct extending over a period?

8. Should the tribunal extend time because it is just and equitable to do so?

Remedy

9. What compensation (if any) should be awarded?
10. Has the Claimant suffered financial loss because of unlawful

discrimination?
11. Should the Claimant be awarded injury to feelings?
12. Should interest be awarded?
13. Uplift in respect of any failure to follow the ACAS Code in relation to her grievance?
14. A declaration or recommendation.

Appendix 1 - List of works - (para 3.10)

List of examples of ongoing works from which the Claimant was removed with start date of
remit for the works. (Not including ad hoc daily works)

1. Monitor contract performance and take appropriate action for contract and compliance and
delivery.
2. Development of document for street lighting policy.
3. Work with SPE to develop LED Lantern Conversion program for commencement 2019/2020.
4. Provide technical advise street lighting and highways electrical matters to colleagues and
external stakeholders.
5. 27/11/17 Councillor Enquiries – Mervyn Bartlett.
6. 27/11/2017 Term Maintenance and Improvement contract RBK Lighting
7. 01/12/2017 Ancient Market Liaise with Kingston First Mark Mclaron GIFAS Under floor pit
8. 08/12/2017 Raise Lower Bollards start of works.
9. 01/12/17 Site surveying for RBK and outside stakeholders
10. 01/12/2017 D&D Electrical Supply CCTV.
11. 04/12/2017 Service Reports (Customer Enquiries) Mervyn Bartlett.
12. 04/12/2017 UKPN Extra works review Mr C
13. 05/12/2017 Christmas Lights Resident Committees Mervyn Bartlett
14. 05-12-2017 Environment Campaign – Samuel Hackett
15. 06/12/2017 ANPR Met Police – Mr C
16. 06/12/2017 Paul Crossley Wheatfield Way design review Go Cycle Mr C
17. 06/12/2017 General Enquiries Metropolitan Police CCTV contact Centre
18. 07/12/2017 Speed Signs and Wig Wags electrical supplies.
19. 07/12/2017 Liaise with Highways inspectors on faults picked up on inspections.
20. 07/12/2017 CRM Customer Service highways faults lighting
21. 07-12-2017 John Lewis Tunnel Survey
22. 09/12/2017 D&D under bridge lighting takeover running Mahesh G
23. 11-12-2017 Design Review site meetings Kier – New Malden High St passed Mr C
24. 12-12-2017 Electric Vehicle Consultation – Councillors.
25. 14-12-2017 Integration Officers Group – Highways Operations.
26. 18-12-2017 Chasing up unfinished works Kier.
27. 21-12-2017 Finding asset owners for Compliance and enforcement Officers
28. 21-12-2017 Councilor Enquiries – Mervyn Bartlett
29. 21-12-2017 Column surveys for Banner Review – Olga Gilevska.
30. 22-12-2017 Chasing priority jobs for councillors with Kier - Olga Gilevska

31. 04-012018 UMS Power Data Reports – Tracy Kirkpatrick
32. 05-01-2018 Strategic Planning Urban Design - Advisor
33. 08-01-2018 Capital Bids -Mervyn Bartlett
34. 08-01-2018 Coombe Park Estate Private Estate -Mr C
35. 22-01-2018 Liaise with Suppliers
36. 08-01-2018 Liaise with GoCycle contractor -Kier Gary Newton
37. 09-01-2018 Contract Tender Evaluation -Olga Gilevska
38. 09-01-2018 Removal Old Parking Meters – Kier
39. 11-02-2018 Mayrise Invoice run -Mr C
40. 16-01-2018 Liaise with GoCycle design team -Atkins.
41. 01-02-2018 Lighting Survey RBK – Leigh Gravenor
42. 01-02-2018 Electrical Supply air quality monitoring. Pollution Control
43. 01-02-2018 Officer action after residents committee – Olga Gilevska
44. 01-02-2018 Clarence Street Design.
45. 01-02-2018 Road safety assessment for lighting on electronic billboards – Younes Hamade.
46. 01-02-2018 John Lewis Tunnel start commissioning lighting design.
47. 01-02-2018 Re Review GoCycle - Neil West.
48. 02-02-2018 New Malden Christmas Lights – Neville Rainford
49. 02-02-2018 UKPN checking permit locations.
50. 02-02-2012 TR12 designs role for Highways
51. 05-02-2018 Start TR12 Road Crossing Lighting Design D&D South Lane Shops
52. 05-02-2018 Crime prevention low Light levels – Olga Gilevska Met Police
53. 06-02-2018 Reposition lighting for Vehicle Crossover – Michael Dore
54. 06-02-2018 Raise external Capital Funding to upgrade LED lighting at RBK - Rachel Lewis
55. 06-02-2018 Capital street lighting budget – Olga Gilevska
56. 09-02-2018 Chris Begley Power supplies for CCTV.
57. 12-02-2018 Accreditation for Kier on Network Rail Assets – John Charles
58. 13-02-2018 RBK invoicing kier – Erika Oldfield.
59. 14-02-2018 MCRA Annual Meeting – Mr C
60. 19-02-2018 Weekly GoCycle Meetings – Jason Patching
61. 19-02-2018 Wheatfield Way /college roundabout relight solar signs
62. 19-02-2018 DCMS funding for schemes Katie Sargent
63. 19-02-2018 Hours for Go Cycle to reimburse working as consultant for consultants.
64. 20-02-2018 Traffic Counters - Andrew Jordan.
65. 22-02-2018 Kingston Annual Contract Meeting - Kier
66. 22-02-2018 Concept design Meetings – Strategic Planning.
67. 26-02-2018 Wifi connecting Kingston -Mr C authorized
68. 27-02-2018 Fountains Roundabout H&S issues - Leon Parry
69. 27-02-2018 Start commissioning quotes for relighting – Philips, SPIE
70. 28-02-2018 TR12 appraisal for Institute of lighting Professionals and Philips - Terry Fletcher
71. 08-03-2018 Lighting for RBK Housing – Olga Gilevska.
72. 08-03-2018 CRM UMS2 UK Power Networks. Sarah Webb.
73. 09-03-2018 Transport for London damaged assets – Phil Skelton.
74. 09-03-2018 Community Management – Surbiton Councillor Complaint – Richard Dean.
75. 13-03-2018 Review Lighting for Kingston Station Bridge removal – Michael

Smith PPD Kier.
76. 14-03-2018 Site Meetings UKPN – Katy Sherry
77. 20-03-2018 Community Rangers – Stored Assets – Jaqueline Dore.
78. 21-03-2018 Program Lighting Upgrade SOX luminaires – Olga Gilevska.
79. 21-03-2018 Rolling Upgrade for Sox Lanterns - Councillor Enquiries – Tom Mann Team Manager.
80. 21-03-2018 CRP Program – Olga Gilevska.
81. 21-03-2018 Quotes for works for D&D Team – Mahesh Ganeshan
82. 22-03-2018 Cost Centre Manger update my details for Aggresso – Mervyn Bartlett
83. 26-03-2018 Councilor Day Direct Enquiry about Street Lighting fault.
84. 27-03-2018 Checking Concession agreement Aqiva RBK - Michael Snaith.
85. 27-03-2018 Request for Street Lighting -Mervyn Bartlett
86. 04-04-2018 School Safety Sign Wig Wag -Graham Clapson Project Engineer.
87. 01-05-2018 Kingston First Catenary Wires – Adrienne Hawkins
88. 09-05-2018 Highlighting Design failures on RBK TR12 failures by Go Cycle.
89. 29-05-2018 Berkley Homes paid RBK £155phr for survey by me as Street Lighting Engineer – Darius Jaszczyszyn.
90. 12-06-2018 Insurance Claim Urgent - 17PPL083 Incident 25/11/2017 Technical Reply.
91. 14-06-2018 Answering technical questions for Atkins for highways engineer on a lighting schemes.
92. 22-06-2018 Replying to risk assessment by Atkins for Mr C TR12 & TR25.
93. 27-06-2018 Appraisal PD mentioned Staff Shortage.
94. 06-08-2018 Loleg, Design Standard Car Charging review.
95. 29-08-2018Traffic counters for Data Engineers – Phillippa White.
96. 30-08-2018 Clarence Street Lighting Design Meeting Urban Design.
97. 05-09-2018 Catchup Mr C .
98. 05-09-2018 ANPR Olga Gilevska & Chris Begley.

Appendix 2 - List of works - (para 3.21)

List of examples of works from which the Claimant was kept away.
1. Tunnel Lighting relighting and energy saving design.
2. Clarence Street Lighting Design Scheme.
3. CRP review up to 30 schemes Kier Lighting.
4. Meter Reading – JLT/ Kingston Bridge.
5. CRP design as above up to 30 new schemes.
6. Emergency works.
7. Verifying uplift on UKPN works for Kier Lighting.
8. Routine/Ad Hoc Maintenance – Coombe Estate.
9. Routine Maintenance – Kier Lighting.
10. Ad hoc maintenance – Kier Lighting.
11. TR22 structural testing of columns
12. LED Upgrades.
13. Design work for D/D team.
14. Mobile phone small cells on columns structural testing and approval.
15. Cameras for parking.
16. Wi-Fi senders.

17. Planning - external lighting designs approval for Planning.
18. Trying to arrange CMS control systems. (reviewed by outside consultants)
19. The raise and lower bollards in the Ancient Market.
20. Councillor enquiries.
21. Councillor’s direct enquiries
22. General public enquiries
23. Highways lighting enquiries (Highways Team)
24. Liaise with Go Cycle design review.
25. Vehicle crossover
26. UKPN connections, Kier lighting.
27. SLA breaches.
28. Electric vehicle charging
29. ANPR cameras for the Police,
30. Pedestrian crossing, update our network TR12 TR25.
31. Christmas lights.
32. Ancient Market electrical 3 phase supplies.
33. Kingston first. Christmas Lights.
34. Network rail, Bridges, walkway & tunnel lighting
35. Liaise with renewable energy, cycle routes.
36. Concrete columns, upgrade.
37. Sox lanterns, urgent upgrade.
38. Liaising with Parks and services for lighting repairs.
39. Column upgrade for LED upgrade.

<u>Finding of Facts</u>

<u>Background</u>

Mr FMr EMr FMr E

<u>Equality Act policies and risk assessment (issue 3.1 and 3.3)</u>

12. The claimant gave notice to the employer that she was intending to transition some eight months before she did so. She transitioned with effect from 1 July 2020. She complains that she was given no support by her employer who failed in its duty of care towards her and had not implemented appropriate policies.
13. We heard evidence from Ms Bailey, senior HR business partner. She accepted the respondent did not handle the claimant’s transition well. She explained that at the time of the claimant’s transition there was an overarching Equality and Diversity Policy Statement which had been updated in March 2018 .This covered a range of protected characteristics which included gender reassignment. (Page 160). Gender reassignment was also referred to in the respondent’s 2006 Dignity At Work Policy. This is at page 147 – 1433 and 141 – 1426. At page 149 there is a heading “sexual harassment” which talks about the Sex Discrimination Act giving protection against discrimination on various grounds, which includes where someone intends to undergo, is undergoing or has undergone gender reassignment.
14. There is another reference to gender reassignment at page 144 under the heading “sexual harassment and gender reassignment” . This part of the policy specifies that harassment of an individual on the grounds of gender reassignment is to be treated as sexual harassment.

15. It was accepted that the policy had not been updated in line with the Equality Act 2010. The updates happened only when a new policy, 2021 Dignity at Work Policy was brought into force on 14 December 2021,many years after the legislation changed.
16. It is accepted by the respondent that it did not have a policy in place which aligned with the legislation in force at the date of the claimant's transition. It was accepted that, while there were references to gender reassignment, these characterised it as sexual harassment. Ms Bailey agreed that was not correct. She told us that when the claimant raised her grievance in relation to her protected characteristic that was not treated as a complaint of sexual harassment but was not able to identify under what policy it was addressed. Ms Bailey was asked to explain why the respondent had not updated its policy appropriately. She was unable to give any explanation. When she joined in May 2021 it was recognised that a number of policies needed to be updated and processes were put in place to do that. The focus was on updating and not investigating the reason for the policies being out of date.
17. Ms Bailey told us that the learning development points taken from this matter is that equality training around trans not only had to be provided but had to be repeated periodically. The respondent now has a specific trans equality policy , developed in consultation with the claimant and first published in December 2022. That has been reviewed in consultation with the LGBTQ+ staff network and was published in January 2023. It will be subject to periodic review. The panel asked how E learning was monitored and was told that the relevant HR departments identify the population that need to take the training and provide managers with details of those who have not done so. Managers are then expected to chase up and ensure compliance.
18. We note that the HR Department now has a policy review system in place. This consists of a spreadsheet identifying appropriate policy review dates for all policies with notes embedded within the policies indicating the date on which they have been updated in the next update cycle as well as consultation with staff groups and the trade union where a policy is being updated.
19. Ms Bailey also stated that the respondent had learned a lesson with regard to dead naming and that more support would be given with regard to contacting external providers. In future there would be a conversation with the individual offering a choice of new accounts being opened or having existing accounts amended. We drew her attention to the sign on the claimant's locker as shown in a photograph. She confirmed that no investigation had taken place into who had done this. We find that the question of who had done this was not investigated at any point by anyone.
20. As accepted, we find that the respondent did not have an appropriate policy in place. While we note the references to gender reassignment within the policy creating 2006, we agree with the claimant, gender transitioning is not a matter of sexual harassment.
21. While we accept that the Equality Act was in place and therefore the employer was bound to meet its obligations, we find that it had failed to incorporate these legal obligations into its policies. It had not provided appropriate training to staff. It did not have any policy in place that would assist individuals like the claimant. We are surprised at such an omission by a local authority and we find its policies and practices at the time of the claimant transitioning to have been woefully inadequate with both a failure

to provide guidance to staff undergoing transition and to team managers. We understand why the claimant felt badly let down by her employer. She was left to navigate a complex set of respondent systems with no support or even signposting from HR as to how to do this. We were told that the respondent employs around 4,500 people and has an HR strength of around 60, yet despite this level of resource there was nothing appropriate in place. No adequate explanation has been given for this significant failing. It does not appear any apology has been offered to the claimant or other staff potentially facing the same issues.

22. Nonetheless, despite our considerable concerns about this failing, we find that the respondent's failure to implement the Equalities Act in its policy was not targeted at the claimant, nor was it because of her protected characteristic. We conclude that it was part of a wider unexplained and un investigated HR failing.
23. The claimant also complains that there was no risk assessment carried out in relation to her gender transition. Ms Bailey agreed this is the case. The respondent does not have a risk assessment for a person transitioning and she does not agree that gender reassignment is a health and safety risk that required a risk assessment.
24. The panel asked whether there was a process for a stress risk assessment. Ms Bailey agreed that there was and accepted that this is a subset of a health and safety issue. She tells us that if a manager became concerned about an individual suffering from stress or if HR received a sicknote indicating somebody was off on long-term sickness and the stress then they would talk about carrying out a stress risk assessment. This did not happen with the claimant. The claimant's sicknotes submitted for the period of absence in 2021 refer to being the suspected victim of bullying and do not use the word stress.
25. Ms Bailey confirmed, however, that when the claimant had returned from a four-month period ill-health she was referred to occupational health. Pages 1080-1083 are the notes of that assessment which focused on the claimant's stress. We find therefore that the respondent was aware, despite the sicknotes not being specific, that the claimant was suffering from stress. No stress risk assessment was carried out in response. It does not appear that the practice Ms Bailey described was in fact in place.
26. We noted that the bundle contained a letter from the claimant's GP which is provided on 24 November 2022 which did indicate that the claimant had experienced stress in 2021. Ms Bailey said that she had not seen this letter. We accept that as the information was provided over a year later, the respondent could not have been expected to consider a stress risk assessment in 2021 based upon this letter, but as we have found they were aware at the time that the claimant's absence was for stress.
27. The claimant was unable to provide any authority for her belief that a health and safety assessment was a requirement beyond saying that health and safety assessments required for all sorts of aspects of her work and she expected such a significant life change to have required an assessment.
28. We accept the respondent's evidence that it does not have a standard risk assessment process for those transitioning gender. We find that there is no express legal obligation for such an assessment to be in place. We find that failure to have a specific health and safety risk assessment process in place for those transitioning was not an unfavourable act because of the claimant's protected characteristic. This is something that the respondent

did not consider was required. It was not in any way related to the claimant.

29. While we were told that the respondent does have a stress risk assessment process in place, there was a failure to put this in place when, based on Ms Baileys evidence, it should have been considered. This is a failing but is not an issue in the case.

Communication with councillors (issue 3.11 and 3.12)

30. We were directed to pages 428 – 444 which was a chain of emails relating to the "wayfinding project". This included two street lighting projects and included the lighting of a plaque to be installed in the market. The claimant was asked to advise on the lighting elements in the project. The claimant raised some concerns in an email of 10 September 2020 because in her view the question she was asking involved public safety and possible expense to highways lighting. She was not comfortable about the decision to install the lighting being proposed. On 10 September Mr C confirmed with the claimant that she had raised good points, these were well raised and certainly required answers. At this point it appears that her line manager is supportive towards the claimant raising health and safety concerns.
31. On 17 September the claimant emailed Mr Bartlett and Mr D , copied to Mr C , to make them aware that Kingston First were trying to install a non-compliant scheme on their network. Both Mr Bartlett and Mr D confirmed they agreed the job needed to be done properly.
32. By 6 November the claimant explained that she could not authorise the equipment to be installed and strongly advised that it should not be authorised and making it clear that it was a safety issue.
33. In response Mr E advised the claimant that he had spoken with Mr D and he (Mr D) wanted it to happen. It was corporately important and highways and transport would move that forward. The claimant was told to do everything to facilitate the project. The claimant was told that *"we do not want NO on the lexicon of language that is being used"* .
34. The claimant responded to Mr D , Mr E and Mr Bartlett, copied to Mr C , in an email of 9 November setting out that she had to say no and they could feel free to bring down upon her whatever censure they liked. This was not the wild West and she would not compromise on safety.
35. Mr E response on the same day was to reply that it did not move her argument forward by sending a long diatribe to a select community saying no. Her role was to make stuff happen and to use her professional knowledge to find solutions. It was not to write an email saying it cannot happen. It was a corporate objective. If the answers that were required were too difficult for her to resolve, then he would appoint an external consultant to advise in a professional manner.
36. Page 834 of the bundle contained an exchange of emails between Mr Bartlett, Mr D and Mr E discussing the claimant's attitude. The chain begins with Mr E contacting his colleagues and saying that he was tempted to send out an email he had drafted to the claimant tomorrow and his email concludes *"or do you want her to get away with a hissing fit again?"*
37. Mr D replies that a firm hand is required, supportive but challenging. Mr Bartlett agrees and states the emails from the claimant are *"just bewildering".* He suggests that they need to channel the claimant's energies into being positive which he concludes was not an easy task. The

claimant was understandably offended by the language used to describe her which we agree was derogatory. Mr D confirmed that he would not have used such language himself and accepted that it could have been put differently.

38. Mr D was asked why he had been supportive of the claimant in emails on 17 September, but by November was supporting Mr E criticisms of the claimant. He explained that he would have expected between September and November that the claimant would have found a solution. He described her as having become “intransigent”. He believes she should have shown a more collaborative approach. He gave as an example of this that on 17 September, when the client suggested a virtual meeting, the claimant should have had that meeting and not refused it. This is not something that he raised at the time, although he was copied into the claimant’s email saying why she did not believe that a meeting would help and she needed matters to be put in writing.
39. The claimant’s explanation as to why she did not think a meeting was appropriate predates Mr D ’s email of 18 September confirming that matters need to be done properly. We do not accept Mr D ’s oral evidence that he had concerns about collaboration at the time and conclude that in September Mr D did not have any concerns about the way the claimant was interacting with the client and did not think that she needed to have the meeting. We find that his concerns do not arise until November when he is no longer content.
40. We were also directed to a chain of emails from page 844 -853 relating to Albany Mews. This involves a lighting project in a conservation area and local residents were objecting to the proposed lighting scheme. Mr D ’s evidence was that when Mr E became aware that residents were raising issues he wrote to Councillor Lidbetter about the matter. The councillor asked for a draft letter to be prepared from the council to residents and Mr D told us that Mr E asked the claimant to provide that letter.(p 847)
41. Mr D stated that instead of doing that, on 2 December the claimant wrote to Councillor Lidbetter, copied to Mr E, setting out why the project was not moving forward. This explains the residents’ hostility. It set out the guidance with which the council had to comply for lighting levels. The claimant’s email concluded that the only way forward was to try and find an equivalent luminaire to the existing which would require the residents to help towards costs.
42. The claimant suggested in questioning that she had sent the letter to Councillor Lidbetter before she had received the request from Mr E to do a draft residents letter. She was not therefore ignoring his instruction, she had taken action before receiving the request. The sequence of events is unclear from the chain of emails itself and Mr D was unable to confirm one way or the other. Mr D did think it highly likely that it was the contents of the email the claimant sent, regardless of whether she had sent it before or after being instructed to prepare a residents letter that led to the next events.
43. Mr E, who was copied into this email, sent an email the next morning to Mr D stating that it looked like the claimant had “*gone native again”*. It also made reference to how influential Councillor Lidbetter might be bearing in mind the review. Mr D ’s response was he did not think it was too bad, although Mr E might want to follow up with the councillor. We again observe that the language Mr E is using is derogatory towards the claimant and not what would expect from a manager. References were made during

the hearing to the respondents STAR values. Such language is not aligned to those values, but there is no evidence that this was addressed with the manager

44. In his witness statement Mr D states that this email was not what the claimant had been asked for and was unhelpful as it did not show the service as being helpful. It is his evidence that the comment by Mr E about bearing in mind the review, was him noting a concern that this email could affect the review of the service which started in November 2020.
45. Mr D 's evidence was that following this exchange Mr C gave instructions to his whole team on 3 December (page 936) that emails to be sent to councillors were to be preapproved by the line manager. The team consisted of three people. The claimant said that she was the only person who communicated with councillors in Kingston from her team. She had been singled out. While Mr Hawkins had been copied onto the email, he corresponded with councillors for the other borough. The claimant had as part of her role communication with councillors. This was her responsibility. In issuing this instruction, her line manager was removing a part of her remit and this was not a reasonable instruction.
46. It was agreed that Mr Hawkins probably communicated with councillors for Sutton. Mr D did not know whether the third member of the team had this responsibility or not. We therefore accept the claimant's evidence that she was the single point of contact within her team for councillors from Kingston. We also accept Mr D 's evidence that it is highly likely the instruction was given because of the claimant's email to Councillor Lidbetter. We therefore find that the instruction was, in effect, directed at the claimant.
47. Despite this written instruction, on 9 December the claimant wrote directly to 1 of the councillors (the email is a page 854). Mr D 's evidence was that he received direct feedback from his manager that the claimant's email of 9 December was not helpful. It had not been preapproved and Mr D 's evidence was that it would not have been approved.
48. On 10 December 2020 (page 861) Mr C therefore wrote to the claimant explaining that he had given very clear instructions that all responses to councillors have to be run by him prior to being sent out. It said that he thought they needed to meet to discuss this further and that a meeting date will be sent out in due course. It is accepted by the respondent that this amounted to a reprimand. Mr D responded to Mr C on 10 December when he was copied into the reprimand stating *"well done to Paul, absolutely spot on."* It was Mr D 's position that this was an appropriate response and a reprimand was given for conduct and not because of the claimant's protected characteristic or any reason related to that.
49. The claimant also explained that response time to Councillor queries was measured and she believed that if she had not responded promptly to questions sent to her, she would have been in trouble for that. This instruction was aimed at her and was related to her transition. We asked Mr D who confirmed that there was a log of official council enquiries kept and who was to reply and a time line for that reply. A failure to respond within the appropriate time it would be queried. He also told us, however, which we accept that if the question was raised about failure to act in a timely way. If the response was that the manager had not approved a draft, that would not have been taken as an issue against the claimant. On the balance of probabilities we accept, that is how the respondent would have acted as it appears to be a reasonable management process. We do not

accept that the claimant would have faced difficulties for late responses caused by a manager's failure to act on a draft promptly.

50. The complaint in the issues list relates to the claimant being removed from direct contact with councillors and being given a reprimand. The claimant believes that these actions are a direct result of her transition. She believes that her actions in raising health and safety concerns would not have been addressed in this way, or led to the instruction not to communicate and therefore the subsequent reprimand when she did not comply with that instruction, prior to her transition.
51. The respondent did not provide any evidence of any exchange of emails between managers criticising the claimant and suggesting she was not a team player or suggesting that she was not being appropriately collaborative prior to June 2020. There does appear to be a shift in attitude towards the claimant's response around November 2020 and the language that Mr E uses to describe the claimant, as we have noted, is very unprofessional.
52. As set out above, Mr D offered an explanation for this approach, telling us that between September and November he would have expected there to be a collaborative approach and therefore that the claimant's continued saying no and not offering further solutions was a legitimate reason for what happened. In essence it was the claimant's continuing to raise problems and not solutions and not her protected characteristic that led to these events.
53. In the correspondence, as we have noted above, there is reference to the review which we understand to be the Ernst & Young review of the organisation. Mr E appears to have a heightened sensibility about how a councillor might respond. The need for service users to be satisfied could be a reason for Mr E actions and for Mr C requiring correspondence to be checked.
54. The claimant suggested in her evidence that the reason Mr E reacted as he did, and she was then required to have her correspondence checked , was because neither Mr E nor Mr C were competent and this was to try to cover up issues in the project.
55. We find that on a proper reading of the correspondence the claimant was not removed from direct contact with councillors , which is the subject of her complaint. Instead she was still able to communicate with them but had to provide a draft of her response to her line manager first. We find that this was a direct reaction to an email sent by the claimant to the councillor. While line management had not reacted in this way previously, we find that they were entitled to issue such a reasonable instruction.
56. As to the reason why they did so at this time, the claimant has suggested a non discriminatory reason, namely Mr E protecting himself. The respondent has suggested concern about the review. Mr D has suggested it was a continuation of objections that caused the change. The respondent is also suggested that it was the nature of the emails itself that caused the concern.
57. Looking at the chronology, supportive emails were sent to the claimant in September which was post-transition. We find that the claimant was supported in September and the change of attitude occurs in November. Had the instruction been related to her transition we would have expected this to be evident earlier.
58. On the balance of probabilities we find that the instruction was given because of the greater desire to protect the relationship with councillors in

the light of the review and genuine concern about the way in which the claimant was corresponding. While we have found that the instruction was put in place because of and in response to the claimant's actions, we accept that it applies equally to the individual who communicated with Sutton councillors. We find that the instruction was not motivated because of the claimant's protected characteristic.

59. We find that the claimant had been given a clear instruction on 3 December. The claimant was therefore acting in breach of a reasonable management instruction when she sent her email without passing it by her line manager. We therefore find that the reprimand she was given in respect of conduct was a reasonable one and was given for breach of management instruction and not because of the claimant's protected characteristic.

The claimant's response and escalation (issue 3.13 and issue 3.14)

60. On 10 December the claimant replied to the reprimand email. This was at page 867. Her response concluded that the inference that she got is that they wanted to start singling her out now and that the implication is that she was incompetent and not doing her job correctly because her opinion might differ. It went on that "*if you wish to proceed I will pass this to HR as I feel since my transition, I have been singled out on a witchhunt and if you wish me to resign I will do this on grounds of constructive dismissal and secondary discrimination, I will not be bullied and treated in a demeaning manner act now question later is how you wish to proceed the care of duty and its CDM end of !!*"
61. That same day Mr C replied (page 866) stating that she had made a number of very serious allegations against him which are completely without foundation. He stated that the baseless comments were untrue, insulting, totally unacceptable and he now required a full apology from her. Mr C copied this email to Mr D , Mr Bartlett and to HR. the claimant characterises this as escalating his complaint against her.
62. It was Mr D 's evidence that there was nothing inappropriate in Mr C informing his managers and HR of the claimant's unofficial complaint. Mr C was very upset about what he considered to be false and defamatory allegations which could lead to disciplinary proceedings if upheld.
63. We find that any manager acting reasonably would have forwarded such a serious complaint to his line management and to HR. We find that forwarding complaint onto more senior management is a sensible line management action and not because of the claimant's protected characteristic.
64. The claimant also complains that it is an act of discrimination that Mr C demanded an apology from her because she had raised an unofficial complaint. We find Mr C 's response to the claimant on 10 December to be inappropriate and unprofessional. We would expect a line manager to have escalated the complaint as he did, but not to demand an apology when the claimant has identified she believes that discrimination is at the bottom of the conduct. Mr D defended Mr C 's response on the basis that he was very upset. He told us that he had a conversation with Mr C about his response but could not recall what was said.
65. We have no reason to doubt that Mr C was offended as his emotional and reactive email confirms and as Mr D told us. We find that part of his

reaction was because of the nature of the accusation which he took as a personal criticism . We find that it is an unreasonable reaction and we find that because it is so extreme that it is more than just unreasonable. We find that the response was driven in part because of the protected characteristic.

<u>Demanding an apology and delay in escalating the complaint and the grievance process (issues 3.16 and 3.17)</u>

66. It was Mr D 's evidence that the complaints by the claimant that she had been bullied and the lack of support were addressed informally. He stated that there were a number of meetings and discussions about this. Details of what happened was set out in the notes of the investigation at page 1313 – 1315.
67. While Mr D was aware of the claimant's issues from 10 December he did not make contact with the claimant until 19 January 2021 when he phoned the claimant. He described this conversation as an attempt to de-escalate the situation and deal with it informally.
68. In his witness evidence Mr D explained that he understood from the claimant that her issues were with the way in which the respondent had handled her transition. His expectation was that there would be a conversation between the claimant and Mr C . He confirmed that his recollection of the telephone call was that he asked the claimant either to substantiate her grievances or to apologise to Mr C .
69. In cross-examination the claimant confirmed that in this meeting she had said she would talk to Mr C and she hoped they could sort it out informally. She had three years left to retirement and she wanted to get the end of her career without all of this. However, when she sat back and thought about things she then felt that Mr C made her out to be in the wrong for doing her job and she was not prepared to accept that.
70. Mr D confirms that between 10 December 2020 and 9 January 2021 he had not taken any steps to contact the claimant to discuss the matter with her. This leaves matters not being addressed for about a month, although we accept that Christmas and periods of leave would have intervened. In his witness statement Mr D told us that he took this approach in making the phone call based on HR advice. In answer to cross examination questions he was less certain. He thought it likely he had taken HR advice on the phone call to the claimant but could not recall whether he had or what it was.
71. In his witness statement Mr D , paragraph 31, said that he was aware from speaking with Mr C how upset he was about these allegations which were "patently baseless". There is no ambiguity expressed about the possibility of there being some merit in the complaint, the phrase indicates that they are very clearly without any foundation whatsoever. When asked about this Mr D told us that in his witness statement he was expressing what Mr C felt, however, on the balance of probabilities we find that it also expressed his own views at that time. We reach this conclusion because that seems to us to be how the witness statement is written and also because of Mr D 's lack of action. He took no steps to investigate the claimant's allegations and we find that this was because he considered that they had no merit and that this was his attitude going into the conversation on 19 January 2021 with the claimant.

72. In this context we noted an exchange of emails on 3 September 2021 at pages 1554-6 which took place during the claimant's sickness absence. In these Mr C setting out a concern about the claimant's possible reaction to him sending out design she had worked on to an external party. Mr D 's response is "*I will not entertain allegations of discrimination and the service needs to move the project forward in the most pragmatic way possible".*
73. On the balance of probabilities we therefore conclude that on 19 January there was little or no effort made to support the claimant and she was effectively told that she needed to apologise. Senior management were supporting Mr C but not taking steps to support the claimant and were approaching the matter on the basis that her complaints were clearly baseless.
74. Mr D explained that the claimant did not clear the air with Mr C and therefore as this situation was unsatisfactory, he agreed with Mr E that he should write to the claimant and ask her to withdraw her allegations and apologise or to make a formal grievance complaint. He told us that the draft email was checked and approved by HR.
75. On 1 February 2021 at page 873 Mr E therefore sent an email. In this email he states that he is giving the claimant a written management instruction to retract her email comments to Mr C and to apologise in writing and this should be done by close of play on 4 February 2021. Alternatively she could substantiate her concerns informally or raise a complaint under the grievance process.
76. The email concluded that if the claimant decided not to follow this management instruction within the timescale indicated, it was his intention to commence formal action under the disciplinary process for failure to follow a reasonable management instruction that is issued by Mr C on 3 December and Mr E instruction in the email of 1 February. Mr D explained that he felt it was unfair on Mr C that the allegation was hanging over him and it needed to be brought to a head.
77. We find that neither Mr D , Mr C or Mr E had taken any steps to ask HR to proactively investigate a serious complaint. Instead all three had simply concluded that the claimant's allegations had no merit in them, despite the fact that there had been no independent investigation, nor had the claimant been asked to give proper details. At this point there had been one conversation on the phone between Mr D and the claimant. Mr D and Mr E then agree the claimant is to apologise. We find that this is more than just an employer acting unreasonably. It is evidence of a dismissive attitude to the claimant's allegations and we find that this was in part because of the claimant's protected characteristic.
78. However, we also accept that the claimant had initially said that she would speak to Mr C and this had not been done and she had said that she did not want to make matters formal. Nonetheless, while the claimant had not wanted it addressed formally, that did not mean she did not want it addressed at all and her line management entirely failed to do that. We do not find the request for informality means that no action should be taken when such a serious allegation of discrimination because of the claimant's protected characteristic had been made. No concern was expressed for the claimant's well-being, the focus was entirely on Mr C .
79. We note that at this time there were no formal policies in place in relation to the claimant's protected characteristic, no training has been given and there were no structures in place to assist an individual in the claimant's position. We have found that three line managers simply concluded any

complaint could not be true and took no steps to support a vulnerable member of staff. HR support appears to have been minimal. HR did not proactively investigate a serious complaint. HR appear to have supported management action in demanding an apology. This is against a context of HR failure to update policy.

80. The claimant replied on the same day, 1 February, stating that she would be taking legal advice and making a formal complaint against the respondent and would be complaining to ACAS. The email was also sent to HR. Despite the fact the claimant has set out that she is intending to make a formal complaint neither HR nor the respondent treat this as a formal matter.
81. The grievance investigation notes state there was a meeting between Mr D , the claimant and HR on 10 March. This is a number of weeks after the claimant's email. This is described in the investigation notes (page 1314) as an attempt to listen and deal with the claimant's broader issues with the organisation and to make sure she was getting the right support. Again it is not an investigation meeting.
82. Mr D arranged to meet with the claimant on 8 April 2021. Page 1550 is an email from him to the claimant of 8 April in which he refers to the meeting between himself and the claimant and a member of the HR team which we believe is a reference to the 10 March meeting, described above. That notes that the claimant is raising four particular issues which include harassment and discrimination/bullying the email concludes that will be set up as soon as possible to find a resolution. This is still not an investigation.
83. The claimant responded in an email dated 9 April at page 1549 of the bundle. In this she set out that she had previously raised an unofficial complaint to try and stop management behaving in certain ways towards her. She stated she had not yet raised an official complaint and pointed out that there had been serious failings in the handling of her complaints so far. She raised issues about public sector equality duty and the respondent's own position under the Equality Act.
84. Mr D told us that on 13 April he had another conversation with the claimant when he tried to persuade the claimant to send both him and HR her complaint document, but no progress was made.
85. There was a follow-up exchange of emails on 14 April (page 1548 – 1549) and having reviewed the claimant's email Mr D let her know that her comments were being treated as an official complaint. He took this action on the advice of HR.
86. We find that Mr D did not escalate the complaint made between 1 February and 14 April 2021. This lack of action is explained by the respondent's witnesses because the claimant had not asked for formal action and because she had not provided all the details of her complaint. However, we find that a confusion as to whether complaint should be formal or informal does not explain an almost complete lack of investigation and action. The respondent's management line had formed a view about the merits of the complaint and we have found that this was motivating their actions. They simply did not take the claimant's complaint seriously but instead, when a manager reacted with outrage, supported that manager. We find this reaction and inactivity were in part because of the protected characteristic
87. Once the matter was treated by the respondent as formal, because the grievance was being investigated, the claimant's reporting line was moved from Mr C to Mr on 29 June 2021. At page 1021 Mr D let the claimant

know about this. In the email of 29 June he also confirmed that did not want the claimant to participate in any work-related task while she was off sick.

Period of sickness absence (issue 3.20)

88. The claimant was signed off sick on 25 June 2021 and did not return to work until 1 November 2021. The bundle contained at page 741 a letter dated 24 November 2022 from the claimant's GP. This is self evidently an action of the GP and not the respondent.
89. This letter confirms that it was written at the claimant's request to confirm that she had undergone a period of huge stress and trauma as a result of being a victim of bullying. This affected the claimant's mental health so much that she was signed off work 25 June to 30 November 2021. The letter confirmed that prior to this time the claimant was in good physical and mental health. It also confirmed that at her darkest point, the claimant experienced severe and intrusive thoughts of self-harm such that the GP was considering sectioning the claimant for her own benefit. Fortunately, the claimant was able to engage with a mental health trust and after a lot of support was now in a better place.
90. The letter refers to bullying and does not refer to dead naming and the claimant accepted that she had not mentioned the dead naming to her GP. Nonetheless, the claimant said that her issues did include the dead naming but she confirmed that her problem was that she was being removed from her remit. In answer to the question whether she was off sick, not because of the dead naming but because of the acts she has characterised as bullying, she replied "more than likely, yes."

The formal grievance (issues 3.22 ,3.24 and 3.23)

91. Once the respondent categorised this as a grievance to be investigated, Mr Grasty, Corporate Head of Digital Strategy and Portfolio was appointed to investigate.
92. He met with the claimant on 30 April and it became apparent to him that she had not yet submitted a formal grievance but an informal complaint and she was working on a formal grievance. The claimant accepted that they agreed that she would complete a formal grievance document, send it back to him and they would have a further meeting.
93. The claimant said that she was happy to talk to Mr Grasty. She recalls that in this meeting and certainly when she sent in a formal grievance, she made it clear that she believed HR were culpable and had no faith in them. She suggested she had told Mr Grasty she did not want HR to be involved.
94. This is not set out in express terms in the grievance document. Mr Grasty accepted that he was aware that the claimant thought HR was culpable of some of the matters that had arisen, but was adamant that she had not told him she did not wish HR to be present in any meeting. He also explained that if the claimant had said this to him he would have explained that HR were required to be involved. Once the process became formal HR has to be part of it. All he had understood from the claimant was that she believed HR were culpable. We accept his account. We find the claimant had not said in straightforward terms that HR were not to be present at the meeting.

95. The formal grievance arrived on 20 May 2021. It was 114 pages of text and embodied documents and links to others. Mr Grasty was not able to deal with it immediately because of forthcoming annual leave. He also was aware that the claimant was off work on sick leave. On 6 July a meeting was arranged for 9 July with the claimant, Mr Grasty and a member of the HR team. On 7 July the claimant contacted Mr Grasty to have this meeting rescheduled.
96. There is an exchange of emails at pages 1033 – 1034. In this the claimant indicated that she had referred the matter to ACAS. In reply a member of the HR team confirmed that they nonetheless wanted to continue the internal process in line with the organisation's policy.
97. The claimant complains that she was told by ACAS on 19 July the respondent had turned down its intervention. The claimant clarified that this had been a request for ACAS to carry out the investigation in place of HR. Mr D 's evidence is he was made aware of the contact with ACAS and the claimant was sent details of the respondent's legal services provider to pass to ACAS. He was not directly involved. We accept the respondent's position that it would be highly unusual for ACAS to carry out an internal investigation or to be the decision maker and any refusal and desire to deal with the matter internally is not because of the claimant's protected characteristic. It is a reasonable and appropriate practice.
98. In this email exchange the claimant also stated that while she had every faith in Mr Grasty being unbiased, she could not believe HR would be because they were involved in the email from Mr E of 1 February 2021. She did not trust their impartiality and what was why she had gone to ACAS. The claimant made it clear that her complaint was not against any individual in HR, but was because HR had failed its remit and protocols as set out in her formal complaint. She did not have faith in the respondent's HR service and was concerned that they were biased as they had been part of the problem.
99. Mr Grasty was told by HR to pause because the claimant had contacted ACAS and was refusing to participate further in the process. Mr Grasty explained that around the end of October or beginning of November 2021 he was asked by HR to restart the grievance investigation proceedings and he agreed to do so and to proceed without HR support because of the claimant's comments. On 1 November (page 1076) Mr Grasty sent an email to the claimant to that effect. The claimant contacted him by phone and said that she was willing to meet him as HR would not be involved but now she could not do anything because of a letter from the respondent's lawyers.
100. Correspondence with the respondent's lawyers took some time to address this point and by the end of November/beginning of December 2021 the meeting had still not taken place. On 2 December Ms Bailey asked Mr Grasty to offer the claimant a further opportunity to engage in the grievance investigation. However, he no longer had the capacity to investigate and therefore was unable to continue. The claimant accepted that Mr Grasty no longer had capacity to investigate. On 14 December 2021 Mr D then informed the claimant that the investigation would move to an external person.
101. While the way that the complaint is set out in the issues list at 3.22 suggests that claimant has made a complaint about an informal meeting being moved to a formal meeting, she clarified that her objection was in fact to the involvement of HR and it is that she says was the act of

discrimination.

102. We find that, while it is agreed she had made her concerns about HR known, these had not included that HR were not to be involved. We find that Mr Grasty's involvement of HR at what is to be a formal meeting with the claimant to interview her about her grievance is a reasonable one. We also find that he invited HR at their request and because this is the way in which the respondent's procedure would operate. We find no link between his agreement to include HR in the meeting and the claimant's transition or protected characteristic.

103. We find that, in all the circumstances of this case, moving an investigation from internal resource to external resource was a reasonable thing for the respondent to do. We find that such a move was not because of the claimant's protected characteristic.

<u>Removing her from a number of works and then keeping the claimant away from works she would normally have done (issue 3.8, 3.9, 3.10 and 3.21)</u>

104. We find that during the period of sick leave the claimant was not provided any work. We accept that as a reasonable and appropriate management action. Were are therefore considering the time from 10 December 2020 email until the date on which she went off sick on 25 June 2021 when she is managed by Mr C , and the period after her return when she is managed by Mr F

105. While she is managed by Mr C the claimant makes allegations about two projects she says were removed from her. She complains that she was removed from her work on the wayfinding project lighting scheme on 20 August 2020. When she was taken to a number of documents within the bundle which showed that she continued to correspond on this project until November 2020, she suggested that she actually meant from 20 August 2021. This was during the claimant's period of sick leave. We find she was not removed on the date she set out in the issues list.

106. The issues list contains reference to removal from Aquiva from 21 September 2020 . This includes small cell installation. The claimant gave no evidence on this project .While this does not appear to be a project about which a claim is made, the bundle contains at page 539 an email of the 30 December 2020 in which Mr C is to be the single point of contact for Councillor Lidbetter regarding the Albany Mews lighting. That says that Mr C will consult with colleagues as part of the project. We find it does not say the claimant will no longer be involved. We note that in the appeal at page 1403 that she was removed from this project. We find that she was therefore removed.

107. The claimant also gave a list in appendix 1 of works she says were removed from her from the point at which she raised her unofficial complaint about Mr C in December 2020. From her perspective he took control of her work streams and, for example, her emails went from between 20 to 60 to 2 to 4 emails a day.

108. When questioned about this the claimant said that prior to her transition she had been doing the work of three people and working often over 60 hours a week. After her transition this dwindled off so that she was getting almost no work at all. She believes this is because of her protected characteristic and an act of direct discrimination by Mr C .

109. The question of her suspension during this time was addressed during

the grievance investigation. Mr D was asked about this (page 1314 – 1315). Mr D confirmed that work would have to be given to others for reasons such as sickness or to ensure critical work within the service is properly managed. He knew that the claimant perceived that Mr E had taken work away from her because of her gender identity, but stated that there were various reasons for allocating work in a team. It had nothing to do with her gender identity and would apply to anyone else. We find that this is therefore an acknowledgement that the claimant's workload had at least changed, although he believes it to be for a non-discriminatory reason.

110. Mr C is also interviewed as part of the grievance procedure and he simply answers that he has not been aware of any projects in which the claimant has become less involved. There is no detailed investigation carried out other than putting this question and receiving the answer from Mr C . Mr E does not provide any information to the investigation.

111. Mr D confirms that he had raised the question of Mr C continuing to be the claimant's line manager and he had requested that he should stay in that position. The respondent's witnesses have also confirmed that they have a policy of trusting staff to do work and do not check on productivity. Mr D confirmed that he would not know himself whether the claimant was at work or was not working on projects. It would be down to Mr C to assign that work.

112. Outside of the grievance investigation the claimant raised this issue of informal suspension and Mr D confirmed that he was aware of this. The claimant set out this matter in writing to him in an email 23 December 2021 in which she brought to his attention that she was still un officially suspended. The claimant repeated this point in an email of 6 January. Mr D 's reply was that he did not know what she meant by that, at no point had she been suspended. He had spoken to Mr FMr E, and it was Mr FMr E's understanding that the claimant was at work.

113. On 11 January Ms Ginty, a member of HR, also addressed this and said that they were not aware of any such term as an addition suspended and I both confirmed that she was not suspended. Mr D had confirmed the claimant had a meeting with Mr F who would talk to the claimant in detail about the programme of work going forward. In cross-examination Mr D confirmed that he had only had spoken to Mr FMr E. That dealt with the claimant's workload from the point at which she was assigned to him, that is from her return from sick leave in November 2021. Mr D did not investigate any complaint that she was removed from work by Mr C . The investigations, which took the form of conversation with the line manager, were in respect entirely of the second period.

114. When the claimant returned from her period of sick leave on 1 November 2021 she was in Mr Fs management line. There was no handover between Mr F and Mr C and therefore Mr F had limited knowledge about what tasks and projects the claimant had been working on prior to her sickness absence. He was aware of one ongoing matter from the list of work set out at appendix 1. It was his evidence that he asked that the claimant continued to be involved in the raising and lowering of bollards.

115. Mr F was also able to provide some information about the matters set out in appendix 2, examples of works which the claimant was kept away. His evidence that the claimant was involved in the tunnel lighting energy saving design (horse fair tunnel). She had some work on this before her

sickness absence and she continued to support this. The Clarence Street lighting design scheme was dealt with by external consultants.

116. Mr F told us that the claimant was involved in the cycle design review, she continued to be involved in electric vehicle charging, the pedestrian crossing work at item 30, concrete columns upgrade item 36 while the column upgrades LED at 39 was dealt with by external consultants. He believed the claimant was keen to carry on some of the tasks she had undertaken prior to her sick leave

117. In general, however, Mr F saw the claimant reporting to him as an opportunity to use the claimant's skills on a number of different works. He described it as a clean slate. He explained that from the point at which he became the claimant's line manager and ongoing today he meets with her every two weeks. The timeslot in the diary is about from 2 to 4:30 PM , but they can take as long as is required. These meetings take place with HR support and they are intended to assist the client with her well-being but also to talk about anything else.

118. He told us that he believes in November 2021 he asked the claimant to take on an audit and review of the Go Cycle Network. This was a project that was personally dear to his heart and was significant. He explained that this was a £30 million project undertaken in 2012 by external consultants. The claimant had raised concerns about the lighting issues and when these are being investigated it was realised that there were indeed difficulties and therefore the respondent decided that the entire design needed to be reviewed and audited. The claimant was identified as the obvious person to do this. Mr D was also keen for her to be involved because she had pushed back and identified safety problems on it previously. The bundle contains an exchange of emails at around pages 1184 which are dated January 2022 would seem to suggest that it is at this point that the claimant is asked to audit the Go cycle installations. We accept Mr F's evidence that he had requested her involvement at an earlier period.

119. Both agree that the claimant did not make significant progress on the project. The claimant said it was because she did not feel comfortable in pushing back against management. She had already been put in an extremely difficult position by the respondent and felt that she was being set up to fail again. Mr F said that he tried to reassure the claimant that he had her back and that Mr D also would support her. Mr F believed this was a full-time role. The claimant said it was not because she was unable to do the work .She did not feel secure enough in her role to take on this task

120. In June 2022 the claimant was moved from Go cycle to the Beddington Lane project. This is a major street lighting project and he specifically asked the claimant to be involved because she was a very competent street lighting engineer and was able to do the full gambit of the work. This was also a full-time job at least until February 2023. Mr F estimated that currently the claimant was spending about two days a week on the project.

121. It was the claimant's case that this was not something that was occupying her full-time because her line manager, the Principal Engineer, kept interfering. She said that she raised this with Mr F in one of the fortnightly meetings. He agreed that she had done so and Mr F sent an email to the Principal Engineer on 1 November 2022 reminding him that the claimant was the CDN on the project and therefore had to have complete control of the health and safety aspect that they should not interfere with that part of it but make sure she was supported to ensure the

contractor behaved as he should(page 109). Mr F believes that the Principal Engineer had done only that, had become involved where the claimant needed support. He believes that the claimant had been given a major project and was fully occupied.

122. Other than emails relating to the Wayfinding project, neither party took us to any documentary evidence which would evidence a change in the claimant's workload. The claimant did not provide us with screenshots showing her emails before or after a particular period or provide any diary information as to meetings attended. The respondent did not provide any documentary evidence to show that the claimant was still working on particular projects. It was the respondent's position that because the claimant had not narrowed down her complaint sufficiently it was not reasonably practicable or proportionate for them to investigate all of the project set out in appendix 1 or appendix 2.

123. We find that the wayfinding project for which there is evidence does not support the claimant's contention that she was removed from it, as she is clearly working on it after 20 August 2020. We have heard that Mr D was not in a position to know what work the claimant was or was not getting. Mr C remained her line manager. He simply issued a denial of the allegation during investigation which did not appear to have been further investigated. He did not attend to give evidence.

124. In the absence of Mr C and the absence of any documentary evidence, taking into account that only Mr C and the claimant would have known whether she was being given any work, on the balance of probabilities we accept the claimant's evidence on this point. We have found that Mr C was upset and affronted by the claimant's complaint about him. We have referred already to a later email of 3 September in which Mr C still appears to be concerned about accusations the claimant might make about him which he characterises as "subsequent inappropriate behaviour" which is to be dealt with (page 1554). In the circumstances we think it more likely than not that he was reluctant to engage with the claimant and therefore find that from the point at which she wrote a complaint about him the point at which she went on sick leave the claimant was given a significantly reduced workload. We find that his conduct is linked to the claimant's protected characteristic.

125. On her return from sick leave the complaint is the claimant was not put back on projects and this is an act of discrimination. It is factually correct that the claimant was given a different workload. We find that management are reasonably entitled to allocate work to individuals and there is no obligation to continue to provide the same projects, nor indeed any rightful employee to remain on particular projects. On the balance of probabilities we accept Mr Fs evidence that he provided the claimant with substantial projects which should have occupied her time and that she was not therefore suspended officially or unofficially from the 2 November 2021. We also accept that Mr F did so because he believed these were the best use of the claimant's skill and that this was not in any way connected with the claimant's protected characteristic.

<u>Reorganisation (issue 3.18)</u>

126. Mr D explained that at some time in 2019 Ernst & Young were commissioned to report into whether the shared environment service, formed in about 2015, was still fit for purpose and able to meet ongoing

delivery challenges. The report was delayed because of covid and was delivered in November 2020.

127. The outcome of this review was refined into a service improvement plan the final draft of which was prepared in January 2021. A number of objectives were set out which included restructuring the highways and transport service to embed effective performance management and programme management excellence. The proposed restructure was announced to staff on 6 May 2021. The codesign workshops with staff were in June 2021 and a proposal circulated to staff on 1 October 2021. This is at page 1036-1044.

128. In this proposal Mr D explained that key recommendations included redesigning the current structure. Consultation proposals were set out on 26 November 2021. The claimant responded to this email on 23 December 2021 at page 1195 and told Mr D that unless her job was ring fenced this would be an act of discrimination. She explained that she could not be interviewed fairly for the position when she had a formal complaint proceeding against the respondent.

129. On 7 January and Mr D and a member of the HR team met with the claimant. A summary of that meeting was set out at page 1193 – 1194. As the restructure was ongoing at that time it was not possible to say what would actually happen in respect of the claimant's role. Ultimately as the role profile for her role was not fundamentally altered she was slotted into a role in the new structure and there was no requirement for an interview. In the respondent's process this occurs where the old role and new role cover about 70% of the same duties.

130. In questioning the witnesses it became apparent that her complaint about the restructure had three elements to it. One was about being asked interview for her job which we have dealt with above. The second is that she believed Mr D used the restructure as an opportunity to remove the claimant's role or force her to leave the organisation. This did not happen. The third complaint is that during the consultation process the role of senior engineer was proposed which would have been her promotion opportunity. This role was removed by Mr D and therefore he blocked her promotion opportunities and that was discrimination.

131. Mr D explained that at one point during the process they had proposed a role of senior engineer. However, they received feedback from staff that the importance of the area meant that it should have a principal engineer. Budgetary constraints meant they could not afford a principal engineer and a senior engineer as well. While in an ideal world one might have both roles this was not affordable. Accordingly the role of principal engineer was created and because that mapped Mr C 's previous job by 50% or more he was mapped into that until his retirement.

132. We are satisfied that the review was carried out of the entire shared services and was not directed at the claimant. We find that Mr D was not seeking to use the review as an opportunity to remove the claimant or her role. The claimant retained her job title, grade and pay and we accept the respondent's position that at least 70% of her job description was the same.

133. We find that the claimant was not asked to interview for her job and to the extent that is her complaint, that is not factually what occurred. We accept Mr D 's evidence as to why the role of senior engineer was removed from the proposed structure. We accepted his evidence that this was not an existing role prior to restructure but an option put forward. We accept

that it was because of staff feedback that instead he took the option to create the role of Principal Engineer. We accepted his evidence that this was motivated by trying to design the best team for the work and was not directly or indirectly aimed at blocking the claimant's promotion opportunities.

Deadnaming (issues 3.4, 3.5, 3.6, 3.7, 3.15, and 3.19)

134. The claimant explained the long and painful struggle she had encountered with the respondent's systems in order to change her name. She confirmed that her name was not updated on the pension records until 8 August 2022. Her name was not updated on the CRM highways complaint system and so she was dead named until 22 February 2022.

135. She stated that there were no policies in place or guidance for IT, she was dead named on the respondent's directories and email systems for nearly 2 years. She was unable to contact anyone to try to stop it without outing herself to a committee of people. We find this was not fully rectified until 9 March 2023.

136. After transition it took two years to get her door pass which allowed access into the office and gave access to operate the printers. When the claimant did get into the building her locker had a Post-it note put on it with her dead name crossed out and her post-transition name written on. This was in full view of everyone. We find that this was not rectified until 28 April 2022.

137. The claimant referred to a particular issue with obtaining a vehicle pass on 4 January 2021. In the grievance she explained that she had to telephone third party agents and was questioned about her name change and was dead named by respondent system that outed her to NFL. She had to telephone twice and was misgendered on both telephone calls which she found demeaning and degrading.

138. The claimant makes reference in the issues list to not making arrangements for her new name for data security training method and so being dead named on 28 May 2021. Other than the listed issues incorporated into the claimant's witness statement there was no evidence given about this. On the balance of probabilities we accept it occurred and is part of the respondent's general failure to have structures and systems in place to address changing names appropriately.

139. Ms Bailey's evidence was that the respondent had learnt a lesson as a result of what happened to the claimant.She states that in future support will be given with regard to contacting external service providers. In future the respondent will take a proactive role in having systems changed and there will be a conversation with the individual to offer a choice of a new account and records opened in a new name, or having existing accounts and records amended.

140. Ms Bailey confirmed that she got involved with the claimant's difficulty with the pension service provided by the London Borough of Sutton. The claimant's name was changed on her pension record by 9 August 2022.

141. As for the door pass, Ms Bailey said it was issued by an external provider and in a future case the respondent would take action to ensure a pass was swiftly issued. It is accepted that the claimant was effectively unable to access the office for almost 2 years.

142. Mr Grasty was also asked about issues with the IT system. This is not

his area of responsibility and he was not able to explain how or why changes took such a long time. He did confirm that he was able to assist the claimant and believed that matters had been sorted out by July 2021. However, in June 2022 the claimant's dead name was used in email. Mr Grasty explained this is because an old server had cached her dead name and once that was found it was fixed. However the respondent was unaware of that problem until the claimant raised it.

Relevant Law and submissions

Limitation period

143. S123 Equality Act provides that

> "….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.
>
> ………..
>
> (3)For the purposes of this section –
>
> (a) Conduct extending over a period is to be treated as done at the end of the period

144. Where there is a series of distinct acts, the time limit begins to run when each act is completed, whereas if there is continuing discrimination, time only begins to run when the last act is completed. There is a distinction between a continuing act and one that has continuing consequences. Where an employer operates a discriminatory regime, rule, practice or principle them such a practice will amount to an act extending over a period. Where however there is no such regime, rule, practice or principle in operation, an act that affects an employee will not be treated as continuing even though the act has ramifications that extend over a period of time. For example a specific failure to promote is a single act despite continuing consequences.

145. Under S.123(3)(b) EqA a failure to do something is to be 'treated as occurring when the person in question decided on it'. Thus a failure to confer a benefit on an employee is treated as being done when the employer decides that the employee should not receive that benefit. The time limit for bringing a claim begins to run from the date of the decision, rather than the date when the decision takes effect.

146. S.123(4) EqA provides that, in the absence of evidence to the contrary, a person shall be taken to have decided upon a failure to do something when he or she does an act inconsistent with doing it or, if he or she does no inconsistent act, when the period expires within which he or she might reasonably have been expected to have done that act. The statutory requirement that a discriminatory omission shall be treated as done when the person in question decided upon it has been interpreted in a manner favourable to employees.

147. In considering the just and equitable extension, the Court of Appeal made it clear in Robertson v Bexley Community Centre t/a Leisure Link

2003 IRLR 434, CA, that the onus is on the claimant to convince the tribunal that it is just and equitable to extend the time limit. The exercise of the discretion is an exception.

148. Previously, the EAT (British Coal v Keeble) suggested that in determining whether to exercise their discretion to allow the late submission of a discrimination claim, tribunals would be assisted by considering the factors listed in S.33(3) of the Limitation Act 1980.

149. That section deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice which each party would suffer as a result of the decision reached, and to have regard to all the circumstances of the case, in particular: the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

150. The Court of Appeal in Southwark London Borough Council v Afolabi 2003 ICR 800, CA, confirmed that, the checklist should be used as a guide. However, the Court went on to suggest that there are two factors which are almost always relevant when considering the exercise of any discretion whether to extend time: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh). In Abertawe Bro Morgannwg University Local Health Board v Morgan 2018 ICR 1194, CA, the Court of Appeal pointed to the fact that it was plain from the language used in S.123 Equality Act that it would be wrong to interpret it as if it contains such a list.

151. In Adedeji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23,[2021] ICR D5, the Court of Appeal repeated a caution against tribunals relying on the checklist of factors found in s 33 of the Limitation Act 1980). The Court of Appeal described that 'The best approach for a tribunal in considering the exercise of the discretion under s 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"'.

Direct Discrimination

152. S13 of the Equality Act defines direct discrimination as

> (1)A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

153. S.13 EqA focuses on whether an individual has been treated 'less favourably' because of a protected characteristic, the question that follows is, treated less favourably than whom? The words 'would treat others' makes it clear that it is possible to construct a purely hypothetical comparison.

154. Whether the comparator is actual or hypothetical, the comparison must help to shed light on the reason for the treatment. We reminded ourselves of Shamoon V the Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11. The comparator required for the purposes of the statutory definition of discrimination must be a comparator in the same position in all material respects of the victim so that he, or she, is not a member of the

protected class. There must be 'no material difference between the circumstances relating to each case' when determining whether the claimant has been treated less favourably than a comparator.

155. The unfavourable treatment must be "because of" the protected characteristic. The protected characteristic needs to be a cause of the less favourable treatment but does not need to be the only or even the main cause. Whether an act or omission amounts to less favourable treatment is an objective question for the tribunal to decide. While the claimant's perception of such treatment is relevant, it is not determinative. Further it is not enough for the claimant to show that she was treated differently; she must demonstrate that such differential treatment was unfavourable.

<u>Burden of proof</u>

156. Igen v Wong ltd [2005] EWCA Civ 142, [2005] ICR 931, CA. remains the leading case in this area. There, the Court of Appeal established that the correct approach for an employment tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the tribunal could infer that discrimination has taken place. Only if such facts have been made out to the tribunal's satisfaction (i.e., on the balance of probabilities) is the second stage engaged, whereby the burden then 'shifts' to the respondent to prove — again on the balance of probabilities — that the treatment in question was 'in no sense whatsoever' on the protected ground.

157. The Court of Appeal explicitly endorsed guidelines previously set down by the EAT in Barton v Investec Henderson Crosthwaite Securities Ltd 2003 ICR 1205, EAT, albeit with some adjustments, and confirmed that they apply across all strands of discrimination.

158. Courts and tribunals have emphasised on a number of occasions that discrimination cannot be inferred from unreasonable conduct alone We were referred to Glasgow City Council v Zafar1998 ICR 120, HL. Simply because the employer has behaved unreasonably does not mean that there has been discrimination, although it may be evidence supporting that inference if there is nothing else to explain the behaviour.

159. We considered Royal Mail Group Limited v Efobi (2019) EWCA Civ 18. The burden does not shift to the employer to explain the reasons for its treatment of the claimant unless the claimant is able to prove, on the balance of probabilities, facts from which in the absence of any other explanation an unlawful act of discrimination can be inferred. It does not matter if the employer acts for an unfair or discreditable reason, provided that the reason had nothing to do with the protected characteristic.

160. In Nagarajan v London Regional Transport [1999] IRLR 572 it was held that the protected characteristic does not have to be the only, nor even the main, reason for the treatment complained of. It must be an effective cause. If the protected characteristic had a significant influence on the outcome, discrimination is made out.

161. The bare facts of a difference in treatment and a difference in status only indicate a possibility of discrimination, they are not 'without more' sufficient material from which a Tribunal can conclude that there has been discrimination, Madarassy v Nomura International [2007] IRLR246 CA para 54-57. Likewise, that the employer's behaviour calls for an explanation is insufficient to get to the second stage: there still has to be reason to believe

that the explanation could be that the behaviour was "attributable (at least to a significant extent)" to the prohibited ground. Therefore 'something more' than a difference of treatment is required.

Remedy –

Discrimination awards

162. Injury to feelings awards compensate for non-pecuniary loss. Injury to feelings awards are available where a tribunal has upheld a complaint of discrimination. The award of injury to feelings is intended to compensate the claimant for the anger, distress and upset caused by the unlawful treatment they have received. It is compensatory, not punitive.

163. The general principles that apply to assessing an appropriate injury to feelings award have been set out by the EAT in Prison Service v Johnson [1997] IRLR 162, para 27:

- Injury to feelings awards are compensatory and should be just to both parties. They should compensate fully without punishing the discriminator. Feelings of indignation at the discriminator's conduct should not be allowed to inflate the award;

- Awards should not be too low, as that would diminish respect for the policy of the anti-discrimination legislation. Society has condemned discrimination and awards must ensure that it is seen to be wrong. On the other hand, awards should be restrained, as excessive awards could be seen as the way to untaxed riches;

- Awards should bear some broad general similarity to the range of awards in personal injury cases – not to any particular type of personal injury but to the whole range of such awards;

- Tribunals should take into account the value in everyday life of the sum they have in mind, by reference to purchasing power or by reference to earnings;

- Tribunals should bear in mind the need for public respect for the level of awards made.

164. In Vento v Chief Constable of West Yorkshire Police (No2) [2003] IRLR 102) the Court of Appeal identified three broad bands of compensation for injury to feelings. The Presidents of the Employment Tribunals in England & Wales and Scotland issued 'Presidential Guidance: Employment Tribunal Awards for Injury to Feelings , With effect from on 6 April 2021 , updated the bands as follows:

- Upper Band: £27,400 to £45,600 (the most serious cases)

- Middle Band: £9,100 to £27,400 (cases that do not merit an award in the upper band); and

- Lower Band: £900 to £9,1000 (less serious cases).

165. The claimant must prove the nature of the injury to feelings and its extent. Awards for injury to feelings unrelated to termination of employment are tax-free. Interest is awarded on injury to feelings awards from the date of the act of discrimination complained of until the date on which the tribunal calculates the compensation. The interest rate is 8%.

Aggravated damages

166. These are available in discrimination claims .They are an aspect of injury to feelings, and are awarded only on the basis, and to the extent that the aggravating features have increased the impact of the discriminatory act on the claimant and thus the injury to his or her feelings. They are compensatory, not punitive.

167. The appropriate acts include:

● Where the act is done in an exceptionally upsetting way: Underhill P in Commissioner of Police of the Metropolis v Shaw UKEAT/0125/11/ZT cites the phrase ‘high-handed, malicious, insulting or oppressive’ behaviour

● Motive: discriminatory conduct that is evidently based on prejudice or animosity or which is spiteful or vindictive or intended to wound is likely to cause more distress than if done without such a motive – for example as a result of ignorance or insensitivity. Naturally, the claimant has to be aware of the motive in question; and

● Subsequent conduct: for example, conducting the trial in an unnecessarily oppressive manner, failing to apologise, or failing to treat the complaint with the requisite seriousness.

168. Tribunals must beware the risk of double recovery, and consider whether the overall award of injury to feelings and aggravated damages is proportionate to the totality of the suffering caused to the claimant.

Conclusion.

169. We have applied the relevant law as set out above to the findings of fact that we have made and have reached the following conclusions on the issues that we were asked to determine.

Time Limits

170. The issues list set out that given that the Claim form was presented on 3.9.21 and early conciliation was started on 16.8.21 and the EC Certificate was issued on 20.8.21, claims about anything happening before 16.5.21 are formally out of time. We were asked to consider whether we should extend time because any conduct complained of was ‘conduct extending over a period? In the alternative should the tribunal extend time because it is just and equitable to do so?

171. The claimant provided no evidence as to why her claim was potentially issued late and no explanation as to why this may have occurred. She offered no evidence as to why it will be just and equitable to extend any time in it. Accordingly in the absence of any such evidence or explanation there would be no just and equitable extension.

172. Looking at the issues list, potentially issue 3.1, 3.3, and 3.8 to 3.18 inclusive are, on their face, out of time unless they form continuing acts or omissions.

173. Issue 3.1. We conclude that failure to implement the Equalities Act is an omission that was not rectified until the new policy was put in place in December 2022 . We have jurisdiction to address this point.

174. Issue 3.3. Failure to undertake a risk assessment is also an omission

so that the period expires when the respondent might reasonably have been expected to have done that act. We find that would have been June 2020. This is not therefore a continuing act and is out of time. We do not have jurisdiction to hear it.

175. Issue 3.8, 3.9 and 3.10. This is the removal of the claimant from two specific projects and removal from a number of works as listed in appendix 1. The removal of these tasks on the claimant's case continued at least until her period of sick leave began on 25 June 2021 and therefore this complaint is within time in any event. On that basis we have jurisdiction to address this point.

176. Issue 3.11, We conclude that removing the claimant's direct contact with councillors is not an ongoing act. It may have ongoing consequences but the decision was taken on 3 December. We do not have jurisdiction to deal with this issue.

177. Issue 3.12. Again we find that this is a single act. The reprimand is given on 10 December 2020 and we do not have jurisdiction to deal with this issue.

178. Issues 3.13, 3.14, 3.16 and 3.17. These all arise once the claimant has made an allegation of discrimination. Once she does so there is both a failure to address her complaint properly, delay in doing so and instead of dealing with the matter apologies are demanded from the claimant. We find that these acts which the claimant believes amount to discrimination are linked to one another. We find that there are also linked to the claimant's allegation that in response line manager removes her from a number of works. As set out above, that removal continues until at least 25 June 2021. On that basis, as we consider that these are connected acts which extend over a period the last act is therefore treated as occurring on 25 June 2021. Accordingly, we have jurisdiction to address these matters.

179. Issue 3.15. This relates to being dead named on a particular date, 4 January 2021. While on its face it would appear that this issue was concluded by that date, we consider that it is part of a series of connected acts of continuing to dead name the claimant, failing to have appropriate systems in place to deal with and failing to address the point with third parties appropriately. We have jurisdiction to address this matter.

180. Issue 3.18. While the review began on 6 May 2021 it was an ongoing review which did not conclude until after 16 May and we therefore find this complaint relates to actions which are within time.

181. Issue 3.24 . This post dates the claim form but will address it as we are taking its inclusion in the issues list as the respondent agreeing to address this within this litigation rather than the claimant bringing a further claim.

Direct Discrimination

182. In reaching our decisions we have found the claimant to be a credible witness. We are satisfied that the claimant has met the initial burden of proof in relation to all the issues she has raised and has proved facts from which in the absence of any other explanation an unlawful act of discrimination can be inferred. We are also satisfied that there is reason to believe that the explanation for the employers' conduct could be that the behaviour was attributable to the prohibited ground. The claimant has satisfied us that she has proved that something more than a difference in treatment occurred. This is a respondent which failed to have in place any policies or practices

or procedures to support an individual transitioning. It is an organisation that admits to continuously dead naming the claimant for at least two years.

183. On the issues raised therefore, the burden has shifted to the respondent to prove, on the balance of probabilities, that the treatment in question was 'in no sense whatsoever' on the protected ground. We have therefore considered whether the employer has simply behaved unreasonably or whether the protected characteristic has been a cause, although not necessarily the only or main cause, of the treatment.

Policy Failures

3.1 Fail to implement the Equalities Act as a protected characteristic on 1.7.20.

We have found that the respondent did fail to have appropriate policies in place but this was not less favourable treatment of the claimant. Further, it was not because of the claimant's protected characteristic but because of HR failures on a wider scale. This claim does not succeed.

3.3 Fail to undertake a risk assessment for gender transition at work on or by 1.7.20.

We have found that this claim is out of time and we have no jurisdiction to hear the matter. If we were wrong on that we would nonetheless find that there was no obligation to undertake such a risk assessment. The respondent failure to do so was not because of the claimant's protected characteristic and the claim would not in any event have succeeded.

Dead naming

3.4 Fail to update the Claimant's name and so deadname her in respect of pension records from 1.7.20 to 8.8.22.

This is admitted. We find that it did amount to less favourable treatment and was because of the claimant's protected characteristic.

3.5 Fail to update the name on her door pass and so deadname her from 1.7.20 to 28.4.22.

This is admitted. We find that it did amount to less favourable treatment and was because of the claimant's protected characteristic

3.6 Fail to update the name on the CRM Highways Complaints System and so deadname her from 1.7.20 to 22.2.22.

This is admitted. We find that it did amount to less favourable treatment and was because of the claimant's protected characteristic

3.7 Fail to update her name in the RBK/Sutton staff directory on google so deadnaming her from 1.7.20 to 9.3.23.

This is admitted. We find that it did amount to less favourable treatment

and was because of the claimant's protected characteristic

3.15 Deadname her on a vehicle pass obtained on 4.1.21.

This is admitted. We find that it did amount to less favourable treatment and was because of the claimant's protected characteristic

Removal from work

3.8 Remove her from contact with Aquiva from 21.9.20.

We have found that this did not happen and the claim does not succeed as a matter of fact.

3.9 Remove her from work on the Wayfinding Project lighting scheme from 20.8.20.

We have found the claimant was not removed from this work on 20 August 2020 and this claim does not therefore succeed as a matter of fact.

3.10 Remove her from a number of works as listed in Appendix 1 that had previously been part of her role on 30.10.20, 3.12.20, & 15.2.21 as set out in her grievance of 30.4.21.

We have found that the claimant was removed from these works. We find that this is less favourable treatment. We conclude that Mr C in taking this action was not simply acting unreasonably, but that the claimant's protected characteristic was part of the reason for this treatment. The claim therefore succeeds.

3.21 Kept away from works she would normally have done as listed in Appendix 2 from 15.02.21 to 29.04.22 and a majority haven't returned to the present day.

We have found that the claimant was not given back the work she did prior to her sick leave. We have accepted the respondent's explanation that work is taken away from individuals during a period of sick leave where it requires moving forward during that absence. We also found that on her return from sick leave the claimant was put on weighty and substantial projects which occupied her time. We have found this was a reasonable management action.

We do not consider that it is less favourable treatment. Even if it were, we accept Mr FMr E's evidence as to why he did this. We find that it was because he wished to make use of the claimant skills and was not therefore in any way linked to the claimant's protected characteristic. This claim does not succeed.

Events characterised by the claimant as bullying

3.11 Remove her from direct contact with Councillors as set out in an e-mail from Paul Dillion on 03.12.20.

We have found that this matter is out of time and we do not have jurisdiction to deal with it. If we had reached a contrary decision the claim would nonetheless fail. The claimant was not removed from direct contact. Instead we have found that she was asked to check the responses before they were sent. We found this is a reasonable management action. This was not less favourable treatment aimed at the claimant as it affected at least one other individual within the team. It was not because of the claimant's protected characteristic.

<u>3.12 Reprimand given to her on 10.12.20 by her line manager Mr C for contacting Councillor Wehring directly.</u>

We have found that this matter is out of time and we do not have jurisdiction to deal with it. If we had reached a contrary decision the claim would nonetheless fail. We have found the reprimand was given to the claimant as a reasonable management response to her failing to obey an instruction. It was not because of her protected characteristic.

<u>3.13 Did Mr C escalate her unofficial complaint (made on 10.12.20) to Mr D , Mervyn Bartlett and Julie Bygrave within about 20 minutes of receiving the complaint?</u>

We have found that the complaint was escalated to line management and HR shortly after it was received. We found that this was a reasonable management action. It was not less favourable treatment because of the claimant's protected characteristic. This claim does not succeed.

<u>3.14 Did Mr C demand an apology from her on 10.12.20 for raising her unofficial complaint.</u>

The fact is not disputed. We did not hear from Mr C directly. We were simply told by Mr D he was very upset and that he characterised the allegations as patently baseless. We conclude from this that he had a dismissive attitude to the serious allegation the claimant was raising. While we do not doubt that part of his reaction was because he was personally affronted, we have to conclude that because of the level of the reaction, some part was because of the claimant's protected characteristic.

<u>3.16 Manager Roger Archer-Reeves demanding an apology from Claimant on to Mr C 1.2.21.</u>

This factual issue was not disputed. We have found that Mr E similarly did not treat the claimant's allegation with respect. We find that a manager asking the individual who has raised a complaint of discrimination to apologise for that complaint before it has been properly investigated to demonstrate a dismissive attitude towards the issue. We have to conclude that some part of his reaction was because of the claimant's protected characteristic.

<u>3.17 Manager Mr D delaying escalating a complaint by the Claimant from 1.2.21 to 14.4.21.</u>

We have found that there was considerable delay in escalating the complaint by the claimant. Despite the claimant's use of language about it; this is something that should have been done much earlier. We have found that Mr D 's attitude to the complaint from the very start was to support Mr C and to take his part. He was equally dismissive of the complaint. Again, we have to conclude that some part of his reaction and his lack of action was because of the claimant's protected characteristic.

<u>3.18 Review of highways service structure by Mr D on 6.5.21.</u>

We have found that the review of the department structure was carried out for operational or business reasons. It was not designed directly or indirectly to remove the claimant from her role or to negatively impact her. We find that the review of the highway service structure was not less favourable treatment, nor does not in any way relate to the claimant's protected characteristic. This claim does not succeed.

<u>3.20 Being signed off sick on 25.6.21 with stress due to alleged suspected victim of bullying.</u>

The claimant was signed off sick by her GP. As the issue is put, this cannot amount to less favourable treatment by the respondent. This claim does not succeed.

<u>3.22 David Grasty moves informal meeting for grievance investigation to formal on 7.7.21 at request of Kemeshimi Ikheloa HR.</u>

As the issue is put, a meeting is moved to a more formal process at the request of HR. Given the nature of the allegations we consider it was reasonable for HR to wish to be involved and to make the process a formal one. This is not less favourable treatment nor is it because of the claimant's protected characteristic. This complaint does not succeed.

<u>3.23 Informed by Steve Mulloy of ACAS that RBK had turned down ACAS intervention on 19.7.21.</u>

This was a request by the claimant that ACAS carry out the investigation into her grievance. We have found that it was a reasonable response to reject such a suggestion. This is not less favourable treatment nor was it because of the claimant protected characteristic this claim does not succeed.

<u>3.24 Mr D informed claimant moved investigation of grievance from David Grasty to Arif Sain an external person on 14.12.21.</u>

The claimant accepted that Mr Grasty was unable to conclude her grievance. We have found it a reasonable action for the respondent to appoint an external investigator. That is not less favourable treatment nor is it because of the claimant's protected characteristic. This claim does not succeed.

<u>Remedy</u>

184. The medical evidence the claimant produced indicates that there was a very significant effect on her mental well-being for a comparatively short period of time. She confirmed that she has recovered and has no ongoing treatment. We find that, as her GP letter says, and as the claimant confirmed, the dead naming was not a significant cause of her distress.
185. Nonetheless, we accept that the dead naming also had an impact on her and was part of the cause of her distress. It took the respondent almost 2 years to address this. While it is admitted that this happened, there does not appear to be any formal apology about this. We consider that this is likely to add to the claimant's distress. We have taken into account that the dead naming was therefore a contributory factor in a very significant period of ill health .We conclude that a GP would not consider sectioning an individual without extremely good cause and that therefore demonstrates the claimant's very significant level of distress. Fortunately, the claimant's absence was short-term, which we have also taken into account.
186. We consider that an award in the middle band of the Vento guidelines would be appropriate in the circumstances and we make an award of £21,00.
187. We were asked by the claimant to award aggravated damages. We have not done so for two reasons. Firstly we do not consider that the circumstance this case make that appropriate. Secondly we consider that the overall award of injury to feelings is proportionate to the totality of the suffering caused to the claimant. To award any further damages would amount to double recovery.
188. Interest is payable on injury to feelings compensation at the rate of 8%. It is calculated from the date of the first act of discrimination to the date on which the calculation is made. In our findings of fact the first act of discrimination which the claimant has succeeded was 10 December 2020. Remedy has been calculated as at 28 July 2023.The calculation is 961 x 0.08x1/365x 21.000= £4423.
189. While the grievance was very much delayed, we find that it was ultimately carried out. We do not think this is a case in which it is appropriate to award any ACAS uplift.

Employment Judge Mclaren

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Date 11 September 2023