



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101472/2022 and 4101245/2023

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**Held in Glasgow Tribunal on 19-21 June, 2-4 October 2023
and 16 October 2023 (In Chambers)**

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**Employment Judge Murphy
Tribunal Member A Grant
Tribunal Member I Ashraf**

Ms E Whyte

**Claimant
Represented by
Ms K Stein -
Advocate**

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Falkirk Council

**Respondent
Represented by
Mr M Briggs -
Advocate**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that:

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1. The claimant was not employed on work that was like S Mosson's work for the purposes of section 65(1)(a) of the Equality Act 2010 (EA). The complaint's complaint that R breached the sex equality clause in her terms of work is not, therefore, well founded and is dismissed.
 2. The complaint that the respondent victimised the claimant contrary to section 27 of EA by ceasing to include her in performance meetings from March 2022 is not well founded and is dismissed.
 3. The complaint that the respondent victimised the claimant contrary to section 27 of EA by informing her around 1 July and 22 September 2022 that the claimant's line manager had been instructed by the Head of Service not to speak to the claimant is well founded and succeeds.
 4. The complaint that the respondent victimised the claimant contrary to section 27 of EA by informing her on 11 May 2022 that she would no longer
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deal with homeless appeals and by removing this work from her is well founded and succeeds.

5. The claimant's claim of (constructive) unfair dismissal is well founded and succeeds. The claimant was unfairly dismissed.
- 5 6. A hearing shall be listed on remedy.

REASONS

Introduction

1. This final hearing took place as an in-person hearing at the Glasgow Tribunal. The claimant gave evidence herself and led evidence from her line manager, Audrey Allan. The respondent led evidence from Stephen
10 Mosson, the claimant's comparator for her equal pay claim, and from Laura Smith, the claimant's 'grandparent' line manager.
2. We did not hear evidence or submissions on the issue of remedy which, on the parties' joint application, was held over.
- 15 3. Evidence in chief was taken orally from all witnesses. We were referred to some but not all documents within a joint inventory of productions extending to 723 pages. Ms Stein gave an oral submission and Mr Briggs handed up a written skeleton to which he also spoke. We are grateful to Ms Stein and Mr Briggs for their assistance with the case.
- 20 4. The following abbreviations are used in this judgment:

The claimant	C
The respondent	R
Audrey Allan, Housing Needs Coordinator and C's line manager	AA
Laura Smith, Housing Needs Manager aka 'Service Manager' and line manager to AA	LS

Stephen Mosson, Senior Housing Needs Allocations Officer aka 'Senior Allocations Officer', C's male comparator in her equal pay complaint	SM
Kenny Gillespie, Head of the Housing Needs Service aka Head of Service	KG

Issues to be determined

5. The claimant brought two claims which were conjoined. The parties prepared a written list of issues which was refined slightly during the preliminary discussion. The issues of liability to be determined in the case are as follows:

Equal Pay (section 65-66 of the Equality Act 2010 (EA))

- 1) Was C employed on work that was 'equal' to the work done by SM in the period from 1 February 2020 to 4 March 2022?
- 2) Specifically, was C's work 'like work' within the meaning of section s.65(1)(a) of EA to that carried out by her comparator during the material period?

Victimisation

- 3) The parties agree that C's grievances and grievance appeal dated 12 and 27 August 2021 and 21 September 2021 in which she asserted a breach or breaches of the equality clause were 'protected acts' for the purposes of section 27 of EA.
- 4) Did the following alleged acts or omissions by R take place and, if so, did they amount to detriments for the purposes of section 27 of EA:
 - a. from March 2022, the omission to include C in performance meetings?
 - b. on or around 22 July 2022 and 1 September 2022, AA informing C that she had been advised by KG that she should not speak to C?

c. on 11 May 2022, informing C that she would no longer deal with homeless appeals and taking this responsibility away from her?

5) If so, did R subject C to those detriments or any of them because C did the protected acts or any of them?

5 Constructive Unfair Dismissal

6) Was there a dismissal as per section 95(1)(c) of the Employment Rights Act 1996 (ERA)?

7) Did R do the following acts or omissions?

10 a. fail to deal with C's equal pay complaint without delay from August 2021 and provide contradictory updates?

b. subject C to victimisation as set out in (4) above?

c. subject C to formal absence monitoring unnecessarily?

d. cause C to take time off work as sick?

15 e. cause C to reduce her hours to reduce stress due to a lack of trust in R?

f. fail to properly deal with C's Job Evaluation Scheme, causing delays and providing contradictory information?

8) If so, did these acts or omissions individually or cumulatively breach the implied term of trust and confidence?

20 9) Was there a 'last straw' scenario? C avers this was:

a. R's failure to provide an outcome to formal grievance appeals on 22 October 2021 and 19 August 2022; and

b. comments made by LS on 7 September 2022 when she questioned C as to "what more could ...[R] do?"

25 10) Did C resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for C's resignation.

- 11) Did C affirm the contract before resigning? The Tribunal will need to decide whether C's words or actions showed that they chose to keep the contract alive even after the breach.
- 12) If C was dismissed within the meaning of s.95(1)(c), what was the reason for the breach of contract?
- 13) Was it a potentially fair reason?
- 14) Did R act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

Findings in Fact

6. The following facts, and any further facts set out in the 'Discussion and Decision' section, are found to be proved on the balance of probabilities.

Background

7. R is a local authority. It employs approximately 5,000 employees in the Falkirk area. It is supported by a centralised Human Resources service which is available to provide advice and support to managers in relation to staffing issues and HR policies and procedures. Within HR is a Service known as the Housing Need Service. It has its own dedicated HR resource.
8. A restructure took place in or around 2018, which resulted in changes to the structure of the Housing Needs Service. These included changes to the reporting lines for C and SM and the tiers of management above them, among other matters. The structure described below is the modified post-restructure model.
9. C was employed from in or around 2001 until her resignation took effect on 31 October 2022. She was employed initially as an Assessment Officer in the Homeless Team. In or around April 2014, she was promoted to Senior Housing Needs Assessment Officer and held this post until her employment terminated. She supervised a team of Assessment Officers) along with C, 'the Homeless Team'). SM was employed by R from 1990. He has held the post of Senior Housing Needs Allocations Officer (or Senior Allocations Officer) since 2010. He supervises a team of Allocations

Officers known as the Allocations Team. The Homeless Team and the Allocations Team both sit within the Housing Need Service.

10. During the material period for the equal pay claim (1 Feb 2020 to 4 March 2022), both C and SM reported to the Homeless Need Coordinator, AA. AA reported to LS (Housing Needs Manager or the Service Manager) who, in turn, reported to KG (Head of Service).
11. The Homeless Team is responsible for dealing with individuals who present as homeless in accordance with the respondent's policies and the legislative framework. The Allocations Team is responsible for administering R's policy on the allocation of its housing stock to prospective tenants. It advertises properties for bidding under R's Allocation Policy which is based on so-called 'Choice Based Letting' (CBL) and maintains the allocation lists in accordance with the Policy which accords priority to prospective tenants according to prescribed circumstances and / or characteristics.
12. R operated a pay and grading structure which was based on its Job Evaluation Scheme (JES). Each job role had an associated grade which went in ascending order from A to O. Each grade had an associated pay scale. The scales were divided into spinal column points. A postholder would be paid, depending on their experience in post, at a point within the pay scale for their job grade. Prior to the 2018 restructure, both the Senior Assessment Officer post and the Senior Allocations Officer post were graded as Grade H. At some stage in 2019, SM's Senior Allocations Officer post was re-evaluated and the Grade for his post was increased to a Grade I. His associated pay scale was higher from that point than C's and he was paid a higher annual salary than C.

Findings relevant to 'like' work question

Job Descriptions

13. A job description (JF) was prepared for C's role around the time it was advertised in 2013. The JD broadly described C's duties throughout her tenure in the period until March 2022. The role inevitably evolved in the period and the JD does not exhaustively list what C's work involved.

However, it identifies the bulk of the work on which she was employed. The JD stated the claimant's job purpose as follows:

"Section C: Job Purpose

5 *Line management responsibility for Assessment Officers to ensure that a high quality service is provided to all homeless people being assessed in terms of the relevant legislation, Scottish Executive Code of Guidance on Homelessness and relevant Council policies."*

14. It listed her key responsibilities as follows:

Section D Key Responsibilities

- 10 ➤ *Supervise Assessment Officer's [sic] workloads providing guidance where required and ensuring that the required performance standards are achieved and to ensure that the Council's obligations in respect of the Housing (Scotland) Act 1987 and Housing (Scotland) Act 2001 and any other relevant*
- 15 *legislation (e.g. Children (Scotland) Act 1995) are met.*
- *Line management of the Admin Team providing guidance where required to ensure that required performance standards are achieved.*
- *Providing training on the Council's homelessness duties to*
- 20 *other staff and external agencies as required.*
- *Maintain computerised record systems and produce regular monitoring reports for Managers and Scottish Executive and take action to deal with anomalies arising from the monitoring reports.*
- *Administer the appeals process.*
- 25 ➤ *Attend meetings and Case Conferences in absence of Homeless Team Coordinator, representing the Service's position.*

- *Interview homeless applicants to assess specific accommodation and support requirements making appropriate arrangements in liaison with specialist services if required.*
 - 5 ➤ *Provide housing options advice in liaison with Specialist Advisors to applicants who are not homeless in an attempt to prevent homelessness from occurring wherever possible.*
 - *Implement the Council's policies in relation to homeless applicants.*
 - *Budget monitoring responsibility for temporary accommodation*
 - 10 ➤ *Ensure all processes across the service achieved and maintained BSI ISO 9001. Liaise with quality officers to monitor performance.*
 - *Ensure Service meets its KPI and LPI performance targets by monitoring and preparing reports on service improvement*
 - 15 ➤ *Ensure all inquiries and complaints are dealt with effectively within service targets*
15. The job description listed the following accountabilities:
- *Line management responsibility for assessment officers*
 - *Responsible for ensuring that homelessness assessments are carried out in accordance with relevant legislation, guidance and Council policies.*
 - 20 ➤ *The post holder will be responsible for monitoring performance standards in accordance with agreed targets and taking action to rectify anomalies.*
 - 25 ➤ *The post holder will provide general advice on homelessness to the public and will assist in preventing homelessness wherever possible.*
 - *The post holder will be supervised by the homeless team coordinator who will monitor his / her recommendations [AA's job title changed in 2018 from Homeless Team Coordinator to*
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Housing Need Coordinator but she continued to line manage CJ

- 5 ➤ *The consequence of errors could result in appeals against the Council's decision and will impact on individual members of the public who would be distressed as a result.*

16. SM's role was re-evaluated under R's JES in 2019. A new Job Profile (JP) was prepared for the Senior Allocations Officer role at that time. The JP broadly described SM's duties in the period from Feb 2020 until March 2022. The JP does not exhaustively list what SM's work involved. However, it identifies the bulk of the work on which he was employed. It identified the purpose of the job as follows:

15 *"To provide supervision and line management support to the Housing Needs Allocations Team ensuring the delivery of an effective allocations and Housing Options service for applicants. Managing the Choice Based Lettings system and allocation of void properties."*

17. The job profile listed job specific tasks as follows:
- 20 ➤ *To ensure the team provides a comprehensive housing options service to customers including information on allocations policy, functional needs, homelessness, tenants rights (private and social tenants), referrals to support providers, in accordance with relevant policies*
- 25 ➤ *To provide information on the Allocations service and policy to customers and outside agencies and to liaise with other agencies where appropriate to ensure customers can fully participate in the Choice Based Lettings scheme to secure accommodation that meets their needs*
- 30 ➤ *To be responsible for the maintenance of all housing applications from initial receipts to rehousing including banding and suspensions and that they are correct and in line with the Allocations Policy*
- *To undertake investigations into personal circumstances, where appropriate, having regard to the Council's duties under*

the Data Protection Act, General Data Protection Regulation and other relevant legislation and policies

- 5 ➤ *To review all appeals received surrounding the allocations policy and application, ensuring a response up to and including second stage*
- *To liaise with Registered Social Landlords regarding Section 5 referrals, nominations as per agreements in place*
- 10 ➤ *Contributes to the Council and other housing providers strategic development plans to ensure the local portfolio reflects our applicants' housing needs*
- *Provide guidance, training, and development for all new members of staff, existing staff and other services / agencies as required.*
- 15 ➤ *To respond to correspondence and other communications from MPs, MSPs, Local Members, applicants etc in relation to all Allocation enquiries (including FOIs)*
- 20 ➤ *Ensure all returns for Scottish Housing Regulator are accurate using existing data reports. Designing, developing, implementing, and maintaining all systems data and reporting as required. Contribute and participate in all reviews of the Allocations Policy including the consultation process*

18. The Job Profile listed the following 'Job Demands', so far as relevant:

- 25 ➤ *You will be required to contribute to development of plans and strategies*
- *...*
- *You will encounter individuals whose circumstances mean they are distressed because of their physical, emotional and / or mental health needs*
- 30 ➤ *You will encounter demanding people in the course of your day-to-day work.*

- *You will apply and ensure adherence to statutory regulations and policy*
- *You will be responsible for the development and management of information / systems*
- 5 ➤ *You will be responsible for the Allocations Team*

Supervision and line management of a team of reports

19. C's work involved line managing a team of Assessment Officers who were based across different offices. Generally C had around 5 reports. (A full complement would have been 7 but there was never a full complement *in situ*).
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20. The Assessment Officers, in turn, dealt with people who presented as homeless, or threatened with being so. They interviewed them to establish their circumstances and assess how they should be classified for the purposes of allocating priority in relation to housing them. They carried out an initial in-depth interview. Thereafter, within a 28-day period, investigated, gathered information and performed an assessment.
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21. Their work involved assessing whether the person was homeless and matters such as whether they had a priority need, whether they were intentionally homeless, their connection to the local area and their requirement for temporary accommodation. They worked within a legislative framework. As a statutory service, information collected through their work required to be recorded and reported to the Scottish Government.
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22. The interaction with people who presented as homeless could be demanding. Some have mental health issues or alcohol or substance addiction problems. Some are fleeing domestic violence or are in crisis for other reasons. Some behave aggressively or even violently towards the Assessment Officers. The Assessment Officers had a role in signposting the interviewees to relevant services such as debt and money advisors, counselling and mediation services, foodbanks, health services or addiction support services.
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23. C provided supervision and advice to these frontline officers in relation to carrying out this work and occasionally required to conduct initial frontline interviews herself where there was a lack of resource in the team to meet the demand.
- 5 24. C's work involved making herself available to the Assessment Officers to discuss cases with them which she did daily. Her management duties in relation to her team included dealing with absence management, annual leave requests, 1-1s and organizing and conducting team meetings every 6 to 8 weeks. She required to arrange and agree with them who would cover which office and when. She carried out training of her team from time to time. She trained new staff on the integrated housing management system and on how to conduct a homeless interview and the documents to be created on the system. She ensured her staff had access to relevant training.
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- 15 25. There were two admin staff who were based at the front desk in the office where C's team worked. They did not work exclusively on admin for C's team but when they were working in relation to the claimant's team's area, she had responsibility also for them.
26. SM's work involved line managing support to a team of 8 Allocations Officers and a Housing Occupational Therapist.
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27. The Allocation Officers administered the allocation of R's housing stock for R. This work involved classifying available properties (passed to them by the Housing Operations Teams) according to their size and type; advertising them weekly for home seekers to bid on under a CBL system; arranging and carrying out accompanied viewings; taking up references for tenants, and allocating the property to a home seeker. To do this, the Team required to classify applicants so as to accord them lower or higher priority for the purposes of the Allocations Policy depending on the category into which they fell. Groups included applicants presenting as homeless, existing tenants of R's social housing or of a Registered Social Landlord (RSL) in R's area; and everyone else. The Allocations team had no responsibility for assessing those presenting as homeless to verify their status, which was done exclusively by the claimant's team whose classification would be passed to the Allocations Team. The Allocation
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Officers are often out and about making offers and doing accompanied viewings

28. SM oversaw the rota. He made sure properties were correctly advertised by his team. He oversaw allocations of properties and gave advice and guidance as required to his Allocations Officers on their work to ensure it was carried out in accordance with the Allocations Policy and performance standards.

29. SM's work involved making himself available to his team to discuss cases which he did on a daily basis. His management duties in relation to his team included dealing with absence management, annual leave requests, 1-1s and organizing and conducting team meetings. The work of the team was carried out in accordance with a rota prepared by SM. He carried out training of his team from time to time and ensured they had access to training.

15 *Appeals*

30. C's team of Assessment Officers made decisions regarding how the individuals were to be classified for the purposes of according priority. Once a decision was made, the service-user could lodge an appeal. If the appeal raised new information not previously disclosed, it was the claimant's role to review the original decision. She would decide whether the outcome was changed and inform the applicant of her decision. Appeals could be against a finding that an individual was not homeless; an offer of temporary accommodation or an offer of supported accommodation.

25 31. Alternatively, if the appeal raised no new information, C's work involved administering the appeal process. The case would go to an appeal board at Service Manager level. C's work involved logging the appeal with the Customer and Business Support team and populating the information in the appeal into R's pro forma template. C required to check the accuracy and attention to detail of the process and decision by her Assessment Officer and discuss with them any omissions or disparities. Sometimes she identified cases that needed more investigation and she provided guidance and support to the Assessment Officer regarding what was

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required. She trained the Assessment Officers in presenting on their decisions at appeals.

32. The appeal panel, involving a Service Manager and other managers of the same level, took the decision on the appeal which would then be communicated back to C with comments. C's work then involved drafting a letter back to the appellant, explaining the decision on appeal. On average, the claimant dealt with two to three appeals per week across the time she spent in the role including the period with which her equal pay claim is concerned.
33. SM dealt with appeals against allocations decisions. There were guidelines about what an applicant could appeal. If for example, a home seeker was made an offer of housing and appealed this, he reviewed the case and decided whether the offer was reasonable. This was a Stage 1 appeal. The decision could, however, be appealed at Stage 2 to the Housing Needs Coordinator.

Budgetary responsibility

34. C had budget monitoring responsibility for temporary accommodation as per her JD. This involved responsibility for the temporary B&B accommodation budget but expanded to include responsibility for school transport provision for children in temporary accommodation and translation costs of interviews and for letters in relation to non-English service users. C also had responsibility for authorizing costs such as repairs costs in relation to temporary accommodation on occasions when the person who normally undertook this responsibility was on leave.
35. There was no evidence that SM's work involved budgetary monitoring or financial authorisation duties and we make no finding that it did so.

External Training

36. C carried out external training at Tully Allan Police College on domestic abuse and homelessness. There was no evidence before us that SM's work involved carrying out external training and we make no finding that it did so.

Maintaining a computerised record systems

37. C's work involved maintaining computerized records systems known as HL1 and HL3 which created a statutory record of an individual's homelessness and a housing application for mainstream housing. The system was used for reporting to the Scottish Government and the records had to be kept up to date and accurate. C's work involved spot checking cases and also checking the information in monthly reports, and dealing with human and system errors.
38. SM has reports set up on the system for him by an internal team within R to provide him with reports to go to the Scottish Government (SG) and the Best Value Network (BVN). They require certain data from the local authorities which SM provides annually. Much of his time is taken up with this in the month of April. The record systems, the nature of the data collated, and the format and frequency of reporting were not the same for C and SM.

External Enquiries from Service Users, MPs, MSPs, Councillors and complaints

39. C dealt with enquiries from service users and elected members raising queries. She investigated and attempted to respond to or resolve these. She responded in the format the communication was received. She logged the enquiries on their CRM system. Complaints could be dealt with informally or they could be made formal in which case they were managed by the claimant initially. She would prepare a written formal response. If it went to Stage 2, the complaint would be dealt with at a higher level, but she would be involved to provide the background. The response to a Stage 2 complaint would be issued by the Service Manager or the Head of Service.
40. SM work involves responding to queries from politicians. He replies using the same format as the communication received. This would involve looking into the matter or case and obtaining the relevant information as well as preparing the response.

FOIs and SARs

41. Both C and SM's work included collating information from records held to respond to FOIs and Subject Access Requests.

Interfacing with RSLs

- 5 42. SM's work involved liaising with RSLs. The housing stock of RSLs can sometimes be advertised, along with R's own properties, by SM's team. SM along with the Housing Needs Coordinator required to liaise with RSLs at a level separate to operational handling enquiries. He spends two or three days a year liaising regarding new builds developed by RSLs in the
10 area and agreeing with the RSLs the arrangements for advertising these properties on the RSL's behalf and ironing out the banding system for applicants for these properties which may differ from R's policy.
43. There was no evidence that C liaised with RSLs for this or any purpose, and we make no finding that she did so.

15 *Attending meetings and case conferences with other internal departments / external entities*

44. C met with Social Work, the Scottish Police Service, the Wheatley Group and with Committed to Ending Abuse (formerly known as Women's Aid) to represent the Homelessness Service when the Housing Needs
20 Coordinator was unavailable to do so, for example, because of sickness or annual leave. She attended Case Conferences on Adult and Child Protection and the Homeless Action Network. She attended such meetings or conferences approximately once per month.
45. SM also attended meetings and events with external entities in the
25 Housing Coordinator's absence to represent the Service. He attended events related to his team's specialism as C attended the events related to hers.

Attending Committee meetings when Housing Needs Coordinator and Service Manager unavailable

46. SM's work involved attending R's committees of elected members to answer questions on changes to the Allocation Policy on occasions when his manager and grandparent line manager were unavailable to attend.
47. There was no evidence that the claimant carried out work that was the same or similar.

Assisting in policy development and writing

48. SM's work included assisting in the developing of R's policy. There had been a recent substantial project involving a review of R's Allocation Policy. This involved a large scale consultation and ultimately the rewriting of the Policy for approval by the relevant committee. The re-writing of R's allocations policy was not led by SM but by the Coordinator, AA. SM was involved in the consultation, including attending events and workshops. His contribution to policy writing was insubstantial.
49. We heard no evidence that C's work involved the development and writing of R's paper policies. Her work did, however, involve the development of initiatives to seek to improve service users' experiences. This included sitting on a steering group of a multi-agency support team with the purpose of avoiding people 'slipping through the net' and not being assisted with homelessness. She also attended meetings with West Lothian Council which had been involved in the development of a public access interface for assistance with housing matters. During the Covid lockdown period, C had to develop R's practices to meet the service users needs by looking at other ways to communicate.
50. AA expected both C and SM to input into strategy and policy. Their contributions related to their respective specialisms.

The restructure: 2018 / 2019

51. A restructure of the Housing Needs Service took place in or around 2018. A number of changes were made and from the point of implementation, AA's job title changed to Housing Need Coordinator and she became the line manager of both C and SM. At the time her vision for the structure was

that the Senior Officers below her would learn more about each other's roles and would be able to cover for each other in cases of absence. This proposed arrangement was discussed at listening events with staff affected by the restructure, including the claimant. In the event this proposal was never implemented, and the Seniors did not learn to perform each other's duties or cover for each other in cases of absence.

52. It was also said by KG, the Head of Service, at such listening events at the time that the Senior Officers would all remain on the same grade and that the restructure would not result in any Grade increases and associated pay increases for posts.

Events from August 2021

53. On 11 August 2021, AA had a conversation with C in which she C that SM was on a higher grade than the claimant. C was on grade H and AA told her that SM was on the grade above which is grade I. AA told C that she had just learned this information herself.

54. On 12 August 2021, C sent a letter in the following terms to AA:

"Dear Audrey

I wish to raise my concerns in relation to information recently received regarding the grading of my post in comparison to that of my male co-worker within the same service and would request that a full explanation be provided.

I believe that I am being treated unfairly and discriminated against in relation to my grading / placement on the pay scale compared with my male co-worker.

It is my understanding that my male co-worker within the same service placed on a higher grade on the pay scale and that the change to a higher grade took effect some time in 2019.

In my role as Senior Housing Needs Assessment Officer my work can be described as 'like work' in that it involves similar tasks requiring knowledge and skills and 'equivalent work' as it is of equal value in terms of how demanding it is and requiring effort, skill and decision making. My role as

Senior has the same value within the Housing Needs Service in that the demands of the role have the same level of responsibility and level of skillset.

5 *As you may know the Equality Act 2010 gives employees a legal right to to pay equality with employees of the opposite sex doing equal work for the same employer. This includes work that is the same or broadly similar, work that has been rated as equivalent under a job evaluation study, or work of equal value. As an employer, Falkirk Council, have a responsibility not to implement practices which disadvantage women and reproduce the*
10 *gender inequality.*

During discussions regarding the restructure of the Housing Needs Service from 2018, several Senior Managers alluded to the fact that all Seniors would be of the same Grade and would be expected to cover each other during periods of absence as well as deputise for the Housing Needs
15 *Coordinator.*

I would appreciate a detailed explanation of the process followed during the restructure and how it is possible that a male co worker was graded higher than my post and the points raised in my letter.

I am concerned that this is unfair and that is why I am raising it with you..”

20 55. On 23 August 2021, C received a response from AA (bearing the date 19 August), which included the following text, so far as relevant.

“I refer to your letter of 12 August 2021 ... I note that you have not specified details of the colleague or the post that they hold.

25 *... I can assure you that, as an employer, Falkirk Council is aware of and takes its equality duties seriously. On this basis, all posts within Falkirk Council are graded in a consistent and robust manner ...*

I note your comments about the recent housing restructure process. It is the case however that, that in the absence of any details about the comparative post you refer to, I am unable to look into this matter further.
30 *It would be helpful therefore if you could confirm which post this is so I can seek further advice on your query.”*

56. C was upset by this response. She had discussed the matter with AA and knew that AA was aware of the identity of the comparator. It was AA who had told her about the grade disparity with that individual. SM was also the only Senior Officer in the Housing Needs Service who was male.

5 57. C lodged a formal grievance on 27 August 2021. She said 'I believe the response to my informal enquiry has therefore been a deliberate attempt to fob me off'. She stated her grounds of grievance as follows:

10 *"I write in response to the letter I received from Audrey Allen Housing Needs Coordinator on 23 August 2021 regarding my Equal Pay inquiry of 12 August 2021.*

I have attempted to raise this matter informally but have not been satisfied with the response, therefore, please consider this as a formal grievance ...

15 *In answer to the question and to allow this matter to be looked into further, the male co-worker I refer to within the Housing Needs Service is Stephen Mosson, Senior Allocations Officer, the only other male senior officer within the Housing Needs Service. I would like to stress this is not personal against this individual but rather about the inequality and discriminatory treatment I believe I am experiencing. I also wish to highlight that under the Equality Act 2010 Equal Pay Statutory Code of Practice it states clearly*
20 *that a woman is not required to identify the male comparator by name at the outset.*

25 *I understand that if there is any discrepancy in terms of pay between myself and my male competitor that Falkirk Council is required to provide a legitimate reason for this. Falkirk Council as an employer must ensure that men and women receive equal pay for equal work that is equivalent in terms of skill, effort, or level of responsibility.*

30 *During the time of the restructure in 2018 information was presented to staff at listening events and on flow chart diagrams which stated that senior officer positions within the housing needs service would be graded the same. I believe there was some discussion about the grading for Senior Officers and it was agreed by First Line managers and senior managers it would be H grade.*

...

I would welcome the opportunity to attend a meeting ...

I would like to address this matter internally without the need for any further action and to resolve the situation and allow me to focus on my job ...”

5 58. On 2 September 2021, LS, invited C to a grievance meeting which took
place via Teams on 10 September 2021. C attended, as well as LS and
Jenny Simpson from HR. During the meeting, LS told C that SM had taken
on some duties of his former line manager (the Coordinator to whom he
reported prior to the restructure). That Coordinator had before the
10 restructure (from 2015) been off on long term sick. C did not know whether
this was so or not, as she did not work closely with SM or know the detail
of his work. C understood AA had taken on some or all of the former
Coordinator’s duties in around 2018 as a result of the restructure. LS said
that SM’s post had retained some of those duties post restructure and that
15 this was why a higher grade was warranted.

59. LS offered to re-evaluate C’s post. She said she didn’t have a copy of the
C’s JD which couldn’t be located. She said she didn’t feel C had the ‘extra’
requirements as part of her post that SM had. When LS initially suggested
the re-evaluation of C’s post, C was amenable to this proposal. However,
20 LS then remarked that she didn’t believe C’s post warranted an upgrade
and said words along the lines; “Maybe you’re doing work you shouldn’t
be doing”. This comment caused C considerable concern. She feared that
the re-evaluation would not be fair because a judgment had already been
made by LS about what grade her post should be assessed as. She also
25 feared she would be told she ought not to be doing duties which she was
carrying out in order to keep her grade suppressed. She felt that, as LS
had only been in post as the Service Manager since 2018, she was not
well placed to know what C’s role did and didn’t involve.

60. On 10 September 2021, after her meeting with LS, C spoke to AA and
30 asked her what work she was doing that she shouldn’t be doing. AA said
she was not aware of any work C ought not to be doing.

61. On 17 September 2021, LS sent a letter to C (wrongly dated 21 September 2021). That letter summarised the main points discussed at the meeting as follows:

- 5 • *You advised that, when housing services was restructuring in 2018, information presented to staff stated that all Senior Officer positions within the Housing Needs Service would be paid at grade H.*

- 10 • *You recently found out that the salary of a male colleague (who undertakes the role of Senior Allocations Coordinator) was revised to grade I sometime in 2019. You want to know why this happened when your grade remained the same*

- 15 • *I explained that for some time, the vacant post of Allocations Coordinator and was covered on our higher duties basis by the Senior Allocations Coordinator. That role was subsequently reviewed and retained some of the duties previously undertaken by the now deleted Coordinator post. These include: development work, performance reporting to Regulator, developing performance reports, extrapolation of data, interrogation and analysis. The post was graded at Grade I using the Council's agreed job evaluation scheme.*

- 20 • *I explained that I believe your role does not involve the same requirement to attend committees and workshops for example. Neither do you have the same role in assisting policy writing and development. You noted that you believe you have responsibilities in your own role which the Senior Allocations Coordinator does not.*

- 25 • *You confirmed that it is your view that the duties and responsibilities of your post have changed since it was previously graded. I advised therefore that I would be happy to arrange for the grade to be reviewed.*

- 30 • *As you're aware, following the meeting I sent you a job evaluation questionnaire for you to start to consider. We will*

then meet on 6th October, following my annual leave, to go through the questionnaire together...

...I hope that you consider this response resolves your grievance on an informal basis. If this is not the case you have the right to submit your grievance to the Head of Housing and Communities within five working days ...”

- 5
62. The references to ‘Senior Allocations Coordinator’ in the second, third and fourth bullets were erroneous. LS intended to refer to the Senior Allocations Officer, which is SM’s (abbreviated) job title.
- 10 63. C decided she not to meet LS on 6 October, as proposed, because she was concerned the evaluation wouldn’t be fair with LS doing it as a result of her comments during the meeting. She decided instead to raise a formal grievance appeal.
- 15 64. On 21 September 2021, C submitted a formal grievance appeal. She repeated the history and her concern that the response to her letter of 12 August was an attempt to fob her off. She explained her concerns about the meeting with LS on 10 September as follows:
- 20 *“...It was explained to me that the male comparator carries out some duties that I do not and are not required in my role. I explained that I believe my role has some responsibilities and duties that the male comparator does not. In response to this it was suggested that perhaps I am doing work that I should not be doing. Laura Smith suggested that a review of my grade could be arranged, and she would send me on the evaluation form ...*
- 25 *I wish to express my concerns prior to agreeing to a re-evaluation being completed. I disagree that the male comparator’s role has work / duties that my role does not and this can be confirmed with my Line Manager Audrey Allen. If it is believed prior to the re-evaluation being carried out that I have been doing work / duties that I should not be doing how can this process be completed to ensure fairness and equality? If there are duties*
- 30 *I have been carrying out and should not have been since I took up the Senior Assessment Officer post on 1st April 2014 how will this be considered to ensure fairness and equality during a re-evaluation of my grade? Will the re-evaluation be completed based on the work / duties I*

have been doing since taking up the post in 2014? Will the re-evaluation eliminate some of the work / duties I have been doing?

I would like to add in relation to this point that I do the duties / work that is required for my role and requested / instructed by my Line Manager and Service Manager and no one has ever at any point, since I took up the post in 2014 raised the issue that I am doing work that I should not be doing and it is only now that this is being suggested.

...

It has been explained to me that the male comparator post was re graded in 2019 as some of the duties from the Allocations Coordinator role which no longer exists, now sat with this post. This information was not presented during the restructure of the Housing Needs Service which took place in 2018.

What was the reason for this regrading and change of duties to the male comparator's post in 2019 shortly after a restructure of the service in 2018? Was any consideration given to re-evaluating the Senior Housing Needs Assessment Officer post? If not, why not? The information presented during the restructuring in 2018 was that Senior Officer posts would be graded the same and this would be H grade and yet within a few months the male Senior Officer is changed to an I grade."

65. C expressed her desired outcome as follows:

"My desired outcome is to be treated fairly and not feel discriminated against under the terms of the Equality Act 2010.

I would like an explanation as to why, as a female Senior Officer I am on at H grade and my male comparator within the same Service is an I grade effective from 2019 when in 2018 during a restructure it was stated that the Senior Officers within Housing Needs Service would be graded the same and this would be H Grade.

Whilst I believe my post should now go through the re- evaluation process I cannot see that this should only be done if I withdraw my grievance. The issue with inequality and discriminatory treatment in my opinion remains."

66. On 30 September 2021, C was signed off sick with work-related stress. She remained off sick until 31 January 2022.
67. On 11 October 2021, while off sick, in the absence of any response to her grievance appeal, C's solicitor, on her instructions, emailed a letter to AA and LD about C's concerns. The letter contained questions about the situation. It requested copies of JDs and person specifications for respective roles as well as seeking details of her comparator's salary. Neither C nor her solicitor obtained a reply from R to the letter.
68. On 12 October 2021, R's Housing Operations Manager, Steve Bentley, invited C to a grievance appeal hearing which went ahead via Teams on 22 October 2021. Mr Bentley was in attendance along with Eileen Murphy from HR. LS attended to present the management case and AA attended for part of the meeting to give evidence at C's request. C was accompanied by a companion who took notes for C at the meeting.
69. AA gave evidence that in 2018, KG had told her and LS that no one would gain any more money as a result of the restructure. She said it was expected that everyone would be at the same grade. She denied being aware of SM's re-grade in 2019. She said she had drafted a JD in 2018 for his post as the old one was historic and out of date but she wasn't aware of a grading change. Her expectation, she said, was that the outcome would be that his grade was unchanged. She said she only became aware of the change of grade in July / August '21. She said that, in her view, there was no difference in the job roles of C and SM.
70. LS said at the meeting that she had no preconceived ideas about the outcome of the re-evaluation process proposed for C. She said that AA was indeed aware that a re-evaluation of SM's role was taking place back in 2018 and that AA herself had been involved.
71. At the end of the meeting, Mr Bentley said he would adjourn the meeting pending the outcome of the re-evaluation. He said they would reconvene in 6-8 weeks. He said words to the effect that it would be a 're-evaluation plus', which C understood was intended to reassure her that the process would be robust and thorough.

72. Mr Bentley sent a letter to C on 3 November 2021 (wrongly dated 28 October 2021) as follows:

5 *“There is a willingness from yourself and management to discuss and progress the revaluation exercise. Following a short recess therefore I made you aware that I wished to adjourn the hearing to allow sufficient time for a grading re-evaluation exercise to be undertaken.*

10 *I made you aware that to do this exercise it is a requirement to review your current job description in order that a competent document is submitted to the Reward Team with visible tracked changes. The outcome of this exercise cannot be pre-judged at this point in time however, will then enable me to consider further issues as outlined in your case.*

Timescales for this exercise are currently unknown and I would request that I'm advised by the service upon conclusion of matters by the Reward Team.

15 *Please accept my apologies for the delay in issuing this summary letter to you, this was due to unforeseen personal circumstances.”*

73. R published a document called ‘How to get a post graded’. It set out the procedure to be followed. It envisaged that the postholder’s line manager should submit the formal grading request following discussions with the HRBP. It explained a Job Evaluation Questionnaire (JEQ) required to be used. It envisaged that, for existing posts, any submission of a JEQ should be in consultation by the manager with the employee to ensure they have the opportunity to input to the process. It said that following evaluation, the employee and manager will be given a copy of the job overview for comments which will be taken into consideration by the Grading Group.
- 20
- 25

74. On 4 November 2021, C emailed Mr Bentley regarding things said at the meeting which had not been captured in his letter but which had been recorded in her companion’s notes. She provided a copy of the statement she had given at the meeting along with excerpts from the minutes taken by her companion. She said: *“Please see below my statement to allow dates to be amended. Also some other important details which I feel should be included.”*
- 30

75. By 12 November 2021, C had received no response from Mr Bentley. She sent an email chasing a response on that date. On the same date, she had a meeting with R's OH Advisors. Later the same day, she met AA to discuss the re-evaluation. At that point, she envisaged returning to work on 25 November 2021 when her sick line expired. At the meeting, she and AA began work on the JEQ. It is a lengthy document which requires significant input with examples to be populated under each of 13 category headings. The document was not completed on that afternoon. It was planned that C would work on it further on her own following the meeting.
76. On 17 November 2021, Mr Bentley emailed C. He apologised for his lack of response, explaining he had been on annual leave and that the HR Advisor was on leave until 18 November. He advised he would get his letter updated and asked C how her discussions were going.
77. On or about 18 November 2021, LS told AA to halt the process while C was off sick. She said 'under no circumstances' would anything be done on the re-evaluation until C's return to work. She told AA to manage C's expectations that the process could take months on her return. AA, in turn, telephoned C. She told her about her discussion with LS and that LS had said work on the re-evaluation must stop and should not progress while C remained off sick. AA informed C she had been told to tell her that it could take months and that it was up to AA to "manage the C's expectations".
78. LS did not instruct AA at this time that she required to obtain an OH report confirming C's fitness to participate in the re-evaluation process while off sick. LS's purported concern in her evidence to the Tribunal about obtaining OH sign off was not reason for her instruction to halt the process. AA instructed a report from OH around this time in November 2021, in accordance with R's usual procedures. When instructing the referral, AA did not specify a management question to the OH adviser specifically about C's fitness to participate during her absence. That had not been suggested to AA by LS. On the contrary, AA was told by LS that 'under no circumstances' would anything be done on the re-evaluation until C's return to work.
79. On 21 November 2021, C emailed Mr Bentley again. She explained she had met with AA and started the evaluation form but that LS had told AA

that the evaluation should not be done while she was off and that the process could take months. She said: *"It is my understanding where a grievance is impacting on an employee's health and return to work then it would be advisable not to delay the process. I am agreeable to proceed with the evaluation process, as I was to attend the grievance meeting. I have discussed this with OH and will be discussing it with my GP this week. This whole process has been dragged out from the beginning when I believe it could have been resolved at the informal stage and it is continuing to impact on health."*

5
10 80. C had felt positive on 12 November 2021, but her symptoms of anxiety deteriorated after her call with AA and she remained signed off after the expiry of her fit note on 25 November 2021, when her sick line was extended until 10 January 2022.

15 81. On 2 December 2021, AA emailed Mr Bentley, LS and Ms Murphy of HR. She said he had information that "OH supports the reason for Liz's ongoing sickness is a direct result of the grievance and the fact it has not progressed." She told them HR had recommended a meeting. She continued:

20 *"As previously advised I did work with Liz on the re-evaluation but on the advice of Laura this was to be halted until Liz returned to work. Liz has stated due to the reason she is absent from work she feels this should be progressed as this is an important outstanding matter that causes her great anxiety.*

Once I receive the OH report I will be expected to action it."

25 82. On 3 December 2021, Ms Murphy replied to AA, copying in SB and LS. The email included the following text:

As this is a confidential process the Chair would provide any update directly to Liz therefore we can't comment further with regard to this case.

30 *If Liz remains unfit for work, have OH been asked to confirm that Liz is fit to meet with management i.e. with regard to the re-evaluation as we understood that this was being progressed?*

83. This was the first occasion on which AA was asked about whether OH had been asked to confirm that the claimant was fit to meet with management with regard to the re-evaluation. Ms Murphy's statement, "we understood that this was being progressed", was a reference to the information in C's own email of 21 November 2021 when C had advised Ms Murphy and others that she had discussed the matter of proceeding with the re-evaluation with OH and would be discussing it with her GP. LS was not present in work at the material time on 3 December 2021 and did not pick up AA's email until after her return in late December 2021.
84. On 3 December 2021, AA sent a further email to S Bentley, LS and E Murphy about C's situation. She told C at the time about sending this correspondence. The email included the following text:
- "As Liz's is line manager it is my responsibility to ensure that you are aware that by delaying this process she states is having a negative impact on her anxiety levels which I have observed as I maintain regular contact with her. I was instructed by management on 18th November not to progress with the revaluation due to Liz being off sick and to make Liz aware that once she comes back to work we can progress this and it will take months to reach a conclusion, which I duly did.*
- Liz has shown me information from OH (which has not yet been sent to me) and the letter that states:-*
- "Current Capacity for Work*
- In my opinion, based on the information available to me today, Miss Whyte is temporarily not fit to return to work at present.*
- However, it is likely that her symptoms may persist if she returned to work without resolution of her perceived workplace issues. Therefore I would recommend*
- that a meeting is held with Miss Whyte in order to resolve her perceived outstanding work issues if at all possible, in the hope of subsequently facilitating a return to work.*

Given that I was instructed I couldn't progress until Liz returns to work and there has been no formal response from the Hearing I believe that is now a stalemate position.

5 *Someone needs to agree and move this matter forward. Can this be resolved as a matter of urgency?*

85. No response was received to this email by AA.

86. By 13 December 2021, C had still received no response from Mr Bentley regarding her email of 4 November with requested additions to be included in the letter or to her email of 21 November 2021, raising concerns about the evaluation process being halted. She emailed him again and her
10 message included the following text, so far as relevant.

"I have not yet received the amended letter which followed on from the grievance hearing held on 22nd October 2021. This is causing me a great deal of stress and anxiety as it feels like nothing is moving forward.

15 *My understanding from the meeting was that I would meet with Audrey to progress with the post evaluation / re-evaluation and I arranged this and met with Audrey on 12 November and did a significant amount of work on this. The following week I was advised by Audrey that she was told by Laura the evaluation / re-evaluation cannot progress until I return to work.*

20 *I have tried from the beginning of this grievance to find a resolution whilst I continued to attend my work and it was after several weeks in to the process that I had to report sick due to anxiety and stress caused by the treatment I have received.*

...

25 *I have followed the grievance procedure and have complied with requests to attend meetings. ...*

*I feel at a loss as to where I go from this point and no one is communicating with me on how things do proceed in this continues to impact on my mental health. I believe I have done everything possible to seek a resolution and return to work ... I now have the additional stress and anxiety of reaching
30 a point of being absent from work where I will be placed on monitoring ...*

I respectfully request a response with the amended letter and details on how we proceed as agreed at the meeting on 22nd October by the end of this week 17th December.

87. Mr Bentley responded on 13 December 2021 as follows, so far as relevant:

5 “...

Apologies, but my laptop has been in for a rebuild and I have lost some data, I thought I sent an e-mail acknowledging your revisions / notes. I was intending to place them with the letter and not to re-issue the summary of the meeting.

10 *From my perspective the instruction was issued at the hearing that all parties (Housing Needs) would review the grading of your post and review the lines of responsibility. Once this exercise was completed the findings considered by the grading panel, a final decision on the case could then be issued.*

15 *Until such time, no competent decision could be issued on the circumstances of your case.*

My understanding is that, as seemingly confirmed in your e-mail, that you have commenced this process. This piece of work is out with the scope of the hearing but the outcome of which could have an influence on the final
20 *decision.*

Given what you have said I have scheduled a meeting with Laura to clarify, she returns from leave tomorrow.

...”

88. There was a further email from C on 13th December 21 to which Mr Bentley
25 replied on 14th December. In his email of that date, he indicated he was speaking with LS that afternoon. That meeting did not, in fact occur as LS was off sick. C was not informed of this by Mr Bentley or otherwise. She received no further communication from him or from anyone else at R until January 2022.

30

Events from January 2022

89. On 7 January 2022, C met with AA and Caroline Calvert of HR. She explained she didn't know if she would be able to return when her fit note expired on 10 January.

5 90. On 13 January 2022, C was referred to R's OH advisors for a telephone appointment. At some stage in January 22, AA went off sick and remained off sick until April 2022.

91. C returned to work on 1 February 2022 on a phased basis. The telephone appointment with OH took place some time between 1 and 22 February 2022, and resulted in an OH report dated 22 February. The OH Advisor included the following text in the report:

10

"I understand that she managed to meet with her line manager and they started the evaluation on the 12th November 2021, however, this had to be put on hold as her line manager was advised by her senior manager that this could not be progressed as Miss Whyte was still off work.

15

This negatively impacted on Miss Whyte's mental well-being causing a set back in her recovery. She contacted her GP and was signed off for a further four to six weeks.

... she also perceives the treatment she has received during the investigatory procedures to have been discriminatory in itself. She describes symptoms of feeling ignored, humiliated, undervalued and questioning her own capability due to loss of confidence and anxiety.

20

... In my opinion, based on the information available to me today, Miss Whyte is currently fit for her role with adjustments. There has not been much improvement in her symptoms and she does not feel well enough to resume her full duties yet.

25

... In my own opinion, Miss Whyte's symptoms are highly likely to persist if her perceived work related issues remain unresolved. I suggest that management consider completing the evaluation process as this would be beneficial to resolve her perceived work issues and to help to prevent the exacerbation of her symptoms."

30

92. At some stage in March 2022, C read an email she had been sent on 31 January 2022 while off sick. C had returned to work on a phased basis on 1 February to hundreds of emails which it took her some time to work through. The email was from Christine Thomson, Senior Implementation and Monitoring Officer. It attached the minute of a meeting which had taken place on 26 January 2022. The covering email said, among other things:
- 5
- “As per the discussion at the meeting, I’ll change the current meeting in the calendar to the more focussed Performance meeting, and will set up a separate general Housing Needs meeting starting in March.”*
- 10 93. On that subject, the attached minute recorded:
- “4. Monthly Performance Review / Future of Meetings*
- Laura noted a consideration about the future of the meetings. Coordinators will still have a performance meeting with focussed themes.”*
- 15 94. The January meeting was a meeting of the full Housing Need Service which included staff and managers responsible for different areas of the work of the Service. One of the standing items on the agenda had previously been performance. Monthly performance reports for the different teams’ areas within the Service were previously discussed at the monthly meeting. C used to speak to the performance data for the Homeless Team at that meeting. SM used to speak to performance data for the Allocations Team.
- 20
95. LS had decided in January 2022 to change the format of the full Service meeting to remove this standing item. Instead, she decided to hold separate performance meetings with the Coordinators each month. LS took this decision because of a concern that, every month, recurrent themes emerged in the performance discussions, but in the context of the full Service meeting, there was not the opportunity to drill down into the issues. There were many people present who were not involved in the discussions about the performance of a particular team’s area. LS wanted to change the format in order to ensure more detailed discussions could take place separately and that action plans could be drawn up for the respective areas.
- 25
- 30

96. She felt it would be preferable to meet with the Coordinators for this purpose. This meant that neither C nor SM would be routinely invited to the new performance meeting. They would still have a role in briefing the Coordinator (AA) on their respective team's performance.
- 5 97. C was upset about the 31 January email as she would not be invited, or would not routinely be invited, to the meetings on performance to speak to her team's performance.
98. On 21 March 2022, C had a meeting with LS to discuss the evaluation work C had begun with AA on in November. They discussed C's duties and the draft JEQ which LS said she would read and, if there were to be
10 any changes, she would note them and return the form to C. She said she would discuss aspects with AA. LS said the evaluation would be thorough. She said it may be that the post has inherited some duties or responsibilities which should not be there but that this would be part of the
15 discussions. LS said the evaluation would be completed and that if the post warranted an I grade, it would become an I grade.
99. By 4 April, the claimant had not heard anything further from LS. C went off sick from 4 April until 6 May 2022. She had a further OH appointment on the day her sickness absence started, and a report was produced by the
20 OH advisor that same day (4 April 2022). The management question to OH as part of the referral was: *"Having met Liz following the outcome of the OH referral it is clear we need to progress with the re-evaluation process but require confirmation that this would be of benefit to Liz and support her in her ability to return to work."* The response from the OH
25 advisor was: *"I recommend that management consider completing the evaluation process as this would be beneficial to resolve her perceived workplace issues and help to prevent exacerbation of her symptoms and allow her to function effectively at work"*.
100. The report also recorded that C still awaited feedback following the
30 meeting on 21 March 2022 with LS. The report stated said, *"Miss Whyte is temporarily not fit for her role ... She hopes to return within the next few days ... However it is highly likely that her symptoms may persist if her perceived work issues remain outstanding. Therefore I would recommend that a meeting is held with Ms Whyte..."*

101. On 5 April 2022, LS sent an updated version of the JEQ to C with changes by LS shown in track. LS had not met with AA to discuss this content as she had indicated to the claimant she was going to do at the meeting on 21 March. On 21 April 22, LS sent her amended draft JEQ to AA by email for comment.
102. C remained off sick. On 27 April 2022, during her absence, a meeting was held between C, AA, and Pauline McGrellis from the Reward Team. Ms McGrellis gave an overview of the evaluation process. She explained when the grading team receives an evaluation request, they arrange a meeting with the post holder and the postholder's line manager. She said that the average can be 6-8 weeks to go fully through the process.
103. C returned to work on 6 May 2022. She requested a reduction in her hours from 37 per week to 30 per week. It took time before her request was actioned.
104. R publishes a 'Managing Sickness Absence Policy.' It has a section (3.2.4) on 'Monitoring Absence'. It includes the following text, so far as relevant:
- "Managers may apply discretion when applying monitoring as there may be situations where it may not be appropriate e.g. where employee has previously had excellent attendance record, pregnancy related absences, industrial injury, bereavements, disability related absences etc.*
- The meeting / RTWI should include discussion around the following areas:*
- ...
- Where relevant, the employee should be advised that their absence level will be monitored on this informal basis for up to six months and if they have any further absences during this period then they may be called into a Stage 2 absence review meeting (in specific cases it may be appropriate to extend Stage 1 arrangements by a further two months rather than moving to the Stage 2 process, e.g. industrial injury, bereavement, significant improvement then just one day off sick).*
- ...

Following or during the Stage 1 monitoring period, if the employee has failed to achieve or maintain the required attendance levels, the following options are open to the manager at this point:

- *Progress to the Stage 2 monitoring process under the Council's Capability Policy.*

5

105. Between 6 and 11 May 2022, C had a return-to-work meeting with AA. AA told C that she would be placed on formal absence monitoring. C told her that was not possible as she had not previously been notified that she had been placed on informal absence monitoring after her last absence in accordance with R's policy. AA said she would check the position with Laura Smith.

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106. On 11 May 2022, C had a meeting with AA and LS. AA was not present throughout the whole of the meeting. During that meeting LS told C that she should not be administering the appeals process. LS said that AA would do that work. C was unhappy about this. She protested that administering appeals was listed as part of her job description. LS said she had not seen C's JD. She said she believed that C may have dealt with appeals temporarily but that she should not have been doing so. C said she disagreed with the removal of these duties. LS left C with the understanding that there was to be a meeting between LS and AA to discuss the issue further.

15

20

107. C was upset about the removal of these appeal duties. She believed it was in response to her raising grievances querying the equal pay treatment she had received and was designed to negatively impact on the evaluation of her post. C was never advised whether a further discussion took place between LS and AA on the subject or of the outcome of any such discussion.

25

108. On or about 18 May 2022, AA returned to C regarding absence monitoring and told her LS had sought advice from HR and that the response was to proceed with formal monitoring on the basis that C, as a manager herself, will have been familiar with the Policy and would know that she should have been placed in informal monitoring previously.

30

109. C sent her grading request form to P McGrellis on 19 and 20 May. Ms McGrellis told her on 20 May that there was a Grading Group meeting scheduled for 1 June and that R's priority "is to conclude on the posts for this meeting prior to starting any new posts". Further email
5 correspondence between the pair ensued and a meeting was proposed at C's request to discuss the JEQ for 17 June 2022.
110. On or about 27 May 2022, as a result of deteriorations in her working relationship with LS, AA approached KG and suggestion she should step back and not be managed by LS for a period. KG agreed and asked her to
10 work on other duties, reporting to him. At that stage, no instruction was given about not talking to C or AA's other reports.
111. On 30 May 2022, C raised an informal grievance about the absence monitoring among other matters arising from the treatment of her absence.
112. On 16 June 2022, C participated in an informal grievance meeting via
15 Teams. The meeting was conducted by S Buchanan, Acting Libraries and Fairer Falkirk Manager and Gail Dick from HR also attended. On 22 June, Ms Buchahan issued a letter in which she said it was apparent that there was confusion in notifying C of the informal monitoring (Stage 1) arrangement and she recommended that C be placed on informal
20 monitoring with effect from 25 May 2022 instead of formal monitoring.
113. On 17 June 2022, C met P McGrellis to discuss the evaluation. Ms McGrellis followed up by email on 21 June to request the information C had started to collate previously to populate into the evaluation and to discuss factors they had not had a chance to discuss in the meeting. C
25 replied that day and requested another short meeting with P McGrellis was agreed for 30 June 2022.
114. On 28 June 2022, C intimated a formal grievance appeal as she was dissatisfied with the outcome to place her on informal monitoring among other matters. She repeated the history of her grievances in August and
30 September 2021 and asked that these points be considered as, she said, she believed there was "*no doubt in management's mind that this treatment would result in any employee reporting sick due to stress.*" She believed her case was exceptional, given the reason for her absence and

she considered R's absence policies should not be applied to her in the way proposed.

115. On 30 June the scheduled meeting between the claimant and Ms McGrellis took place to discuss factors relating to her draft JEQ. The same day, following the meeting, C forwarded the JEQ she and AA had begun work on in November 2021 as revised with LS's changes on 5 April 2022. Ms McGrellis undertook to add any relevant comments on to the review and said the next stage would be a discussion with C to give her a chance to make any comments. She indicated it would be tight to make the Grading Group meeting on 3 August 2022 but advised she could set up a separate chat with them about C's post outwith the Grading Group schedule if required.
116. On 1 July 22, P McGrellis sent over the updated JEQ with her comments to C, LS and AA. She indicated this could now be reviewed with LS. C undertook to read it the following week during her annual leave and expressed the hope that she, AA and LS could pick up on it the week after.
117. On 1 July 2022, the claimant's hours reduced to 30 hours per week.
118. On 12 July 2022, C emailed LS and AA, copying in P McGrellis and asked when it would be possible to discuss the evaluation and move things on and. C mentioned Ms McGrellis had said it was tight for time.
119. On or around 22 July 2022, AA mentioned to KG that she was in contact with C in relation to interviews they had been conducting together. KG told AA not to speak to C. He did not tell her at this stage not to communicate with other colleagues. That summer, AA had also conducted interviews alongside SM.
120. The same day or soon after, AA told C that KG had instructed her not to speak with C. AA did not explain why not. At that time, C was aware R had received her Tribunal case and she believed that the instruction related to this. Neither KG nor LS contacted C to discuss the situation or the reasons for any instruction that AA ought not to speak to be speaking to C. AA defied KG's instruction and continued to be in contact with C.

121. In or around the end of July 2022, the claimant suffered symptoms of chest pain and facial numbness causing her to attend hospital and her GP. Her doctor diagnosed that her symptoms were triggered by stress and anxiety.
122. On 4 August 2022, there was a further hearing to consider C's grievance appeal regarding formal absence monitoring. It was conducted by Ms J Kerr, Communities Manager and Mhairi Walker attended from HR. Ms S Buchanan presented the case for management.
123. At some stage between 12 July and 15 August, a meeting was set up for 15 August to discuss C's job evaluation process. This was proposed to take place with Ewelina Masterton.
124. On 15 August 2022, Ms Kerr issued her grievance appeal outcome letter. The grievance was not upheld. The informal monitoring commencement date was altered to begin from 6 May instead of from 25 May 2022. On the same date, C was signed off sick again due to heightened anxiety. She remained off sick until 7 September 2022. The meeting scheduled to discuss her evaluation with LS and Ms Masterton was cancelled as a result.
125. On 18 August 2022, C had a consultation with OH. She advised of the symptoms of chest pain and facial numbness which had led her to attend hospital a few weeks earlier. At that point, she was working from home. The OH Advisor advised *"It would be prudent for management to explore and resolve the ongoing work related issues so they do not become a potential source of job dissatisfaction and disengagement..."* The OH Advisor opined that the claimant's condition of anxiety was likely to be considered a disability.
126. On 19 August 2022, C lodged a grievance appeal. She repeated her complaint that her earlier grievances from August and September 2021 were still not resolved. She asserted she was suffering long term health effects caused by obstructive and stalling tactics. She advised she disagreed with being placed on monitoring for her absence in the circumstances, whether formal or informal in circumstances where, she alleged, the decline in her health had been caused by her employer.

127. On or around 1 September 2022, during a conversation between AA and KG, C's name came up and KG said to AA: 'I've told you not to speak to Liz Whyte'. AA asked what the problem was and KG said she shouldn't be speaking with anyone. AA then pointed out to KG that she had been interviewing alongside and in dialogue with another of her Seniors. KG did not express that he had any problem with that. On the same day or soon after, AA called C, who remained off sick, and told her that KG had repeated the instruction that she should not speak to C. AA again ignored KG's instruction and continued to be in contact with C.
128. Also on 1 September 2022, LS sent C a reviewed version of JEQ with her comments.
129. On Wednesday 7 September 2022, C returned to work. She was due to finish up at the end of Friday 9 September for a week's annual leave which was previously booked. On 7 September, she had a discussion with LS. She told LS that she was really struggling and she didn't see any way forward. She explained that she felt very disappointed with R's response to her concerns. LS said words to the effect: *"We've reduced your hours; we've referred you to CBT. What more could we do?"* C felt frustrated by this comment in circumstances where her re-evaluation and grievance remained outstanding. She felt the tone of the comment was not supportive nor intended as a genuine question. LS had said similar words after C's absence in February 2022 at her return to work interview and, at that time, in contrast to this occasion, she had felt LS's words and tone were genuinely aimed at trying to facilitate her return.
130. On 8 September, C emailed LS regarding her evaluation document and undertook to return to LS with comments on her amendments. C worked until 9 September then finished for annual leave. While off, she reflected on the position and took stock. She had still not received any response to her grievance appeal intimated on 19 August 2022.
131. On 20 September 2022, C sent an email giving notice of her resignation to LS as follows:

Good afternoon

I am writing to inform you I am resigning from my post of Senior Housing Needs Assessment Officer and take early retirement. Please accept this as my formal termination of employment and the start of my notice.

5 *I feel I am left with no choice but to submit my resignation and take early retirement due to my experiences in the last year relating to Equal Pay, unfair and discriminatory treatment under the terms of the Equality Act 2010 and more recently what I believe to be discriminatory victimisation. The grievances I have raised dating back to 12th August 2021 remain unresolved and the latest one submitted on 19th August 2022 to the Head*
10 *of Service has not been progressed at all.*

As stated in my grievances I have followed the route available to me, as an employee, to seek resolution to matters concerning me and I have remained professional and respectful throughout. The continued impact on my health is documented in reports by Occupational Health to
15 *management and the recommendations made in each report to assist and resolve matters ignored.*

I believe this to be a fundamental breach of the confidence and trust on the part of management.

20 *The reminder recently that I had been referred to ... CBT and my working hours reduced to assist me and being asked the question what more could we do? I believe is an example of the complete disregard and lack of understanding of the impact on my health caused by the matters which I have raised throughout the grievance route and it still remains unresolved.*

...

25 *Regards*

132. C was 56 at the time and she was eligible to draw down early retirement benefits under the pension scheme.

133. On 22 September, C emailed LS with her comments on the evaluation form and additional information. On 27 September 2022, LS emailed C to the effect that her evaluation would be considered by the Grading Group on
30 26 October 2022. C replied on the same date and asked to extend her

period of notice to allow her to see what the conclusion of the Grading Group would be.

134. On 29 September 2022, the claimant was invited to attend a grievance hearing on 11 October. She declined the invitation. On 26 October 2022, C received notification that her post had been considered by the Grading Group and it had been decided it should remain at Grade H. On 28 October 2022, C intimated a grading appeal against this outcome.

135. On 31 October 2022, the claimant's employment ended pursuant to her (extended) notice of resignation.

10 **Observations on the evidence**

136. There was relatively little in material dispute between the parties. Some areas of conflict, particularly between the evidence of AA and LS, were on matters of fact which, we concluded, did not have a material bearing on the issues the Tribunal had to decide. Where that was the case, we have not made findings on the disputed facts.

Evidence on the respective work of C and SM

137. We found the claimant gave her evidence in a straightforward and unvarnished way and she had a strong recollection of the detail and chronology of events. We found her to be a credible and reliable witness.

20 138. We also found AA gave her evidence in a straightforward way. As C's line manager for many years in C's Senior Officer post, and more recently as SM's line manager, we found AA's evidence compelling on the nature of the work C and her comparator were engaged on in their respective posts. We also found the evidence of SM on the work of his role to be straightforward and credible and, indeed, substantially without conflict with the evidence of C and AA.

25 139. LS was more removed from their day-to-day work as their 'grandparent line manager' and, for that reason perhaps, we found her evidence on the details of their respective jobs to be less grounded in detail and less convincing.

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140. We heard extensive and detailed evidence about the tasks associated with C's job while the evidence about SM's work was much briefer and higher level. It was not necessary to make findings about every last task associated with the two posts or to describe in our findings in meticulous depth how the work was carried out.
141. There were only a couple of conflicts of any materiality when it came to the work on which C and SM were respectively employed. One related to the question of C's responsibility for administering homeless appeals.
142. LS's evidence was that by custom and practice this was part of the Coordinator's responsibility. She said that the claimant was picking up this work in AA's absence but acknowledged that, in between AA's absences, the work 'possibly stayed with the claimant'. Both C and AA were clear about the claimant's role in administering appeals and that it had always been her role to do this since her appointment to post in 2014. We preferred their account of the matter. It accorded with what was written in the 2013 JD. C gave detailed evidence of what the work involved and we accepted she had done this work since appointment. LS, on the other hand, did not become C's grandparent line manager until relatively late into C's tenure in 2018 and acknowledged she was aware that for significant periods from then, C had been undertaking the appeal duties.
143. The other apparent conflict related to the extent of SM's involvement in writing R's policies. C said she didn't believe SM was involved in policy writing and AA said she was not aware of him writing policy for R. In relation to the large-scale project of reviewing and revising the Allocations Policy in 2019/2020, AA said she, not SM, had done the writing. SM only commented briefly on this in his re-examination. He agreed with the terms of a letter which asserted he "assisted in policy writing and development". He didn't provide any details about the nature or extent of his involvement in writing policy. LS gave evidence about SM's role in the review of the Allocations Policy and spoke of the assistance he gave her in taking it to the Scrutiny Panel. We accept that SM's involvement in this and the consultation, but we believed AA that it was she, not SM, who did the re-write. There is not sufficient evidence on which to base a finding that SM made a contribution of any significance to the writing of any policy for R.

Evidence about whether staff told that grades would not change as a result of the restructure

144. There was a difference in the evidence about whether, at the time of the restructure in 2018, staff were told at a listening event by senior management that no grades would be increased as a result of the restructure exercise. C's evidence was that this was said. AA gave evidence that she and LS initially proposed a structure in an organogram to KG whereby the Coordinator role (AA's role) would increase a grade. Her evidence was that KG said to her many times at that time that no one would gain financially from the restructure and no one's grade would increase.

145. LS said that at no point did she recall a statement that there would be no re-grades in the restructure. However, it was also LS's evidence that she took up the Service Manager position in 2018 when the restructure was already underway and partially implemented so that it is not clear she would have attended all events that C or AA did. SM said he didn't recall this being said at the listening events but he also that he didn't recall anything about these events.

146. We preferred the evidence of C and AA on this matter. C had maintained that this was said at listening events in her letter of 12 August 2021 and her grievances dated 27 August 21 and 21st September 21. She also gave evidence at the grievance meeting on 22 October 2021 that this had been said. AA likewise gave evidence at that meeting that both she and LS were advised that no one would gain any more money in the restructuring. LS is not recorded as having contradicted at the grievance meeting what was alleged by C to have been said at listening events. There was a consistency between C's recollection and that of AA which had been put to the respondent during C's employment without being refuted a number of times.

30 *Evidence about LS's instruction to AA to halt C's evaluation process in Nov 21*

147. AA's evidence was that she was told by LS to halt the process and that under no circumstances would any work be done on it until C's return. MB put in cross-examination that LS's evidence would be that her decision to

halt the process was in light of concerns about the C's health and that this was a reasonable position for LS to adopt. AA said this would be for LS to explain and repeated her evidence that LS told her to manage C's expectations. Mr Briggs did not put to AA that LS instructed her to obtain an OH report confirming C's fitness to participate in the process in her absence. LS said she gave this instruction in November to AA. She suggested it was not followed (though her evidence was that she had not seen the terms of the referral to OH by AA in November 2021 resulting in the report quoted in AA's email of 3 December 2021). Ms Stein did not put to LS that AA did not accept she was instructed by LS on 18 November 21 to obtain an OH report confirming C's fitness to participate in the re-evaluation process. She did not put that AA's account was that LS told her 'under no circumstances' should re-evaluation work be carried out during C's absence.

15 148. The Tribunal, therefore, required to resolve this factual dispute based on the conflicting accounts of the two key witnesses neither of whom had been specifically challenged. We accepted and preferred AA's evidence about the content of her conversation with LS on or about 18 November. Her evidence accorded with C's evidence about what AA reported to C, after speaking to LS. There was also some documentary support from the material period. In her emails of 2 and 3 December to LS, E Murphy and others, AA recorded she had been told to halt the process. LS did not reply, on her return to work or at all, to point out that this was not what she said but instead had merely instructed it be paused pending an OH report. We also noted that there was no evidence that LS or HR ever requested a copy of the referral giving rise to the report quoted in AA's email of 3 December. We might have expected that one of them would do so if they believed the process had merely been paused temporarily pending a referral being made by AA in the terms LS alleged had been instructed.

30 149. We do not accept as a matter of fact that LS's purported concern about obtaining OH sign off was the true cause for her instruction to halt the process. We accept AA's (unchallenged) evidence that what LS said to her was that "under no circumstances" was the re-evaluation to be progressed during C's absence. There was no evidence that LS took any steps to ensure that OH advice was being obtained addressing the question of C's

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fitness to participate. There was no evidence either that LS had expressed any concern about getting OH confirmation of C's fitness to participate in the grievance process which also took place while C was off sick with stress. On the balance of probabilities, we do not find that LS instructed AA to seek OH sign off in November 2021, nor that LS took any action to satisfy herself on the point until much later, in the referral leading to the 4 April consultation and report. We conclude, on balance, that a concern about OH sign off was not LS's reason for instructing the suspension of the re-evaluation process in November 2021.

10 *Evidence regarding KG's instruction to AA not to speak to C*

150. The evidence of AA and LS about the nature of the instruction and the reasons for it differed.
151. AA said she approached KG about her dysfunctional relationship with LS at the end of May 22 and asked to be removed from LS's line management. As a result, she said KG moved her to work on special projects under his direct management at that time. She said she was not, at that stage, given any instruction not to speak to C or anyone else. In July 22, AA said that KG told her not to speak to C and in September, KG repeated: 'I've told you not to speak to Liz Whyte'. According to AA's evidence KG instructed her for the first time in the September conversation that she shouldn't be speaking with anyone. AA's evidence was that she then pointed out to KG that she had been interviewing alongside and in dialogue with another of her Senior Officers and that he did not express a problem with that.
152. LS gave evidence that KG spoke to her about the matter. She said her understanding was that an instruction was given to AA to have limited communications with team members because she had been taken 'offline' and was not managing the team during that time. She said she understood the reason was that it was to put in 'clear communication channels' for the staff and to avoid confusion.
153. LS did not witness the discussions between KG and AA. KG did not give evidence in these proceedings. We preferred AA's direct account of the conversations she had with KG and accepted her evidence, on the balance

of probabilities. AA's account was consistent with C's evidence about what she reported to C shortly after each of the conversations with KG.

Relevant Law

Equal Pay

- 5 154. Chapter 3 of the EA (sections 64 – 66) are concerned with equality of terms between the sexes and, so far as relevant, provide as follows:

64 Relevant types of work

- (1) *Sections 66 to 70 apply where—*

10 (a) *a person (A) is employed on work that is equal to the work that a comparator of the opposite sex (B) does;*

(b) ...

- (2) *The references in subsection (1) to the work that B does are not restricted to work done contemporaneously with the work done by A.*

15 **65 Equal work**

- (1) *For the purposes of this Chapter, A's work is equal to that of B if it is—*

(a) *like B's work,*

...

- 20 (2) *A's work is like B's work if—*

(a) *A's work and B's work are the same or broadly similar, and*

(b) *such differences as there are between their work are not of practical importance in relation to the terms of their work.*

- 25 (3) *So on a comparison of one person's work with another's for the purposes of subsection (2), it is necessary to have regard to—*

(a) *the frequency with which differences between their work occur in practice, and*

(b) the nature and extent of the differences.

66 Sex equality clause

(1) *If the terms of A's work do not (by whatever means) include a sex equality clause, they are to be treated as including one.*

5 (2) *A sex equality clause is a provision that has the following effect—*

(a) if a term of A's is less favourable to A than a corresponding term of B's is to B, A's term is modified so as not to be less favourable;

10 *(b) if A does not have a term which corresponds to a term of B's that benefits B, A's terms are modified so as to include such a term.*

(3) *...*

15 (4) *In the case of work within section 65(1)(b), a reference in subsection (2) above to a term includes a reference to such terms (if any) as have not been determined by the rating of the work (as well as those that have).*

155. Whether a claimant's work is the same or broadly similar to that of her comparator is a question of fact. Only if the work of A and B are the same or 'broadly similar' is it necessary to go on to consider whether any
20 differences are of practical importance in relation to the terms of their work. In such event, it will be necessary to have regard to the frequency with which the differences occur and their nature and extent.

Victimisation

156. Section 27 EA is concerned with victimisation and provides, so far as
25 material, as follows:

"27 Victimisation

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

(a) B does a protected act, or

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

.....

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

- 5 157. For a disadvantage to qualify as a detriment, it must be found that a reasonable worker would or might take the view that he had thereby been disadvantaged. The test must be applied by considering the issue from the point of view of the victim. An unjustified sense of grievance about an allegedly discriminatory decision cannot constitute a detriment but a
10 justified and reasonable sense of grievance may well do so (**Shamoon**).
158. The detriment must be 'because' of the protected act. The protected act must be 'the reason' for the treatment. In **Greater Manchester Police v Bailey** [2017] EWCA Civ 425 confirmed the test remains the 'reason why' question not a 'but for' test.
- 15 159. In **Nagarajan v London Regional Transport** [1999] IRLR 572, the House of Lords ruled that conscious motivation was no more needed in the establishing of victimisation under the old Race Relations Act 1976 than it was in relation to ordinary direct discrimination under that Act. In that case, it was enough that the employment tribunal had found victimisation to exist
20 on the ground that 'consciously or subconsciously' the interviewers for a vacancy had been influenced by the fact that Mr Nagarajan had previously brought proceedings against the employer.
160. It is not required, in order to successfully establish victimisation, to show that the alleged perpetrator was wholly motivated by the claimant's
25 behaviour in carrying out the protected act (**Nagarajan v Agnew** [1994] IRLR 61, EAT). Where there are found to be mixed motives for a detriment, it is desirable that there be an assessment of causation of the unlawful motive or motives which must be of sufficient weight to be treated as a cause though need not be the sole cause (**Owen & Briggs v James** [1982]
30 IRLR 502). What is needed is that the discriminatory reasons should be 'of sufficient weight' or that the protected acts should have a 'significant influence on the outcome' (**O'Donoghue v Redcar and Cleveland**

Borough Council [2001] IRLR 615, CA; **Nagarajan v London Regional Transport**).

161. Section 136 of EA deals with the burden of proof. It provides, so far as material, as follows:

5 “**136 Burden of proof**

(1) *This section applies to any proceedings relating to a contravention of this Act.*

(2) *If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

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(3) *But subsection (2) does not apply if A shows that A did not contravene the provision.*

(4) *The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.*

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(5) ...

(6) *A reference to the court includes a reference to—*

(a) *an employment tribunal;*

...”

20 162. The effect of section 136 is that, if the claimant makes out a *prima facie* case of discrimination or other prohibited conduct including victimisation, it will be for R to show an explanation which is not discrimination or victimisation.

25 163. There are two stages: Under Stage 1, the claimant must show facts from which the Tribunal could decide there was discrimination or victimisation. This means a ‘reasonable tribunal could properly conclude’ on the balance of probabilities that there was discrimination (**Madarassy v Nomura International plc** [2007] IRLR 246, CA). The Tribunal should take into account all facts and evidence available to it at Stage 1, not only those

30 which the claimant has adduced or proved. If there are disputed facts, the

burden of proof is on the claimant to prove those facts. R's explanation is to be left out of account in applying Stage 1.

164. However, merely showing a protected characteristic plus less favourable treatment is not generally sufficient to shift the burden. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal could conclude that, on the balance of probabilities, R had committed a prohibited act. 'Something more' is, therefore, required (**Madarassy**). This requirement for 'something more' than merely showing a protected act plus a detriment applies equally in victimisation cases as in discrimination cases (**Bailey**).
165. Direct evidence of direct discrimination or victimisation is rare. Depending on the facts and circumstances, various types of evidence have been held in different cases to have supplied that 'something more' which has allowed an inference of prohibited conduct to be drawn.
166. If the claimant shows facts from which the Tribunal could decide a prohibited act has occurred, then, under Stage 2, R must prove on the balance of probabilities that the treatment was 'in no sense whatsoever' because of the protected characteristic or protected act (**Igen v Wong** [2005] IRLR 258).
167. There are cases where it is unnecessary to apply the burden of proof provisions. These provisions will require careful attention where there is room for doubt as to the facts necessary to prove discrimination (or victimisation). However, they have nothing to offer where the Tribunal is in a position to make positive findings one way or the other (**Hewage v Grampian Health Board** [2012] IRLR 870).

Constructive unfair dismissal

168. Section 95 of ERA defines a dismissal, including what is commonly referred to as constructive dismissal in subsection (1)(c):

"95 Circumstances in which an employee is dismissed

- (1) *For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if) -*

.....

(c) *the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.*"

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169. The onus of proving a constructive unfair dismissal lies with the claimant. The case of **Western Excavating Ltd v Sharp** [1978] IRLR 27 sets out four conditions which must be met to succeed in such a claim:

- 1) There must be a breach of contract by the employer, actual or anticipatory;
- 2) That breach must be significant, going to the root of the contract, such that it is repudiatory;
- 3) The employee must leave in response to the breach and not for some other, unconnected reason; and
- 4) The employee must not delay too long in terminating the contract in response to the employer's breach, otherwise he or she may have acquiesced in the breach.

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Implied 'trust and confidence' term

170. In every contract of employment there is an implied term ("the t&c term"), articulated in the case of **Malik v BCCI SA (in liquidation)** [1998] AC 20 as follows:

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"The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

171. In **Baldwin v Brighton and Hove City Council** [2007] IRLR 232, the EAT held that the use of the word "and" following "calculated" in the passage quoted from **Malik** was an erroneous transcription of previous authorities, and the formulation should be "calculated or likely" (emphasis added). The EAT reaffirmed this modification in **Leeds Dental Team Ltd v Rose** [2014] IRLR 8. The test does not require to the Tribunal to make a factual finding as to what the actual intention of the employer was. If an employer acts in

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a way which, considered objectively, is likely to destroy or seriously damage the relationship of trust and confidence, that is sufficient.

172. In **Firth Accountants Ltd v Law** [2014] IRLR 510, the EAT noted that in a case concerning a breach of the implied term of trust and confidence, there must have been no reasonable or proper cause for the employer's conduct for there to be a breach of the implied term. If there was reasonable and proper cause for the conduct, there is no breach of the **Malik** term and no dismissal.

The 'last straw' doctrine

173. In **Omilaju v Waltham Forest London Borough Council** [2005] 1 All ER 75, the Court of Appeal held that a final straw which is not itself a breach of contract could result in a breach of the implied term of trust and confidence. The essential quality of that act was that, when taken in conjunction with the earlier acts on which an employee relied, it amounted to a breach of the implied term of trust and confidence. It had to contribute something to that breach, although what it added might be relatively insignificant.

174. Further guidance in so-called 'last straw' cases where resignation is the culmination of a course of conduct comprising several acts or omissions across a period of time was provided by the Court of Appeal in **Kaur v Leeds Teaching Hospitals NHS Trust** [2018] EWCA Civ 978. The final straw may be relatively insignificant but should not be utterly trivial. It does not have to have the same character as the earlier acts, though it must contribute something to the breach. It need not be capable of being characterised as unreasonable or blameworthy viewed in isolation. Where there has been conduct which breached the implied term of trust and confidence but the employee affirmed the contract, if the conduct was continued by a further act (the last straw), the employee could revive their right to terminate based on the totality of the employer's conduct. If the employer's conduct in its entirety is assessed to have been repudiatory, and the final act was part of that conduct, then whether or not it breached the implied term of trust and confidence at an earlier stage is irrelevant; even if it did, and even if the employee had affirmed the contract then, the final act revives the employee's right to resign in reliance upon it.

175. Where there is a breach, the employee may choose to give the employer the opportunity to remedy it, and generally should not be prejudiced if they delay in resigning until the employer's response to an appeal or grievance is known. In **WE Cox Toner (International) Ltd v Crook** [1981] IRLR 443, the employee was censured by the employer in July 1980 and demanded that the censure letter should be withdrawn through his legal representatives. He was informed on 6 February 1981 that the letter would not be withdrawn and resigned four weeks later. The EAT held he was precluded from claiming for unfair dismissal because he had remained for four weeks after it became clear his grievance would not be remedied. However, it was accepted, without finally determining the point, that he was not necessarily affirming the contract up to the point of the refusal to withdraw the censure.
176. In **Kaur** (cited above), the Court of Appeal at para 63 said that exercising a right of appeal against what is said to be a seriously unfair disciplinary decision is not likely to be treated as an unequivocal affirmation of the contract. In **Gordon v J & D Pierce Contracts Limited** UKEATS/0010/20, the first instance tribunal held there were no breaches of contract but even if there had been, the claimant's decision to invoke the employer's grievance procedure meant he had affirmed the contract. The Employment Appeal Tribunal allowed an appeal against this point, favouring the approach in **Kaur**.
177. Delay will not of itself amount to acquiescence, but it will be an important factor. In **Chindove v William Morrison Supermarkets Ltd** UKEAT/0201/13, a period of six weeks' sickness absence before resigning was held not to amount to affirmation. The EAT said that, as a general principle, a tribunal might be more indulgent towards the period of delay because the need to make a decision one way or the other was arguably less pressing than if the employee was continuing to actually work for the employer.
178. In **Buckland v Bournemouth University** [2010] IRLR 445, the Court of Appeal considered whether a fundamental breach of the implied trust and confidence term could be cured by an employer taking action to make amends. It held that a repudiatory breach is not capable of being remedied

so as to preclude acceptance. The wronged party has an unfettered choice of whether to treat the breach as terminal and, by making amends, all the defaulting employer can do is invite affirmation. A doctrine that, if an employer cures a fundamental breach the innocent party loses his option of acceptance could only be introduced into employment law on grounds that were capable of extension to other contracts, and the court would not be justified in doing this.

Discussion and Decision

Equal Pay

10 *Was C employed on work that was 'like work' to that on which SM was employed in the period from 1 Feb 2020 to 4 March 2022?*

179. Ms Stein adopted into her submissions parts of the claimant's pleaded case dealing with the equal pay issue and some comments made by C's representative at a previous preliminary hearing as recorded by the EJ. She referred to the evidence and focused, in particular, on an asserted lack of substance in the differences in duties relied upon in LS's grievance outcome letter sent on 17 September 2021 (but dated 21 September 2021). She said there was not enough for a material and genuine difference between C's work and SM's. Ms Stein acknowledged, however, that there was no dispute that SM did very different work because he was employed in a different part of the service. She said that their work required the same skill and effort and was of equal importance to R.

180. Mr Briggs submitted that C's 'like work' complaint could not succeed on the evidence. He cautioned that the Tribunal must not fall into the trap of conceiving it as an equal value claim. He said that any differences were of practical importance and that this was borne out by the difference in the grading results between the two posts on re-evaluation.

181. The question for the Tribunal in the first instance is whether the work was the same. If it was not the same, we require to assess whether it was broadly similar. Only if we find that it was the same or broadly similar, is it necessary to go on to consider whether any differences were of practical importance in relation to the terms of their work. There is no complaint advanced under section 65(1)(c) (work of equal value).

182. We accept that there was a small kernel of the work on which C and SM were employed which was the same or broadly similar. That kernel might be described as the 'generic' line management responsibilities for the respective teams. We refer to duties like managing sickness absence, performance and conduct, all of which had to be done in accordance with R's same staff policies and procedures. Conducting disciplinarys, 1-1s, return to work interviews, annual performance reviews, etc, was, we find the same or broadly similar work for both C and SM. Likewise, the approval of annual leave or other planned time off for their reports and the arrangement of adequate cover across the team through rotas was the same, or at least broadly similar, work.

183. However, beyond those common generic management tasks, we are not persuaded that other aspects of team support and supervision was the same work for C and SM. A substantial part of the work of each was the provision of support to their teams with enquiries their officers had regarding the work they in turn carried out. That work was quite different. It is true that both teams' work was governed by a statutory framework. However, the legislative provisions and obligations with which each team was concerned were different. The tasks and challenges associated with being an Assessment Officer in C's Homeless Team and those of being an Allocations Officer in SM's team were different. Both deal with front line customers but C's reports were more likely to deal with extreme and challenging behaviour by service users on a regular basis. SM's team's team undertook more work that might be described as 'back office' tasks in addition to their work interfacing with service users.

184. The differences in the work of the teams meant the nature of the support and guidance provided by C and SM in response to enquiries from their reports was different. It differed in that it involved different specialisms of statutory and policy expertise. There was also a different balance between black letter law /policy enquiries and those around managing personal interactions and challenging behaviour by service users. We find that this work was not the 'same'. We are not persuaded that it was 'broadly similar' either.

185. Likewise, when it came to managing external enquiries from service users and politicians, although there was an element of similarity in terms of the requirement to communicate in an appropriate manner and format with the enquirer, the substance of the enquiry and response would be different. This reflected the teams' discrete functions. Although the work of the two teams interlinked, they dealt with different aspects. SM and C could not interchangeably answer each other's external enquiries.
186. We are not convinced that dealing with an enquiry about why someone has not been assessed as homeless can properly be categorised as 'broadly similar' to dealing with an enquiry about whether a family of four is eligible for a property with an extra bedroom. In responding to such enquiries, they would pull different information from different systems and draw upon different areas of specialist expertise to respond.
187. Similar distinctions can be made in relation to the work of C and SM on appeals. Though superficially there is similarity in that both postholders' work involved the undertaking of first stage reviews and the preparation of cases for higher level appeals, the subject matter and substance of the reviews and appeals was different.
188. Beyond that, each of the two Senior Officers' work involved various other tasks or duties which the other's did not. For example, C has budgetary responsibility to approve and monitor payments in relation to temporary accommodation and school transport while SM does nothing of that kind. SM liaises with RSLs regarding their advertising requirements for new build housing stock while C does nothing of that kind.
189. C provides training to the police on domestic abuse and homelessness. SM did nothing similar. She sometimes carried out frontline interviews with service users presenting as homeless. SM did nothing similar. SM's work, meanwhile, involved attending R's committees of elected members to answer questions on changes to the Allocation Policy on occasions when his manager was unavailable. C's work involved nothing similar. Though both Seniors' work involved reporting on their team's performance data to external entities, there were substantive differences in what, when and how they reported.

190. Viewing the work of each Senior holistically, we find that the work is neither the same nor broadly similar. In those circumstances, it is unnecessary to consider whether differences are of practical importance.

5 191. Although Ms Stein has suggested that the claimant's work required the same skill and was of equal importance, the Tribunal has no jurisdiction to assess these questions. Given the finding that the work was not the same or broadly similar, and given no complaint is advanced under section 65(1)(b) or 65(1)(c), we find that the claimant's work was not equal to that of SM. It follows that section 66 of EA (incorporation of a sex equality clause) does not apply. The claimant's complaint that R breached a sex equality clause, therefore, cannot succeed and is dismissed.

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Victimisation

192. R accepts that C's grievances dated 12 August and 27 August 2021 and 21 September 2021 were 'protected acts' for the purposes of section 27(2) of the EA.

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Detriment (1) (removal of performance meetings): Submissions

193. Ms Stein gave submissions about the background context to the removal. The proposed resolution to the grievances was that C's role be re-evaluated. She pointed out that C had concerns early on that Laura Smith had said she was doing work she shouldn't be doing and she feared that duties would be eliminated in the re-evaluation process. She referred to LS's admission that she didn't believe C was doing work which would warrant an upgrade. Ms Stein observed that, in the process that followed, duties were taken from C.

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25 194. Ms Stein said the decision to remove C's participation in the performance part of the Service meeting took place in January 2022. She contended this was not long after the grievance meeting on 22 October 2021. She noted C was off sick in the period and suggested this made the time even shorter. She said C does not say this was a 'conspiracy' or a 'planned action' but that it was at least unfortunate, if nothing else, that C was worried about duties being eliminated and that no one told her this had happened. Ms Stein submitted this was not the duty of care expected of a reasonable employer.

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195. Mr Briggs reminded the Tribunal that the appropriate approach to be applied in assessing causation in a victimisation claim is the 'reason why' test. It is insufficient, said Mr Briggs, for C to show that *but for* her having carried out the protected acts, she would not have suffered a detriment. He said C needs to show the "real reason, the core reason, the *causa causans*, the motive". He disputed that the removal of the participation in the performance meetings was a detriment. In any event, Mr Briggs submitted that this action was not because C did or was believed to have done a protected act. He submitted that the burden lies with C on the balance of probabilities and that R has no burden.
196. Mr Briggs referred to the documentary evidence and said that there was a contemporaneous record of the rationale. The minute of the meeting recording the change said: "Monthly Performance review / Future of meetings. Laura noted a consideration about the future of the meetings. Coordinators will still have a performance meeting with focused themes." He pointed out that other Senior Officers were no longer to attend. This was, according to Mr Briggs, an operational decision which was not detrimental to C when assessed on an objective standard.

Detriment (1) (removal of performance meetings): Discussion and decision

197. The Tribunal has found, as a matter of fact, that the reason for decision was her concern that the monthly full service meeting was not a conducive or productive forum for discussions about performance data which was not particularly relevant to all attendees. We accept LS felt that it would be preferable operationally to take these discussions 'offline' and hold separate meetings with her Coordinators to facilitate more detailed analysis.
198. We remind ourselves that conscious motivation is not required and that unconscious cause will suffice (**Nagarajan v London Regional Transport**). We also bear in mind that C's having done a protected act need not be the sole cause of the treatment, though in cases of mixed motives, C's protected act must have sufficient weight to be treated as a cause. Based on the evidence, we are satisfied, on the balance of probabilities, that C having raised grievances the previous autumn, was

not a cause, conscious or unconscious, of LS's decision regarding the future format of performance discussions in the Housing Need Service.

199. We accept that she made this decision for the operational reasons given, and we find that she was not subconsciously influenced by the claimant's grievance(s) in doing so. We had regard, in assessing the evidence, to the fact that the change visited upon C as a result of this decision was equally visited upon her comparator, SM. In those circumstances, it seems improbable LS was influenced in taking this action by C's grievances or by a motivation to erode her responsibilities. LS's account of her operational rationale for the change, on the other hand, struck us as entirely plausible. As we are in a position to make a positive finding on the reason for the asserted detriment, there is no need to have regard to the burden of proof provisions (**Hewage**).

200. Given we have found that the treatment was not because the claimant did the protected acts, it is unnecessary to go on to assess whether or not the removal of the claimant's responsibility for presenting on her team's performance data amounted to a 'detriment'.

201. Ms Stein may or may not be correct that LS's decision and her failure to communicate the change more carefully to the claimant against the backdrop of the claimant's concerns was unfortunate, but that is not an issue which the Tribunal is concerned with deciding in this case. Nor are we concerned with assessing whether LS's conduct was such as might be expected of a "reasonable" employer.

Detriment (2) (removal of responsibility for appeals): Submissions

202. Ms Stein again relied upon the background context and the ongoing incomplete re-evaluation in relation to the removal of C's responsibility for dealing with homeless appeals. She pointed out C had clearly expressed concern that duties would be taken from her and that this was an occasion when they were then taken away.

203. Mr Briggs said that if the Tribunal accepts that the removal of the appeal responsibility was a detriment (which R disputes), then it must consider the issue of causation. He said the allegation appeared to be that it was removed to manipulate the outcome of the job evaluation. He said R

denied this as a fact but that, even taken at its highest, it was insufficient to establish the necessary causal standard. In Mr Briggs' submission, C can only show that *but for* her having done a protected act (that is, begun the process that led to the re-evaluation exercise), R would never have been in a position to subject her to that detriment (because there would have been no re-evaluation exercise to manipulate). He said C would need to be able to show that the reason for the removal was because she'd made an allegation about equal pay.

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204. Mr Briggs also disputed that the removal of the appeals was a detriment. According to Mr Briggs, LS said to C that she did not have overall responsibility for appeals. He asserted this was not in contradiction of C's JF which merely referred to 'administering' appeals.
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Detriment (2) (removal of appeals): Discussion and decision

Was the removal a detriment?

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205. We have found as a matter of fact that C had responsibilities for appeals since her appointment to the role in 2014. Her JD included the words: "*administer the appeals process*". At a meeting on 10 September 2021, LS had told C that SM's post had retained some higher duties, formerly carried out by his line manager and said this was why a higher grade was warranted. We have also found that LS told C she didn't feel C had these 'extra' requirements and said words like, "Maybe you're doing work you shouldn't be doing", without at the time identifying any particular duties. After that meeting, C spoke to AA who said she was not aware of any work C should not be doing.
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206. Around 7 months later, on 11 May 2022, LS told C that she should not be administering the appeals process. In the face of C's protests about the contents of her JD, LS admitted she had not seen C's JD and suggested she believed C may have dealt with appeals temporarily but should not have been doing so.

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207. At the time, C's JE process was ongoing and had not yet been sent to the Grading Group. At the time, C had expressed explicitly her concerns to R in her grievance 21 September 2021 about LS's comments on 10 September. C had sought reassurance from R about how the re-evaluation

could be conducted fairly if it was believed she was carrying out work she should not have been. She'd asked whether it would be based on the work she'd actually been doing since 2014 or whether it would eliminate some of her work / duties. She had received no substantive response.

5 208. We are satisfied that a reasonable worker would take the view that she had been disadvantaged by the removal of the appeal duties in all of these circumstances. We do not accept that C's sense of grievance about the removal was unjustified. The implications for the re-evaluation process
10 aside, the removal could, we accept, in and of itself, sustain a sense of grievance in a reasonable employee. These duties had formed part of the claimant's work for around 8 years. They were not an insignificant component of her workload and she dealt with approximately two or three appeals per week. The removal represented an erosion of her duties which was carried out rather abruptly and without proper reference to and
15 discussion about her JD.

209. When viewed in the context of the outstanding re-evaluation process and the claimant's unanswered queries about whether duties might be eliminated and how this would affect the re-grading, we readily find that, objectively assessed, the removal was a detriment. There were objective
20 grounds for C's view that she had been working on appeals according to her JD and in line with her line manager's expectations. There were objectively reasonable grounds for her fear that the removal of these duties would have a negative impact on the review of her post by the Grading Group. C was reasonable in taking the view that she had been
25 disadvantaged.

Causation: Was the removal of appeals because of C having done the protected act(s)?

210. We, therefore, turn to the question of causation. C's pleaded case is that the removal was because of one or all of her three grievances / appeals
30 lodged in August / September 2021.

211. We have not been not able to make positive findings in either direction based on the evidence in this case, and, therefore, require to apply the burden of proof provisions in section 136 of EA.

212. Under Stage 1, we require to leave out of account R's explanation. Leaving this out of account, the question for the Tribunal is whether C has shown facts from which we could reasonably and properly decide, on the balance of probabilities, that the appeals were removed because she did the protected acts. We remind ourselves that merely showing protected acts plus a detriment will not usually be enough to discharge a Stage 1 burden and that "something more" is usually required.
213. We have taken into account all facts and evidence at this stage, not only that adduced by C (but excluding R's explanation). We took account, in particular, of the following context to the decision to remove C's appeal duties.
- a. LS's remarks on 10 September 2021 that she didn't feel the claimant had the 'extra' requirements SM had, and her comment that C "may doing work [she] shouldn't be doing". LS's remark at that time that she didn't believe C's post warranted an upgrade.
 - b. R's lack of response at the time to C's pleas for reassurance in relation to these comments by LS. She had asked whether she would be assessed on the work she had been doing and whether duties would be removed without a response.
 - c. During C's sickness absence, the work underway by AA and C on the re-evaluation had been paused at LS's insistence. We have not accepted, as a matter of fact, LS's proffered explanation for the instruction about satisfying herself that OH approved the continuing work.
 - d. LS, rather than AA (who remained C's line manager at the material time), continued to take the lead in C's re-evaluation after AA's return to work. LS involved herself in the meeting of 11 May 2022. The involvement of a 'grandparent' line manager was not envisaged in R's 'How to get a post graded' document. LS's own evidence was also that it was line manager's responsibility to progress the JEQ with a postholder.
 - e. LS took the decision without satisfying herself on the terms of C's JD and without the endorsement of C's line manager, AA.

214. From these facts and evidence, we conclude that a reasonable Tribunal could properly draw inferences adverse to the respondent. It could properly infer that LS, consciously or otherwise, wished to ensure R could effectively defend C's equal pay challenge. It could properly infer that LS was wedded to the outcome of C's grading process she'd projected in September 21 (i.e. no change). It could properly infer LS involved herself in the progression of the JEQ and took the decision of removing the appeals responsibility to try to promote that outcome. In short, we are satisfied, a Tribunal could properly infer that, because C had raised grievances alleging equal pay breaches, LS removed her appeal duties so as to reduce the risk that C might be found to be engaged on equal work or work rated as equivalent with SM.
215. We considered carefully Mr Briggs's submissions about the test for causation. We accept that a *but for* analysis is insufficient. For the Stage 1 burden to be discharged, we must find that a Tribunal could properly decide that claimant having raised the grievances was the *reason why* the duties were removed (though it need not find it to have been a conscious reason or the sole reason).
216. We considered Mr Briggs's suggestion that an allegation that LS removed the duties to manipulate the JE could not, taken at its highest, establish the necessary causal standard. The argument was eloquently made and has superficial appeal, but ultimately, we concluded it is unsound. It is right that the test is the 'reason why' and not a 'but for' analysis. However, that LS might be inferred to have acted on a desire (conscious or otherwise) to manipulate the process to encourage a certain outcome does not, we think, exclude or even undermine an inference that a reason for her doing so (conscious or otherwise) was that the claimant had complained about unequal pay. The inferred cause of the act (C raising equal pay grievances) and the intended outcome from the act (the maintenance of C's grade at the same level) are perfectly compatible.
217. We find that C has discharged the initial Stage 1 burden such that the burden now shifts to R under section 136(2) and (3) to show that R did not contravene section 27.

218. We consider whether R has shown a victimisation-free explanation for the removal of the claimant's appeal duties.
219. The only evidence led by R on the issue came from LS. She said she did not victimise C. She said she was understanding of C's reasons for raising the grievances, namely that C had been presented with certain facts by AA and was looking for an explanation. LS's evidence was that the appeals were always previously done by the coordinator and that this was custom and practice. LS was asked for her response to the allegation she'd told C no longer to deal with appeals because of the grievance. She said "*I was very aware if I credited Liz Whyte with responsibility for certain areas, that would have impacted on Audrey Allan and would have resulted in Audrey Allan being re-evaluated ... And with the appeals, I specifically asked Audrey Allan's views on this area and she refused to give a view.*"
220. To our understanding, LS's asserted reasons for removing the appeal duties from C were, therefore:
- a. that she believed C had no remit to undertake the appeals work, though she was aware she had been doing so. She believed by custom and practice this work sat with the Coordinator.
 - b. That she believed if C was credited with the appeals work this could impact on AA's post and its grading because the work would be 'double counted' as being the responsibility of both the Senior Officer and the Coordinator post, which LS believed to be unacceptance practice.
221. We have found C carried out this work since 2014. That reality sits uneasily with LS's suggestion of a perceived 'custom and practice' that the Coordinator carried out the appeals work. So too does LS's own acknowledgement that C was doing the appeals work not only when AA was absent, but also when she was not.
222. Further, AA gave evidence that LS (a Stage 2 appeal panel member) used to send appeals direct to C. There was no evidence of LS having previously queried with AA or with C the latter's involvement in appeals in the years before C raised the grievances or having suggested this was contrary to custom. Even when LS remarked to C on 10 September that

she may be doing work she ought not to be doing, she did not bring up the matter of appeals specifically at that time.

223. Though LS suggested she raised the matter with AA, AA's position was that she does not recall the matter of responsibility for appeals being discussed on 11 May while she, AA, was present. AA said if it had been raised, she would have disagreed with the removal as appeals had always been in C's remit. LS's evidence was that she did raise it with AA and that AA refused to endorse the proposed removal of the appeals from C. Whichever account is believed, there is no evidence that either AA or C agreed with LS when she asserted a custom and practice that the appeals fell to the Coordinator.

224. Taking all of the evidence into account, we find that R has not proved, on the balance of probabilities, the existence of the asserted custom and practice (that the appeals work sat properly with AA) or that LS genuinely believed in its existence. We find that R has not shown that such a custom or a belief therein was the cause of LS's decision to remove the appeal duties from C.

225. The other aspect to LS's explanation was that she believed that leaving the appeals with C would have negative implications for the grading of AA's role. We found this evidence unconvincing. It was clear from the evidence of both LS and AA that their relationship was a poor one. LS described the relationship as having fractured in around 2017 and since then, euphemistically perhaps, as having been 'strained at times'. By May 2022, the tensions between the pair were acute. We do not find it credible that, in deciding to remove the appeals from C, LS's concern was the protection and preservation of AA's pay grade.

226. On the evidence before us, we are not satisfied that this was a substantive cause of LS's removal of the appeals responsibility. R has not established on the balance of probabilities that the cause of LS's action was either her belief that the appeals should be carried out by the Coordinator or a concern to ensure AA's grade was not diminished. R has not, therefore, discharged the 'Stage 2' burden of showing it did not contravene section 27 by removing C's appeal related duties on 11 May 2022. This complaint of victimisation, therefore, succeeds.

Detriment (3) (KG instruction to AA not to speak to C): Submissions

227. Ms Stein said that the communications with AA about the instruction not to speak to her in July and September 2022 caused C considerable upset. Her submission, she said, was not that this was done to punish C, but that there was a connection in time between the grievances and the decision to instruct AA not to speak to her. Ms Stein said that the management had not considered what effect this would have on C despite the terms of OH reports which had been obtained.

228. Mr Briggs said that if the Tribunal accepts AA was told not to speak to C and accepts that this was a **Shamoon** detriment (which R disputes), it will require to determine causation. In his submission, to find the case proven, the Tribunal would need to be persuaded that it is more likely than not that AA was given the instruction because of C's protected act. He said this was inherently unlikely because AA had been taken offline and instructed not to contact *any* member of staff. He said it was inherently more likely that it was because of AA's own issues with management than because of a complaint by C made the previous summer. Mr Briggs suggested that for the allegation to succeed, the Tribunal would have to find that R decided to wait nine months to exact vengeance on C by confecting a reason to take a Coordinator offline so as to instruct her not to speak to an entire group of employees. He contended this was a bizarre allegation to make.

*Detriment (3) KG instruction to AA not to speak to C: Discussion and decision**KG instruction to AA a detriment to C?*

229. We begin by considering whether what AA told C about not being permitted to speak to her was a detriment to C.

230. Around 22 July 2022, AA told C that KG had instructed AA not to speak with her. She did not explain why not. C was attending work at the time of this call. Neither KG nor LS contacted C to discuss the situation with her. Around 1 September 2022, while C was off sick, AA called her and told her that KG had repeated the instruction that she should not speak to C. AA did not heed KG's instruction and continued to be in contact with C.

231. We accept that C felt disadvantaged by this discussion. The disadvantage was not an ensuing lack of access to AA because AA remained willing to speak to C and did so. The disadvantage was C's awareness that any conversation she and AA might have thereafter was apparently contrary to the instructions of senior management. C knew her Head of Service had instructed a situation whereby she was to be left without direct line management support or contact, including during a period when C was off with work-related stress.

232. We further find that a reasonable employee would have a justified sense of grievance about such a situation. When the background context to the instruction is considered, the objective legitimacy of that sense of grievance is reinforced. C knew R was aware she had an outstanding grievance from the preceding September as well as a live grievance appeal dated 28 June 2022 (which she expressly linked to the earlier grievance). She knew that R was aware at the time the instruction was given that she had taken substantial time off with work related stress which they knew she attributed to the ongoing situation with her unresolved grievance. She knew that R was aware that AA provided C with the information that originally prompted her equal pay grievance, namely that SM was on a higher grade than she was.

233. Objectively assessed, we find C's sense of disadvantage in receiving these reported instructions from AA in July and September 2022 amounted to detriments for the purposes of section 27.

Causation: KG instruction to AA not to speak to C because C did protected act(s)?

234. C's pleaded case is that the reported instruction that Audrey Allan should not speak to her was because of one or all of her three grievances / appeals lodged in August / September 2021. We have not been able to make positive findings in either direction based on the evidence in this case, and so we have regard to the burden of proof provisions.

235. We have found C was told twice by AA that she had been instructed by the Head of Service not to speak to C and that this was a detriment. The protected acts and the detriment are established. We consider now

whether C has established the ‘something more’ that is necessary to discharge the Stage 1 burden upon her. We have taken into account all facts and evidence at this stage, not only that adduced by C (but excluding R’s explanation). We took account, in particular, of the following context to the decision to remove C’s appeal duties:

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a. It was AA who told C about SM’s higher grade in the first place and LS was candid that she was “appalled that this information would be shared” by AA.

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b. AA had given evidence on behalf of C at the appeal hearing on 22 October 2021 and expressed the view that there was no difference in the job roles between C and SM which was a contrary view to that put forward by LS in her letter of 21 Sep 2021 and at the hearing.

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c. LS had instructed that work on the re-evaluation by AA and C be halted in November 2022 during C’s sickness absence. LS’s proffered explanation for the instruction has not been accepted by the Tribunal.

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d. AA had contacted Steve Bentley on 3 December 2021 to push for C’s grievance to be progressed in the interests of her welfare, without success.

e. LS, rather than AA (who remained C’s line manager at the material time), continued to take the lead in C’s re-evaluation after AA’s return to work and involved herself in the meeting on 11 May 2022 when she removed C’s appeal duties. The involvement of a ‘grandparent’ line manager was not envisaged in R’s procedure.

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f. LS removed the appeals without satisfying herself on the terms of C’s JD and without the endorsement of AA. The Tribunal has not accepted LS’s proffered explanation for the removal of the appeals.

g. On 12 July, C had emailed LS and AA asking if it would be possible to discuss the evaluation and move things on. No reply had been made when KG gave the instruction to AA not to speak to C.

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236. From these facts and evidence, we conclude that a reasonable Tribunal could properly draw inferences adverse to the respondent. It could properly infer that LS was concerned that AA’s approach to C’s grievance did not

align with LS's preferred approach or indeed with LS's projected outcome and that LS had reported her concerns to KG. An inference could properly drawn that, because of C's equal pay allegations, R was motivated to isolate her from AA to avoid the latter supporting her or even actively assisting her endeavours to have her post upgraded. In short, we are satisfied, a Tribunal could properly infer that, because C had raised grievances alleging equal pay breaches, KG instructed AA not to speak to C so as to reduce the risk that AA might support C with her equal pay challenge against R.

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10 237. We considered Mr Briggs's argument that, for the allegation to succeed, we would have to find R waited 9 months to 'exact vengeance' on C by taking a Coordinator offline. It is unnecessary to find that the intention was punitive. In applying Stage 1 we need only find that it could properly be inferred that C's grievances were a cause, conscious or otherwise, of the
15 detriment. It need not necessarily be the sole cause though it must be capable of being inferred that it was a substantial cause. We have found that such an inference could properly be made.

238. We also considered Mr Briggs's submission that the time delay of 9 months contributed to an inherent improbability of the instruction not to talk to C being caused by C's grievances. It is relevant to acknowledge that
20 between the date of the last protected act on 21 September 2021, and the date of the detriments in July and September 2022, there had been lengthy absences on the part of both C and AA. C was off from 30 September 21 to 1 February 22. When she returned in January, AA was off, and remained
25 off sick until April 2022. C then went off herself again from 4 April to 6 May 2022. If R had concerns about AA's contact with C following C's grievances, those concerns would become much more pressing from May 2022 when both were back in attendance. AA had previously already been instructed not to liaise with C on her re-evaluation during C's sickness
30 absence.

239. We find that C has discharged the initial Stage 1 burden such that the burden now shifts to R under section 136(2) and (3) to show that R did not contravene section 27.

240. Under Stage 2, we consider whether R has discharged the burden of showing that it did not contravene section 27 by instructing AA not to speak to C.
241. It is not disputed that the instruction came from KG, the Head of Service. He did not give evidence in these proceedings. We have made findings in fact that in July and September 22, KG told AA not to speak to C. In July, he did not forbid her from speaking to anyone else. In September, when C's name came up again, he repeated the instruction and when AA queried it, he said she shouldn't be speaking with anyone.
242. LS did not witness the instruction being given on either occasion but gave evidence about her understanding of KG's reasons. She said she understood C was to have limited communications with team members because she had been taken 'offline' and was not managing the team during that time. The purpose, she said, was to have clear communication channels and to avoid confusion.
243. This explanation sits rather uneasily with the accepted evidence of AA about the content of the conversations she had with KG. She had been engaging with other reports, including accompanying them on interview panels, but it was only when she mentioned C's name that the instruction was prompted in July. It was also at a further mention of C, specifically, that it was repeated in September.
244. We were also troubled by the heavy-handed nature of the instruction. It is one thing to tell a manager that, while working on special projects, they do not have line management responsibility for those normally reporting to them. Telling that manager that they may not speak with those colleagues is rather another matter. R led no evidence on why such a severe instruction was needed to avoid confusion. Nor was there any evidence that R explained to C the 'clear communication lines' they wished to promote. C's only information on this came from AA's own (forbidden) updates to her about her conversations with KG.
245. We were not persuaded by Mr Briggs' suggestion that the fact that KG extended the instruction to the whole of AA's team rendered it inherently improbable that it was linked to C's grievance. At the material time, AA only

had three direct reports. The instruction not to speak to the others was given only latterly in September (after AA had begun special projects at the end of May) and only in response to AA querying the instruction not to speak to C. Even then, the instructions seemed somewhat inconclusive insofar as directed at others in AA's team. When AA pointed out ongoing engagement, she had with one of the other Senior Officers, this did not seem to give KG concern.

246. Having regard to all of the evidence, we find R has not proved, on the balance of probabilities, that KG's motivation or reasoning were as advanced by LS. R has not proved that C's equal pay grievances were not a cause of his instruction. It has not discharged the 'Stage 2' burden of showing it did not contravene section 27 and this complaint of victimisation, therefore, succeeds.

Constructive unfair dismissal

247. Ms Stein noted that, even if the Tribunal was not with her on the complaint of equal pay, it was still possible to find C had been constructively unfairly dismissed.

248. Mr Briggs submitted that breaches of trust and confidence must be determined objectively. He reminded us that we must consider whether the employer had reasonable and proper cause for its conduct, even if it seriously damaged the relationship of trust and confidence. The requirements did not need to be 'good', he emphasized, only 'reasonable and proper'.

249. The other submissions made by the representatives on the constructive UD complaint which relate to specific allegations are summarised below in the context of the discussion on the allegations.

Failure to deal with C's equal pay complaint without delay from Aug 2021 and giving contradictory updates

250. This alleged breach or contributory conduct is considered in this decision alongside that listed at paragraph 7(f). The question of R's response to the equal pay grievance is closely bound up with the separately itemised allegation that R failed to properly deal with C's job evaluation, causing

delays and providing contradictory information. The agreed approach to the grievance was that there would be a re-evaluation of C's role, pending which the grievance outcome would not be progressed. The representatives did not separate their submissions on these two separately itemised allegations, and we likewise deal with them together.

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251. Ms Stein submitted that the re-evaluation agreed in October 2021 dragged on, with limited progress in 2021 as a result of the instruction to halt work on it. She referred to correspondence in December 21 when C and AA tried to push it forward. She referred to S Bentley's undertaking to discuss the matter with LS which did not happen. She also referred to the OH report which, Ms Stein said, indicated a clear connection between the unresolved issue and C's ill-health. She queried why the meeting on 21 March 2022 wasn't scheduled sooner and submitted nothing then happened until May.

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252. Ms Stein pointed up AA's evidence that the re-evaluation took longer than others because of a higher than normal level of scrutiny applied to C's JEQ. She also referred to an email from the grading person saying that it normally takes 6 to 8 weeks. (We understand Ms Stein intended to refer to C's companion's note of the meeting on 27 April 22 with P McGrellis and others where Ms McGrellis is noted as having said that the normal average can be 6-8 weeks to go full through the process). Ms Stein submitted that, in any event, the work should have been prioritised since the re-evaluation was in the context of a grievance and the situation was damaging C's health. She pointed out re-evaluation was not concluded on 20 September 22 when C gave notice.

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253. Mr Briggs said that, assessed objectively, there was reasonable and proper cause for the delay in progressing the JEQ while C remained off sick. He relied upon LS's proffered reason that she was unwilling to commence the process while C was off sick until told by OH that she was ok to do so.

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254. Mr Briggs also addressed the email sent by AA to S Bentley, LS and E Murphy of HR on 3 December 21 quoting from an OH report and referring to a 'stalemate' position. He noted LS was off sick at the time and submitted that the problem with the email was that there was no context to the quote from the OH report. He suggested it said C would benefit from a

resolution to her workplace issues without giving clear information about what a resolution would look like. In Mr Briggs's submission, job evaluations are lengthy processes and C's expectations were wholly unrealistic. It was unlikely, said Mr Briggs, that OH had been given a clear indication as to what was involved. He relied on R's position that LS had asked AA to get a report which expressly asked about C's fitness to participate in the process but that AA hadn't done so.

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255. Mr Briggs argued the delays until C's return were in no way a breach of contract and that after her return the process gathered speed.

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256. We considered discrete periods in the chronology. On 22 October 2021, it was agreed that matters would be progressed by proceeding with a re-evaluation of C's role. C and AA met on 12 November 21 but work was halted within a week on LS's instruction, during C's sickness absence, which continued until 1 February 2022.

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257. **Period from 12 November 2021 to 1 February 2022.** There was undoubtedly delay between 12 November and 21 March. Whatever initial output was achieved from the meeting between C and AA, all progress was paused at R's insistence. Nothing at all happened to progress the re-evaluation during that time. Mr Briggs's submission about re-evaluations being, by their nature, lengthy processes has little relevance in relation to this particular period. A process will inevitably take longer if no work is done on it. This suspension of work lasted over two and a half months.

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258. Early in that period, on 21 November 21, C wrote to S Bentley, confirming that she was agreeable to proceed with the evaluation, that she had discussed this with OH, and that she would be discussing it with her GP that week. Earlier, on 4 November she had previously also asked him to amend the grievance outcome letter to include excerpts from her companion's notes of the grievance meeting and he had undertaken to do on 17 November.

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259. AA's email to S Bentley, LS and E Murphy on 3 December, urging progress on C's behalf quoted the OH recommendation that a meeting be convened with C. It also expressed concerns that C's symptoms would persist if she returned without a resolution. C was told that email was sent. On 13

December, C herself then wrote to S Bentley again to chase progress on the amended grievance outcome letter and to complain that she understood the grievance outcome was that the process was to start during her sick leave.

5 260. In that time, the response to C (and to AA) was minimal. With regard to amending the grievance letter, having been told by SB he would do so, almost 4 weeks later again, SB contradicted this and informed C he didn't propose to issue an amended letter. Meanwhile, AA received no substantive response to AA's email of 3 December. No meeting was
10 convened with C as R knew had been recommended by OH. On 13 December, Mr Bentley advised C that he would meet LS the following day. He did not do so (as LS was off sick) and neither he nor anyone else at R informed C that the meeting did not go ahead. C received no further update from R in response to the December correspondence before her return to
15 work in February (or indeed after).

261. There was therefore considerable delay during this particular period. R was aware of C's state of health and the reasons she had given for it. Notwithstanding those circumstances, communication with her was sparse and lacking in any substantive response to her concerns over the lack of
20 progress or to AA's pleas to move it forward.

262. We consider whether, as Mr Briggs's contends, there was reasonable and proper cause for R's delay.

263. We have not found it established as a matter of fact that LS's purported concern about obtaining OH sign off was the true cause for the instruction
25 to halt the process.

264. The only other potential explanation for the delay alluded to by R was the strain on resources caused by absences. This was spoken to by LS in a general manner and not with detailed reference to any particular period in her evidence. In relation to the period of C's initial absence, there was
30 absence on LS's part during December 21 and on AA's part during January 22.

265. We understand, however, that there was little or no overlap between this absence of C's line manager and of her grandparent line manager in the

period with which we are concerned. One or other of them was at all times in attendance at work and available to progress matters. We acknowledge that the absences may have caused strains on their respective workloads. However, we do not find that this was a substantive cause of the suspension of work in the period between November and February. The evidence is clear that this was caused by LS's instruction to halt work during C's absence, and there is no evidence at all that this was a reason behind her instruction.

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266. In any event, R is a large employer with a significant number of other managers as well as an HR resource. HR had continuous oversight of the situation including the grievance and the correspondence, urging progress. It could have involved KG or another senior manager if needed to move things forward. Mr Bentley likewise was aware of the matter and took no steps to ensure the matter was being progressed or at least that C's concerns about the delay received a proper response.

267. We do not find that LS's alleged concern about OH sign off or workload strains caused by management absence provided reasonable and proper cause for R's delay in progressing the re-evaluation (and consequently the grievance process) between 12 November and 1 February. R asserted no other alleged reasonable or proper cause for R's conduct in delaying matters during this period.

268. **Period from 1 February 2022 to 21 March 2022.** Again, nothing happened in this time, notwithstanding C's return to work. We do not agree with Mr Briggs' submission that the pace picked up on C's return. Against the backdrop of C's known concerns about the delays during her absence, there was a further 7 weeks of inaction. There was no update to C about the position during this time nor any explanation for the delay. There was no attempt to discuss timescales with her.

269. As to reasonable and proper cause, no explanation was put forward by R for this period specifically. LS couldn't recall when the re-evaluation got picked up by her after C's return and gave no detail about this gap. When Mr Briggs asked her whether she at any point felt there had been an unreasonable delay, she mentioned workload and sickness and that the grading process can be long.

270. The argument that the grading process is intrinsically long, again holds little water for this period when no work was being done to progress it. We recognise that AA was absent and LS was feeling the strain of an increased workload, but, the respondent employs other managers, including others who had an awareness of C's situation, as well as HR personnel and Rewards Team personnel with expertise in the re-evaluation process. An OH report dated 22 February had alerted R to the fact that C felt "ignored, humiliated and undervalued" as a result of her treatment during the investigation, and that the previous suspension of the process had "negatively impacted on [C's] mental well being". R was aware of compelling reasons to prioritise the matter and there was no evidence before us to suggest LS or anyone else did so during this period. Nor was there evidence that R sought to explain to C the reasons for the ongoing delay. On the evidence before us, we are not satisfied R had reasonable and proper cause for a further 7-week delay in picking up the process following C's return.

271. **Period from 21 March to 11 May 2022.** The meeting between C and LS on 21 March was left that C gave her completed JEQ form and LS undertook to read it and let C know if she had any changes. LS said she would discuss her concerns about the content with AA. By 4 April C had heard nothing further from LS and went off sick. On that date, an OH report recommended that management consider completing the evaluation process to help to prevent exacerbation of her symptoms and allow her to function effectively at work. The report specifically noted C awaited feedback from LS on the JEQ and recommended a meeting.

272. The next day, LS sent through her changes but hadn't discussed these with AA. She didn't forward them to AA for comment until more than 2 weeks' later on 21 April. A Teams meeting then took place in late April when P McGrellis gave an overview of the evaluation process and suggested it could take 6-8 weeks. C's own JEQ and LS's changes were not discussed or advanced at the meeting. C returned to work on 6 May and, 5 days later on 11 May, C attended a meeting with AA and LS when they discussed C's draft JEQ further.

273. It is true that during this period, C was absent but by the beginning of that absence the OH advice was clear that the re-evaluation should be progressed. By April, AA was back at work. LS's evidence was that the progression of the JEQ review normally sits with the line manager and it was not fully explained why she continued to be involved on AA's return. Neither AA nor LS detailed any specific explanation for the lack of progress in this period in their evidence to the Tribunal, beyond LS's general reference to sickness and workload and AA's comments about LS applying an unusual level of scrutiny to C's form.
274. In particular, we heard no explanation from LS as to why it took more than two weeks to return to C after the 21 March meeting, or as to why she did not forward AA the changes she proposed when she prepared them but waited more than 2 further weeks to forward them to AA. AA suggested that there was more 'back and forth' with her initiated by LS and greater scrutiny by LS than would be usual but she suggested that even this 'extra' 'back and forth' would account only for a couple of days. There was no evidence that either LS or AA informed C of the reasons or updated her as to expected timescales.
275. Although the delays during this period are shorter relative to the earlier stages which saw long stretches of inaction, we are not satisfied that the evidence before us establishes any reasonable and proper cause for the delay in moving forward the draft after the 21 March meeting or the delay in the required involvement of AA in the process after AA's return.
276. **Period from 12 May to 15 August 2022.** At the meeting on 11 May, the JEQ was moved forwards, albeit in a manner C was unhappy about, involving the removal of the appeals responsibility. C was in attendance at work throughout this period. AA was removed from her line management at the end of May.
277. The months of May and June 2022 saw more concerted activity by R on C's re-evaluation. C's interactions with P McGrellis relating to her evaluation between 19 May and 1 July 2022 progressed at a healthy pace. Ms McGrellis responded promptly to C's correspondence. She arranged meetings with C promptly and followed up with her input to the JEQ in a timely manner.

278. However, when the updated JEQ was then emailed to LS and AA for their comments on 1 July 2022, that momentum waned and the process seems to have stuttered again. C chased these managers on 12 July for a meeting to progress but the meeting to discuss the latest draft was not scheduled until 15 August, almost 6 weeks after the document had originally been sent to them for comment. The meeting did not, in the event, proceed because C went off sick on that date.
279. There was a lack of detail in the evidence of LS and AA about the specific reasons for this. AA had been removed from managing C and during July was instructed by KG not to speak to her. It appears, therefore, that the responsibility to progress the matter, or at least to interface with C, lay with LS at this stage. We are not satisfied that the evidence before us establishes any reasonable and proper cause for the delay, in particular between 1 July and 15 August 2022 when a meeting had been requested by C, but was not arranged by R.
280. **Period from 15 August to 20 September 2022.** C was generally absent or on annual leave in this period, attending work only on 7- 9 September. On 1 September, LS sent her a reviewed draft JEQ. During her brief return to work, on 8 September, C provided LS with her further comments on the draft. Between 10 and 20 September, C was on annual leave. She had received no response in that time from LS to her email of 8 September at the point of intimating her resignation on 20th September.
281. The final period of delay which culminated in C's resignation was shorter than many of the previous periods. It took LS 13 days to respond to C's email of 8 September (though C resigned on the 12th day). There was a cumulative effect of the succession of delays. It had had a substantial impact on C's health of which R had repeatedly been made aware by C, by AA and by OH. On 6 and 7 September, C had appealed to LS directly and told her how much she was struggling and how disappointed she felt about the lack of progress. She had told her she couldn't see a way forward. There was a lack of any detail in LS's about the specific reasons for the time it took her to respond to C following C's input on 8 September and no evidence that LS offered any explanation or timescales to C.

282. Overall, there were considerable delays throughout the process. The most stark was the period of complete inaction between 12 November and 21 March 2022. There was also a particularly lengthy gap from 1 July to 15 August. The latest delay in responding to C's 8 September email was relatively short, at 12 days. Viewed objectively, however, against the backdrop of earlier intervals and R's knowledge of the snowballing effect on C's mental health, we find that R's failure to progress the evaluation (and, therefore, the grievance) in a timely manner and to communicate clearly about the process and timescales was likely to destroy or seriously damage the relationship of trust and confidence. We have not found reasonable and proper cause for this conduct established.

Did R subject C to the act of victimisation asserted in May 2022?

283. We have found that R subjected C to unlawful victimisation contrary to s.27 of EA by removing her appeal duties in May 2022.

284. We further find that this act, viewed objectively, was calculated or likely to seriously damage the relationship of trust and confidence. LS suggested she believed that by custom and practice, the work sat with AA but, as discussed above, we do not find this was a genuinely held belief. Nor do we accept she removed the duties in order to protect AA's job grade for the reasons discussed earlier. We are not persuaded there was reasonable and proper cause for the removal of C's appeal duties.

Did R subject C to formal absence monitoring unnecessarily?

285. Rather than prioritizing the re-evaluation and showing sympathy, Ms Stein submitted R sought to subject C to formal absence monitoring. The failings were not about LS specifically, but about R. Somebody in the respondent should have paid attention to the treatment of C, said Ms Stein.

286. Mr Briggs said the move to formal absence monitoring was not in breach of contract but was in line with R's policy. He said the only issue was that LS had forgotten to send an email which he said was an oversight. Otherwise, in Mr Briggs's submission, the Policy would have been followed to the letter. He said it should be borne in mind that R waived the policy and returned C to informal management, despite the trigger being hit.

287. It is not disputed that R subjected C to formal absence monitoring at a time when she had not been informed that she was previously subject to informal absence monitoring. The Policy provides managers with discretion on when to impose informal monitoring and gives examples including 'industrial injury'. C attributed her poor health and absence to work related matters and had been very explicit with R about this. C was not told in her return to work interview following her return on 1 February 22 or thereafter that she was subjected to informal monitoring. She might quite reasonably conclude that managerial discretion had been exercised not to do so.
288. The Policy does not envisage a circumstance where informal monitoring can be carried out without the employee's knowledge. Under the Policy, only following or during Stage 1 'informal' monitoring, is it open for R to progress to Stage 2 in cases of further absence. It is understandable why Mr Briggs's should seek to minimize R's omission to inform C as a mere administrative lapse. We cannot agree, however, with this characterisation. The action taken by R in jumping to Stage 2 was not in line with its own Policy. Even if the situation was originally caused by LS's unidentified oversight in failing to send a letter, when C pointed out the noncompliance, R's response, instructed by LS and apparently HR, was to persist with the imposition of formal monitoring.
289. We are not persuaded by the suggestion that C, as a manager, 'should have known' she was subject to informal monitoring without having been told as much. Informal monitoring is not prescribed by the Policy as an inevitable consequence of hitting the absence trigger point. We are not satisfied that there was reasonable and proper cause for R to advise C on 18 May that, notwithstanding her concerns, they would proceed with formal monitoring. R's conduct in doing so was capable of amounting to a fundamental breach of the T&C term or, at least, of contributing to a cumulative breach of that term.
290. We considered whether R, in any event 'cured' the breach by its subsequent actings or, alternatively, whether the claimant affirmed the contract following S Buchanan's decision on hearing her grievance. Ms Buchanan ultimately reversed the decision to impose formal monitoring on

22 June and instead imposed informal monitoring retrospectively. In doing so, R did not and could not 'cure' the breach or deprive C of her right to accept the breach (**Buckland**). We are not persuaded that C accepted the breach by continuing to be employed after 22 June. She appealed against
5 Ms Buchanan's decision in relation to the imposition of monitoring and thereafter against Ms Kerr's decision on the issue (which appeal was outstanding when she submitted notice of her resignation). She continued to protest about R's original treatment in imposing the formal monitoring and its proposed response to her complaint about that treatment.

- 10 291. Even if we found C had affirmed the contract in June (which we do not), it would, in any case, have been necessary to consider whether the breach was revived by a later 'final straw'.

Did R cause C to take time off sick / to reduce her hours?

- 15 292. To establish a breach of the implied term of trust and confidence, the focus must be on acts or omissions of R which are, individually or cumulatively, asserted to have seriously damaged or destroyed the relationship of trust and confidence. The assertions in **paragraphs 7(c) and (d) on page 4** of this decision are focused not on R's conduct but on the alleged effects upon C (i.e. taking time off sick and reducing her hours). We understand
20 the constructive UD complaint is founded upon the other acts and omissions of R advanced in that paragraph 7. We understand it is these acts and omissions which are said to have caused C to be absent and to reduce her hours and it is these acts and omissions we have assessed to decide whether they found a breach of the t & c term.

25 *Failure to provide an outcome to a formal grievance appeal dated 19 August 2022*

293. As well as the failure to provide an outcome to the grievance appeal from October 2021, C relies upon R's failure to progress her grievance dated 19 August 2022.
- 30 294. On 19 August, C appealed against the grievance she had raised about the monitoring, among other complaints. This was a Stage 2 grievance (i.e. an appeal against the Stage 1 formal grievance which was heard on 4 August). R's grievance policy does not prescribe a specific time period within which a grievance appeal hearing should be convened, although it

stipulates that, if agreed between the parties, a mediation meeting should be arranged by HR within 10 days. C had received no acknowledgement or any other contact regarding her grievance appeal by 20 September 2022.

5 295. Neither Ms Stein nor Mr Briggs specifically honed in on this strand to C's
constructive UD claim in their submissions. Nevertheless, it forms part of
C's pleaded case and C gave evidence about this matter. She spoke of
her disappointment and her belief that there was a 10-day time limit that
10 had been breached. She also specifically referred to the failure to progress
this grievance appeal in her resignation letter. No evidence was led by R
on the issue. LS confirmed she wasn't fully aware of that grievance
process beyond her conversation with S Buchanan at the informal stage
regarding Ms Buchanan's recommendation that the informal monitoring be
substituted for formal monitoring.

15 296. Objectively viewed, we accept that, in all the circumstances, a delay of
over a month in acknowledging receipt of a Stage 2 grievance appeal is
capable of contributing to a breach of the trust and confidence term. There
is no evidence before us of any circumstances that could amount to
reasonable or proper cause for the omission to progress this process.

20 *Did these acts or omissions individually or cumulatively breach the implied term
of trust and confidence?*

297. The question for the Tribunal turns, then to whether these acts
cumulatively amounted to a breach of the implied term of trust and
confidence. We find that cumulatively, they were likely to seriously damage
25 the relationship of trust and confidence. Indeed, we find that individually,
the:

- a. delays to the re-evaluation process;
- b. the removal of C's appeal duties; and
- c. the imposition of formal absence monitoring

30 were each capable of and did amount to repudiatory breaches of the t&c
term.

Were the last straws relied upon capable of amounting to last straws?

298. C relies upon the failure to provide an outcome to the October 21 grievance appeal, the failure to respond to the 19 August grievance appeal and LS's comment on 7 September 2022 as the 'final straw(s)' in response to which she resigned.
299. In submissions, Ms Stein focused on the comment by LS. Ms Stein noted C had been off sick from 15 August to 6 September, returning for 3 days from 7-9 September before going off again on annual leave. She submitted C was 'tearing her hair out' at the point when LS made the comment, '*what more could we do?*' This, she said, was the last straw.
300. Mr Briggs referred to LS's evidence that her question was a genuine one. He said the Tribunal should accept this and placed reliance on the context. He noted C had raised 4 grievances and been permitted to progress a re-evaluation process without meeting the criteria. He said she's been off sick for 3 extended periods and been granted phased returns and reduced hours. He said the absence management policy had been waived and she had been allowed to "continue on informal rather than formal absence management". She had also been sent for CBT. R had been accommodating, he said, and had treated C with compassion and flexibility. There was, he said, little else R could have done, and it was neither unreasonable nor a final straw for LS to make the enquiry she did.
301. The wider context is that C's primary complaint about equal pay had not by 7 September 2022 been resolved or progressed to a conclusion in the manner agreed (re-evaluation of her post). She had first raised the matter over a year earlier. She had many times advised R that the delay was causing her anxiety and contributing to her ill health and absence. We have found that there were numerous delays with that process. Latterly, a further grievance appeal lodged over a month before the meeting on 7 September had been completely ignored.
302. As well as the context of C's unresolved grievances, we considered the context of the accommodations by R of phased returns, reduced hours and CBT treatment. We remind ourselves that the final straw need not be a breach in itself. Its essential quality is that, when taken in conjunction

with the earlier acts, it can amount to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds might be relatively insignificant.

5 303. When LS made her comment on 7 September, C had been explicit on many occasions about her wish for the re-evaluation to be progressed. She had spelled it out in the later grievances lodged in the summer of 2022. She had been explicit with LS during the conversation on 7 September itself. Having regard to all of the circumstances, we accept that LS's question 'What more can we do?' was objectively capable of providing a final straw that contributed to a cumulative breach of the implied term, and that it did so.

15 304. Much was said in evidence and in submissions about whether LS intended the question 'innocently'. Irrespective of LS's subjective intention when she said these words, or indeed of C's subjective perception of how they were intended, they were objectively capable of contributing to the breach. Against a background of extended delays to a process that remained unfinished and a further unprogressed grievance, LS's words were provocative and apt to contribute to the breach, however they were intended.

20 *Did C resign in response to the breach?*

25 305. We accept C resigned in response to the breach of the trust and confidence term after the final straw incident on 7 September. Her resignation letter specifically referred to LS's comment as well as to Cs unresolved grievance about equal pay from August 21 and her later unprogressed one from August 2022.

306. Mr Briggs did not challenge C's asserted motivations for her resignation in cross examination or submissions.

Did C affirm the contract before resigning?

307. No point was taken by R regarding affirmation.

30 308. C resigned soon after the final straw comment on 7 September. She took stock during her annual leave the following week and resigned on 20 September 2022. When she did so, she still had received no

acknowledgement of her grievance appeal dated 19 August. She had emailed LS on 8 September with further additions / comments on the JEQ document and had received no response or acknowledgement of that.

5 309. We do not find that C, by her words or deeds affirmed the contract or acquiesced in the breach during the relatively short period after the final straw. The delay was short, and C was not physically at work for most of it. She had long service and wished to take stock during her annual leave. In any event, neither the re-evaluation nor the 19th August appeal was progressed during the period between 8 and 20 September so those
10 breaches continued.

What was the reason for the breach?

310. R did not advance an argument that the breach was a for a potentially fair reason so as to justify the dismissal.

15 311. On the evidence before the Tribunal, we do not find that there was a potentially fair reason for the breach for the purposes of section 98(1) and (2).

312. We find, therefore, that C was constructively unfairly dismissed.

Conclusion

20 313. In summary, the Tribunal finds that C was not engaged on like work with SM and R did not, therefore, breach the equality clause. R did not victimise C by ceasing to include her in Service meetings about performance. R victimised C contrary to s.27 of EA by informing her the Head of Service had instructed her line manager not to speak to her and by informing her she would no longer deal with homeless appeals. R (constructively)
25 unfairly dismissed C.

314. A hearing on remedy will be convened.

Employment Judge: EJ Murphy
Date of Judgment: 15 November 2023
Entered in register: 21 November 2023
and copied to parties

