EMPLOYMENT TRIBUNALS

Claimant: **Miss W Shah**

Respondent: **City of Bradford Metropolitan District Council**

Heard at Leeds on: 25, 26, 27, 28, 30 April, 12 December 2022, and 4 (Tribunal reading day),17, 18, 19 and 20 July 2023.

Deliberations in chambers : 18 September 2023

Before: **Employment Judge Shepherd**
Members: **Ms J Noble**
Mr R Stead

Appearances:
For the claimant: **Mr Johnston, counsel**
For the respondents: **Ms Hashmi, counsel, during the hearing in April 2022.**
Ms Callan, counsel, from 17 July 2023.

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claims of direct discrimination and harassment against the respondent are not well-founded and are dismissed.

2. The claims of victimisation with regard to the requirement that the claimant continued to report to her line manager, pressured her to attend a meeting, the proposal that the claimant move teams and the provision of a reference to Health and Well-being support are not well-founded and are dismissed.

3. The claim of victimisation for a failure to conduct the grievance within the timescales set by the respondent's procedure succeeds and a remedy hearing will be listed.

REASONS

1. The claimant was represented by Mr Johnston and the respondent was represented by Ms Hashmi during the hearing in April 2022 and by Ms Callan from 17 July 2023.

2. The Tribunal heard evidence from:

Waheeda Shah, the claimant;
Maroof Shah, the claimant's sister.
Shahib Juneja, Former Educational Safeguarding Officer;
Suzanne Ellis, Former Education Safeguarding Lead;
Paul Harkin, Attendance Manager;
Danielle Wilson, Strategic Manager;
Marium Haque, Director of Children's Services;
Kate Upton, Education Safeguarding Service Manager.

3. The Tribunal had sight of a bundle of documents which consisted of a main bundle which, together with documents added during the course of the hearing, was numbered up to page 584 The Tribunal considered those documents to which it was referred by parties.

4. This case has been subject to very lengthy delays for numerous reasons including the mental health condition of the claimant, that the original counsel for the respondent was unable to continue to represent the respondent at the hearing in December 2022. Ms Hashmi wrote to the Employment Judge on Friday, 9 December 2022 at 19:34 stating that she had, further to advice from the Bar Council and the Bar Standards Board, withdrawn from her representation of the respondent at the recommenced hearing which was due to commence on 12 December 2022. The Tribunal has not been made aware of the reason for Ms Hashmi's withdrawal. There were then numerous attempts to relist hearing.

5. Due to these lengthy delays, the Tribunal conducted a further reading day on 4 July 2023 prior to the final part of the hearing commencing on 17 July 2023.There was a further delay as the claimant's counsel had to leave the Tribunal due to a domestic emergency on 18 July 2023. Due to a national rail strike, the evidence of Kate Hopton was provided by a CVP video link on 20 July 2023 and the submissions of the parties representatives were also provided by CVP. The Tribunal panel attended in person and the claimant attended the Tribunal and was provided with a separate room in order to take part in the video hearing. It was necessary for the Tribunal to reserve judgment and, as a result of the Tribunal's heavy workload and annual leave, deliberations could not take place until 18 September 2023.

The Issues

6. The issues were identified by Employment Judge O'Neill at a Preliminary Hearing on 25 November 2021. They were identified as follows:

1. **Time limits**

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 9 April 2021 (1 respondent) and 10 June 2021 (2 respondent) may not have been brought in time.

1.2 Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.2.2 If not, was there conduct extending over a period?

1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.2.4.1 Why were the complaints not made to the Tribunal in time?
1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. Direct race discrimination (Equality Act 2010 section 13)

2.1 The claimant describes herself as a British citizen of Pakistani heritage and Muslim.

2.2 Did the respondent do the things set out in the Scott Schedule

2.3 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated.

The comparator will be named in the Scott schedule

2.4 If so, was it because of race

2.5 Did the respondent's treatment amount to a detriment?

2.6 The Tribunal will decide in particular:

2.6.1 was the treatment an appropriate and reasonably necessary way to achieve those aims;

2.6.2 could something less discriminatory have been done instead;

2.6.3 how should the needs of the claimant and the respondent be balanced?

3. Harassment related to Race (Equality Act 2010 section 26)

3.1 Did the respondent do the things in the Scott Schedule:

3.2 If so, was that unwanted conduct?

3.3 Did it relate to race

3.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

3.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

4. Victimisation (Equality Act 2010 section 27)

4.1 Did the claimant do a protected act as set out in the Scott schedule:

4.2 Did the respondent believe that the claimant had done or might do a protected act,

4.3 Did the respondent do the things described in the Scott schedule:

4.4 By doing so, did it subject the claimant to detriment?

4.5 If so, was it because the claimant did a protected act?

4.6 Was it because the respondent believed the claimant had done, or might do, a protected act?

5. Remedy for discrimination or victimisation

5.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

5.2 What financial losses has the discrimination caused the claimant?

5.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

5.4 If not, for what period of loss should the claimant be compensated?

5.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

5.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

5.7 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

5.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

5.9 Did the respondent or the claimant unreasonably fail to comply with it

5.10 If so is it just and equitable to increase or decrease any award payable to the claimant?

5.11 By what proportion, up to 25%?

5.12 Should interest be awarded? How much?

7. Following the Preliminary Hearing the claimant provided additional information in the form of a Scott schedule. The respondent objected to a number of allegations in the Scott schedule and contended that they were amendments. Employment Judge Cox refused the application to amend the claim on 29 March 2022. It was agreed by the representatives that the allegations that remained to be determined by the Tribunal were numbers 3, 5, 8, 16 – 19 and 21 – 24 within the Scott schedule as set out in the Tribunal's conclusions.

8.The claims against Danielle Wilson as second respondent have been withdrawn and a separate judgment dismissing the claim against Danielle Wilson is issued.

Background/Findings of fact

9. Having considered all the evidence, both oral and documentary, the Tribunal makes the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings the Tribunal made from which it drew its conclusions.

10. Where the Tribunal heard evidence on matters for which it makes no finding, or does not make a finding to the same level of detail as the evidence presented, that reflects the extent to which the Tribunal considers that the particular matter assists in determining the issues. Many of the Tribunal's findings are also set out in its conclusions with regard to those issues identified in the Scott schedule.

11. The claimant commenced employment with the respondent on 15 January 2006. She was appointed as the Attendance Lead Manager within the Education Safeguarding Service on 15 October 2018.

12. The respondent had carried out a restructure which was implemented in October 2018. The job profile for the Attendance Lead (page 131) set out Key Purposes of Role – one of the entries is**:**

> "Reduce absence including persistent absence; ensure action is taken early to address patterns of absence. Maintain links and sharing of information with Area Teams and CME casework."

13. On 15 November 2018 the claimant commenced a period of long-term sickness. She did not return until 21 May 2019.

14. The claimant was absent from work between 15 November 2018 and 21 May 2019.

15. Danielle Wilson, Strategic Manager, became the claimant's line manager from around March 2019.

16. The claimant sent an email to Danielle Wilson on 17 April 2019 setting out some concerns, one of those was about changes that the claimant had heard about from her colleagues. She referred to CME developments and asked for clarification She referred to lack of communication/information causing her anxiety and stress. The claimant's GP had advised her to delay her return to work.

17. On 23 May 2019 (159) an Occupational Health report was provided by the respondent's Employee Health and Wellbeing Service. The opinion of the Occupational Health Nurse was that the claimant was fit to fulfil the duties of her role with some support.

18. On 23 May 2019 the claimant attended a return to work meeting with Danielle Wilson (159).The claimant was to return on a phased return. A workstation assessment would be carried out.

19. On 8 October 2019 an individual stress management action plan was carried out by Danielle Wilson in respect of the claimant(190). This referred to the claimant having chronic fatigue and arthritis and that she had been off work as a result of this. It indicates that the claimant felt that she was supported by Danielle Wilson with regard to her health conditions.

20. There were proposals made for the restructure of the entire Education Safeguarding Service as a further £500,000 funding had been secured. An Education Safeguarding Team Managers meeting took place on 15 April 2021 (232) the claimant attended as Attendance Lead. It was provided in the minutes of that meeting that plans for the realignment of the service had been approved by the SLT and DMT and would go to OJC the following week. When approved Danielle Wilson would hold two full staff briefings "to inform all colleagues of impending changes."

21. Danielle Wilson sent an email to the managers within the Education Safeguarding Team on 5 May 2021(242) stating that she wanted to deliver a whole staff briefing.

She said she was aware some staff would be taking annual leave as it was Eid and asking the managers to let her know if they had any staff who would be unable to access the briefing if it was held on Tuesday and Friday. This email was sent to the claimant's job share partner Paul Harkin but not the claimant. Danielle Wilson said that she accidentally missed the claimant off this email list because it was sent on a Wednesday morning when the claimant was not contracted to work.

22. On 12 May 2021 (244) the claimant sent an email to Danielle Wilson in respect of structure slides. She stated:

> "Eid possibly tomorrow so just wanted to understand them rather than worrying over Eid."

23. On 12 May 2021 a staff briefing meeting was held. During the meeting the claimant raised a number of questions about the structure. Danielle Wilson felt that she did so in an aggressive, uncooperative manner. Following the meeting a number of officers who were present raised concerns about the claimant's behaviour and Kate Hopton, Education Safeguarding Service Manager, said that the claimant had raised a number of questions which she said she thought were designed to sow doubt and fear among the staff. Concerns had been raised with her by other officers and she telephoned Danielle Wilson after the meeting to raise concerns.

24. On 13 May 2021 Danielle Wilson sent an email to the claimant stating that she wanted to " have a conversation after yesterday's briefing. It is there a good time today?"

25. Danielle Wilson checked the claimant's diary and noticed that it said " Eid?". Danielle Wilson checked the system and found that the claimant had not requested leave from 13 May 2021 and said that on prior occasions she had failed to submit leave requests and this had been discussed with the claimant on a number of occasions. Danielle Wilson sought advice from HR and she was advised to arrange an informal meeting as quickly as possible.

26. On 14 May 2021 the claimant sent an email to Danielle Wilson at 09.03 stating "Hi, I was on annual leave for Eid yesterday."

27. Danielle Wilson telephoned the claimant on 14 May 2021. There was discussion about the claimant's absence. She provided Danielle Wilson with an email from 28 April 2021 (238) in which it was stated:

> "Hi I have put off putting in leave for Eid day but looking likely it will be 13th, will put leave in next week as the may be more certainty. Is this okay?"

Danielle Wilson said that this email only said that the claimant would put in a leave request and no leave request had been submitted.

28. The claimant sent an email to Mark Douglas, Director of Children's Services (247) in which she referred to the telephone call with Danielle Wilson. She said that it was done to be spiteful and had upset her. She referred to the call lasting an hour and that she had been threatened and bullied.

29.The claimant met with Mark Douglas on 19 May 2021 and on 21 May 2021 (259) she submitted a grievance to Mark Douglas in which she stated:

> "Following our meeting on the 19 May 2021, as discussed please find attached a summary of the main points raised.
>
> I met with you to discuss my concerns around how I have been treated unfairly and victimised by Danielle Wilson over the last 3 years. The most recent incident took place on Friday 14th May, where again I was bullied, intimidated and threatened. Leaving me really upset and in tears.
>
> I was told off for asking questions in relation to the current restructure proposals and accused of not working in line with 'Bradford Behaviours'. Questions were asked in an open forum and supported by other colleagues. Instead it can be argued that DW and her behaviour towards me has failed to operate in line with the 'Bradford Behaviours' on many occasions, she has not shown me positive engagement, flexibility, value my views, and has been disrespectful towards me. She has openly tried to undermine and humiliate me. I was able to give you examples of many occasions in which this has been witnessed by others, who are more than willing to come forward and have provided me with written statements.
>
> I explained to you my responsibilities have been stripped from me, over the past 3 years and how the current restructure proposal is further evidence of this. I feel this is somewhat an attempt to ensure that I am left with little management responsibility and can easily be side-lined and eventually pushed out.
>
> Furthermore, on many occasions I have been intentionally not included in making decisions directly related to my work and team members. Further showing examples of continuous attempts to undermine me in front of others and my team members.
>
> I pointed out to you that I have little confidence that further action will be taken by the management team against DW, as she openly boasts about having 12 plus grievances against her. Almost treating these as trophies and having the support of senior managers to behave the way in which she does.
>
> I also shared with you my worries about how coming forward and speaking out will only make the bullying worse. I believe from here on my every decision and work practice will be scrutinised further and her ill-treatment towards me will only get worse. I will be further isolated and marginalised.
>
> I explained that already due to the bullying that I suffered I felt pushed towards going part time. DW is now probably hoping to push me to leave as the incidents had become more frequent and severe.
>
> I therefore desperately look to you to please help as I no longer can cope and this is having a significant impact on my well-being. This has been going on for far too long and I can no longer cope with the unfairness that I have suffered at the hands of this individual. I am not an isolated case. I have made the difficult

decision of coming forward and am now fearing that this is only going to intensify.

You asked me what I expect as an outcome? The following is what I'm wanting:

1) I want to be able to focus on my work and provide the best possible service to the communities and people I serve, rather than having to continuously look over my shoulder and be forced to justify myself and be micromanaged.

2) I want to be managed by someone else, the relationship has completely broken down. I have tried mediation in the past and it did not work. The personality of this individual will not allow it to work. I therefore refuse to have this as9288) an option. As I no longer am going to be treated in this way.

3) I want attendance to be in CSC/EH/any other suitable department were the work we do will be supported and valued as under DW it is not.

4) I want DW to be held accountable for her actions and work in line with Bradford behaviours.

5) I want my grievance fully investigated as well as all the previous grievances against DW to be investigated and explained the failure for inaction.

Thank you for taking the time out to meet with me listen to my concerns. I now await your meeting invite Chris to meet again so you can update me on what you are willing to do."

30. On 21 May 2021 Mark Douglas informed the claimant that Marium Haque, Deputy Director, would be managing her grievance.

31. On 11 June 2021 Marium Haque sent an email to Julie Cowell, HR Manager (288) in which she stated :

"Not sure why she's angry at me about the CME decision….???? When I arrived there wasn't a team – so I had no part in "stripping" it off her. I had no clue who Waheeda was at the time and I think I may have met Danielle once in a large meeting. I got the funding and got it approved at OJC in November/December 2018. [The Strategic Manager] advised where it should sit and I went with her recommendation as I'd no idea who had it before and as it was in her service area, I went with her suggestion. This seems quite odd to me to raise it now nearly 3 years later?

I also don't think I agree with her interpretation of what she's said about the PT working – she submitted a request. I asked her to meet with me to discuss it. I think Kath Horne put the invite in the calendar for us to meet. Regardless, it was not as a result of Danielle's involvement. But she instigated the initial request for PT working. It appears that she seems to think that I pushed her into it having met with her. I cannot accept or agree to what she has written as it simply isn't correct."

32. Also on 11 June 2021 the claimant sent an email to Marium Haque(289) in which she stated:

> "Following our meeting yesterday I would like to respond to your suggestion for the interim management arrangements proposed. I appreciate you have tried to accommodate my request not to be managed by Danielle whilst this investigation is pending.
>
> However, I feel it is not an option for me to have to move from my service area and my duties under these circumstances. I recall clearly pointed out Danielle's role and duties cannot be changed as to do this would suggest my accusations/claims are founded yet it can be suggested from me? I therefore will not accept this option.
>
> Your only other suggestion was I continue to be managed by Danielle and reassured all content/communication will be monitored. You were happy to be copied into all emails. I therefore with much hesitation will have to agree to this, as my priority is to ensure there is minimum impact and disruption to my work.
>
> I am liaising with David to respond to you about the outcomes we discussed. My understanding of the next steps is you will provide us with notes and themes from our meeting yesterday for the investigation officer and this person will be identified within the next two weeks.
>
> I want to point out the following for clarity and understanding purposes all.
>
> You made reference to the following two points and provided clarity and further agreed you will look into the timescales for the previous restructure and decisions made. However, you were able to take full responsibility for these actions and claimed they were not decisions made by Danielle.
>
> I feel pushed towards going part time – we explored this and we agreed the meeting arranged with yourself was not at my request.
>
> I made reference to me feeling my duties are being stripped historically, you took responsibility for moving/re-establishing CME team but felt your decision to place this with another manager was justified without any discussion with myself. I pointed out the CME work under me was praised at the last inspection in 2018, you still took the decision to move it away from me.
>
> However, there are other examples to evidence how I felt my duties and responsibilities will be minimised, taken from me and no recognition being given to my area of work. I believe I will have an opportunity to discuss this further with the independent investigating officer allocated."

33. On 11 June 2021 Marium Haque sent an email to the claimant(291) in which she stated:

> "Following our meeting yesterday, as agreed, I am emailing you with the key areas that will form the parameters of the Terms of Reference that will be used to help shape your Grievance discussion with the Investigating officer. During

the course of our discussion, I explained that I would not be able to include your points regarding the change of management arrangements for the Team and the part-time working arrangements as neither of these were led or involved Danielle.

As I understand it, your Grievance relates to allegations of bullying and discrimination in the workplace by your line manager, Danielle Wilson. Examples of areas that would provide particular points to investigate detailed, but not limited to, the following:

Supervision sessions with Danielle are felt to be undertaken in an aggressive manner.

Request for leave are not always supported, particularly in respect of leave for Eid this year.

Following the recent restructure meeting, Danielle phoned you and this phone call was difficult as Danielle challenged your approach during the meeting and you were clear that you do not believe your questions or behaviours were inappropriate.

You believe Danielle has singled you out, possibly as a result of your race, as you are the only one who has to report to her on a daily basis.

You believe Danielle has deliberately undermined you by allowing one of your direct reports, Lindsey Fallon, to go to Danielle directly and on one occasion, Danielle approved for Lindsay to take study leave without a prior discussion with you.

We discussed that during the course of the investigation you will be able to bring in other pertinent areas that you feel support your allegations and could be areas that the investigating officer may need to consider.

We also discussed the outcomes that you would like to happen as a conclusion to the grievance. As part of this discussion, I explained to you that one of your outcomes was that the Attendance Team would move to a different part of the directorate. Judy Cowell and I explained that a restructure would not be an outcome from the Grievance and therefore we needed to be clear with you about your expectations in this regard.

I also asked you to review, with your trade union representative, the outcome relating to not wishing to engage in mediation as you believe that the relationship with Danielle is irreparable. We discussed that this could be problematic should you have to continue to be line managed by Danielle in the future. You agreed to discuss this with your trade union representative.

At the end of the meeting we discussed your request to move to a different line management arrangement for the duration of the investigation. I shared with you the option for you to move to the Admissions service where you would be responsible for the management of the in-year transfer and Fair Access team. We explained to you that this was an interim role and that you were free to

> remain in your current post should you wish to do so. It was made clear that Danielle retains full responsibility and oversight of the Attendance Team and that as such, you would need to continue to report to her if you remain in your current role. I offered for you to copy me in to emails between you and Danielle if you would find this helpful.
>
> I would like to thank you for your openness during our meeting as I appreciate it was a very difficult for you share and talk through the issues with us. As soon as we have identified a suitable person to investigate your Grievance, we will be back in touch to let you know. In the meantime if you have any questions please contact me or Julie."

34. On 15 June 2021 Marium Haque sent an email to the claimant and Danielle Wilson requesting a short meeting to discuss the investigation. The claimant rejected this meeting and explained that it was inappropriate for her to attend the meeting with Danielle Wilson when she had recently raised a grievance against her.

35. Marium Haque sent an email to the claimant asking her why she was unable to attend the meeting and asking her when she was able to meet as "it is important for us to discuss the working issues that I put in the email to you and Danielle yesterday"

36. The claimant requested a postponement to allow her Trade Union representative to attend This was refused as the claimant was not entitled to be accompanied as it was not a formal meeting and it was essential for the meeting to happen to avoid delay.

37. On 16 June 2021 Marium Haque sent an email to the claimant and Danielle Wilson (305)stating

> "Thank you for meeting with me at short notice today. I thought it would. be useful just to provide some points of what we discussed and agreed.
>
> Current arrangements regarding daily checking in between you both will continue. This has been put in place since the introduction of remote working and will continue.
>
> Monthly/4 weekly supervisions will continue as normal and Danielle will provide a note of the discussion and Waheeda you will make changes or amendments if needed. Points which cannot be agreed should be identified clearly. Marium will be copied into the supervision notes and any emails regarding the notes for the time being.
>
> Management meetings are virtual and it is envisaged they will remain so for the foreseeable future. Waheeda attends every alternative month as your job share partner attends the other meetings.
>
> Leave and flexi arrangements will remain unchanged and there is an expectation that all leave and flexi requests will be submitted in advance and approved prior to being taken. We also discussed updating ESS with the previous leave and flexi that has been taken, including the Bank holidays that

> are on a Friday. We identified these included Christmas Day 2020, New Year's Day 2021 and Good Friday 2021.
>
> Waheeda will send Danielle the handover information between her and her job share partner so that Danielle is informed of particular issues that are taking place this week. Waheeda will ensure that Danielle is kept informed and up-to-date of key issues so that Danielle can share these with Paul if needed."

38. On 6 June 2021 Julie Cowell, Senior HR Business Partner sent an email to Liz Vere Director of Silver Consulting asking if she would be willing to undertake an investigation in respect of two grievances. Liz Vere replied indicating that she did have some capacity to take on an investigation in the next few weeks. She also indicated that she had annual leave booked for the last two weeks of August but if the investigation was not anticipated to be a lengthy one and hopefully this would not impede the project going forward. She would be happy to meet the Deputy Director to understand the requirements and suggested dates of 12 or 13 July which currently looked good.

39. On 8 July 2021 the claimant notified ACAS of a prospective claim.

40. On 12 July 2021 Marium Haque sent an email to the claimant indicating that she had identified Liz Vere as the external investigator who would be contacting the claimant in the near future.

41. On 14 July 2021 Danielle Wilson sent an email to the claimant, copied to Marium Haque, in which she asked the claimant if she was feeling better after the previous week and said she would put a return to work meeting on the claimant's calendar.

42. On 16 July 2021 Marium Haque sent an email to the claimant and Kate Hopton indicating that Danielle Wilson was unwell and they needed to cancel the return to work meeting and that the claimant should speak to Kate Hopton.

43. On 22 July 2021 the claimant attended a return to meeting with Kate Hopton. In the notes it is recorded that one of the factors affecting the claimant's sickness was the grievance process. It was also noted that the claimant had asked Julie and Marium for a referral to EHWB around six weeks previously but nothing had happened.

44. On 13 August 2021 the claimant's trade union representative sent an email to the respondent asking whether there were any updates on a number of queries including the one with regard to the claimant in which it was stated

> "Grievance submitted. Had meeting with AD in June to discuss request for change of management etc which was not agreed. Still waiting for investigating officer to be appointed and moved this on. Member was informed officer had been appointed to hear her grievance on 19 July 2021 to date no meeting or any further contact from Management"

45. On 16 September 2021 Kate Hopton sent the claimant a copy of a referral to Employee Health and Well-being Management.

46. On 27 September 2021 Julie Cowell sent an email to the claimant's union representative and others relating to a number of cases in children's services for which an update had been requested. It was stated:

> "Apologies for the delay in responding to you with these cases, but I needed to follow-up with a number of different managers involved in each of these cases…
>
> Waheeda Shah – due to the complexities of the content of the grievance and the officer involved in this, Marium Haque has made the decision to source an external investigator to undertake this which has taken some time to put in place. However, an external investigator (Liz Vere) has now commenced the process and has been in touch with Waheeda to arrange to meet with her. She offered her meeting date of 29 September, but Waheeda has informed her that she is now on leave and it is not convenient for. A further date of the 14 October was offered on her return from leave, but this was not suitable for Waheeda due to her working part-time, returning from leave and work commitments and so a further date of 21 October has been agreed."

47. Danielle Wilson had been absent from work due to illness from 16 July 2021. The Tribunal understands that she has now obtained alternative employment.

48. The claimant presented a claim to the Employment Tribunal on 9 September 2021. She brought claims of race discrimination, harassment and victimisation.

49. A Grievance investigation meeting took place on 21 October 2021 with the Investigating Consultant who had been advised on 12 July 2021 of a potential investigation and who was commissioned to carry out the investigation on 14 September 2021. The claimant was accompanied by her Trade Union representative. It appears that the investigation has been put on hold during the Tribunal.

50. The claimant remains in the respondent's employment although she has been off sick since 16 June 2021.

The law

Direct discrimination

50. Section 13 of the Equality Act 2010 provides;

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

Section 109 of the Equality Act 2010 states:

Liability of employers and principals

> (1) Anything done by a person (A) in the course of A's employment must be treated as done by the employer.
> (2) Anything done by an agent for a principal with the authority of the principal shall be treated as also done by the principal.

(3) it does not matter whether that thing is done with the employer's or the principal's knowledge or approval.
(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A –

(a) from doing that thing, or
(b) from doing anything of that description.

Section 4 of the Act defines the protected characteristics, one of which is race.

51. In **Islington Borough Council v Ladele [2009] ICR 387** Mr Justice Elias explained the essence of direct discrimination as follows:

> "The concept of direct discrimination is fundamentally a simple one. The claimant suffers some form of detriment (using that term very broadly) and the reason for that detriment or treatment is the prohibited ground. There is implicit in that analysis the fact that someone in a similar position to whom that ground did not apply (the comparator) would not have suffered the detriment. By establishing that the reason for the detrimental treatment is the prohibited reason, the claimant necessarily establishes at one and the same time that he or she is less favourably treated than the comparator who did not share the prohibited characteristic."

52. In **Glasgow City Council v Zafar [1998] ICR** Lord Browne-Wilkinson stated

> "Those who discriminate on the grounds of race or gender do not in general advertise their prejudices: indeed they may not even be aware of them"

53. It is sufficient for a claimant to establish direct discrimination if he or she can satisfy the Tribunal that the prohibited characteristic was one of the reasons for the treatment in question. It need not be the sole or even the main reason for that treatment; it is sufficient that it had a significant influence on the outcome, see Lord Nicholls in **Nagarajan v London Regional Transport [1999] IRLA 572** in paragraph 17:

> " I turn to the question of subconscious motivation. All human beings have preconceptions, beliefs, attitudes and prejudices on many subjects. It is part of our make-up. Moreover, we do not always recognise our own prejudices. Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did. It goes without saying that in order to justify such an inference the tribunal must first make findings of primary fact from which the inference may properly be drawn. Conduct of this nature by an employer, when the inference is legitimately drawn, falls squarely within the language of section 1(1)(*a*). The employer treated the complainant less favourably on racial grounds. Such conduct also falls within the purpose of the legislation. Members of racial groups need protection from conduct driven by unrecognised prejudice as much as from conscious and deliberate discrimination. Balcombe L.J. averred to an instance of

> this in *West Midlands Passenger Transport Executive v. Singh* [1988] I.R.L.R. 186, 188. He said that a high rate of failure to achieve promotion by members of a particular racial group may indicate that 'the real reason for refusal is a conscious or unconscious racial attitude which involves stereotyped assumptions' about members of the group."

54. Where an actual comparator is relied upon by the claimant to show that the claimant has suffered less favourable treatment it is necessary to compare like with like. Section 23(1) of the Act provides: "there must be no material difference between the circumstances in relation to each case." That does not mean to say that the comparison must be exactly the same, there can be a comparison where there are differences. The evidential value of the comparator is weakened the greater the differences, see **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285 and **Carter v Ashan [2008] ICR 1054**. The Supreme Court in **Hewage v Grampian Health Board [2012] ICR 1054** confirmed that a Tribunal had not erred in relying on non-exact comparators in a finding of discrimination.

55. Evidence of direct discrimination is rare and the Tribunal often has to infer discrimination from the material facts that it finds applying the burden of proof provisions in section 136 of the Equality Act as interpreted by **Igen Ltd v Wong [2005] ICR 931** and subsequent judgments. In **Ladele** Mr Justice Elias, in the EAT said:

> "The first stage places a burden on the claimant to establish a prima facie case of the discrimination: where the applicant has proved fact from which inferences could be drawn that the employer treated the applicant less favourably [on a prohibited ground] then the burden moves to employer… then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If he fails to establish that, the Tribunal must find that there is discrimination."

56. To summarise, the claimant must prove, on the balance of probabilities, facts from which a Tribunal could conclude, in the absence of an adequate explanation that the respondent had discriminated against him. If the claimant does this, then the respondent must prove that it did not commit the act. This is known as the shifting burden of proof. Once the claimant has established a prima facie case (which will require the Tribunal to hear evidence from the claimant and the respondent, to see what proper inferences may be drawn), the burden of proof shifts to the respondent to disprove the allegations. This will require consideration of the subjective reasons that caused the employer to act as he did. The respondent will have to show a non-discriminatory reason for the difference in treatment. In the case of **Madarassy v Namora International PLC [2007] ICR 867** the Court of Appeal made it clear that the bare facts of a difference in status and a difference in treatment indicate only a possibility of discrimination: "They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".

57. A claimant cannot rely on unreasonable treatment by the employer as that does not infer that there has been unlawful direct discrimination; see **Glasgow City Council v Zafar [1998] ICR 120**. Unreasonable treatment of itself does not shift the burden of proof. It may in certain circumstances be evidence of discrimination so as to engage

stage 2 of the burden of proof provisions and required the employer to provide an explanation. If no such explanation is provided there can be an inference of discrimination **Bahl v Law Society [2004] IRLR 799**.

58. In the case of **Qureshi v Victoria University of Manchester and another [2001] ICR 863** Mummery J said:

> "There is a tendency, however, where many evidentiary incidents or items are introduced, to be carried away by them and to treat each of the allegations, incidents or items as if they were themselves the subject of a complaint. In the present case it was necessary for the Tribunal to find the primary facts about those allegations. It was not, however, necessary for the Tribunal to ask itself, in relation to each such incident or item, whether it was itself explicable on "racial grounds" or on other grounds. That is a misapprehension about the nature and purpose of evidentiary facts. The function of the Tribunal is to find the primary facts from which they will be asked to draw inferences and then for the Tribunal to look at the totality of those facts (including the respondent's explanations) in order to see whether it is legitimate to infer that the acts or decisions complained of in the originating applications were on "racial grounds". The fragmented approach adopted by the Tribunal in this case would inevitably have the effect of diminishing any eloquence that the cumulative effect of the primary facts might have on the issue of racial grounds. The process of inference is itself a matter of applying common sense and judgment to the facts, and assessing the probabilities on the issue whether racial grounds were an effective cause of the acts complained of or were not. The assessment of the parties and their witnesses when they give evidence also form an important part of the process of inference. The Tribunal may find that the force of the primary facts is insufficient to justify an inference of racial grounds. It may find that any inference that it might have made is negated by a satisfactory explanation from the respondent of non-racial grounds of action or decision."

59. Since the House of Lords' Judgment in **Shamoon v Chief Constable Royal Ulster Constabulary** [2003] IRLR 285 the tribunal should approach the question of whether there is direct discrimination by asking the single question of the reason why. That case has been expanded on by **Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830**, **Ladele, Amnesty International v Ahmed [2009] IRLR 884**, **Aylott v Stockton on Tees Borough Council [2010] IRLR 994**, **Martin v Devonshires Solicitors [2011] ICR 352, JP Morgan Europe Limited v Cheeidan [2011] EWCA Civ 648**, and **Cordell v Foreign and Commonwealth Office [2012] ICR 280**.

60. For a finding of direct discrimination it is not necessary for the discriminator to be consciously motivated in treating the complainant less favourably. It is sufficient if it can be inferred from the evidence that a significant cause of the discriminator to act in the way he has acted is because of the persons protected characteristic. As Lord Nicholls said in **Nagarajan v London Transport,**

> "Thus, in every case, it is necessary to enquire why the complainant received less favourable treatment. This is the crucial question. Was it on the grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job? Save in obvious cases, answering the crucial question, will call for some consideration of the mental process of the

> alleged discriminator. Treatment, favourable or unfavourable, is a consequence which follows from a decision."

61. Therefore, in most cases the question to be asked by the Tribunal requires some consideration of the mental process of the discriminator. Once established that the reason for the act of the discriminator was on a prohibited ground the explanation for the discriminator doing that act is irrelevant. Liability has then been established.

62. In the case of **Qureshi v Victoria University of Manchester** Mummery J said, with regard to race discrimination:

> "As frequently observed in race discrimination cases, the applicant is often faced with the difficulty of discharging the burden of proof in the absence of direct evidence on the issue of racial grounds for the alleged discriminatory actions and decisions. The Applicant faces special difficulties in a case of alleged institutional discrimination which, if it exists, may be inadvertent and unintentional. The Tribunal …. must also consider what inferences may be drawn from all the primary facts. Those primary facts may include not only the acts which form the subject matter of the complaint but also other acts alleged by the applicant to constitute evidence pointing to a racial ground for the alleged discriminatory act or decision. It is this aspect of the evidence in race relations cases that seems to cause the greatest difficulties. Circumstantial evidence presents a serious practical problem for the Tribunal of fact. How can it be kept within reasonable limits?"

63. The Tribunal has considered the case of London Borough of **Ealing v Rihal [2004] EWCA Civ 623** in which Lord Justice Keane in the Court of Appeal stated at paragraph 38:

> "The Tribunal's reference to Mr Foxall being an "honest and honourable man" (paragraph 48) is not inconsistent with him being unwittingly influenced by racial considerations. As Neill LJ said in *King –v- Great Britain China Centre* at page 528:
>
> > "Few employers will be prepared to admit such discrimination *even to themselves.* In some cases discrimination will not be ill-intentional but merely based on an assumption that "he or she would not have fitted in"." (my emphasis)
>
> Nor is Ealing assisted by the fact that the Tribunal accepted as genuine and true Mr Foxall's explanation of what he was seeking to do in the scoring. That was simply the Tribunal accepting that Mr Foxall was honestly describing what he was trying to do in that exercise. As it said a little later, he gave this evidence with great conviction *on his own part*. That in no way leads to a conclusion that he was not influenced by racial considerations, albeit without appreciating it. "

Harassment

64. Section 26 of the Equality Act provides

> (1) A person (A) harasses another (B) if--

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of--

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

65. The test is part objective and part subjective. It requires that the Tribunal takes an objective consideration of the claimant's subjective perception. was reasonable for the claimant to have considered her dignity to be violated or that it created an intimidating, hostile, degrading, humiliating or offensive environment.

66. In the case of **Grant v HM Land Registry [2011] IRLR 748** the Court of Appeal said that:

"Tribunals must not cheapen the significance of the words "intimidating, hostile, degrading, humiliating or offensive environment". They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

67. In the case of **Richmond Pharmacology v Dhaliwal [2009] IRLR 336** the EAT stated

"We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

Victimisation

68. Section 27 of the Equality Act provides as follows:-

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

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

(2) Each of the following is a protected act -

(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

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

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

69. In a victimisation claim there is no need for a comparator. The Act requires the tribunal to determine whether the claimant had been subject to a detriment because of doing a protected act. As Lord Nicholls said in **Chief Constable of the West Yorkshire Police v Khan [2001] IRLR 830**:-

> "The primary objective of the victimisation provisions ... is to ensure that persons are not penalised or prejudiced because they have taken steps to exercise their statutory right or are intending to do so".

The Tribunal has to consider (1) the protected act being relied on; (2) the detriment suffered; (3) the reason for the detriment; (4) any defence; and (5) the burden of proof.

70.To get protection under the section the claimant must have done or intended to or be suspected of doing or intending to do one of the four kinds of protected acts set out in the section. The allegation relied on by the claimant must be made in good faith. It is not necessary for the claimant to show that he or she has a particular protected characteristic but the claimant must show that he or she has done a protected act. The question to be asked by the Tribunal is whether the claimant has been subjected to a detriment. There is no definition of detriment except to a very limited extent in Section 212 of the Act which says "Detriment does not ... include conduct which amounts to harassment". The judgment in **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285** is applicable.

71.The protected act must be the reason for the treatment which the claimant complains of, and the detriment must be because of the protected act. There must be a causative link between the protected act and the victimisation and accordingly the claimant must show that the respondent knew or suspected that the protected act had been carried out by the claimant, see **South London Healthcare NHS Trust v Al-Rubeyi EAT0269/09**. Once the Tribunal has been able to identify the existence of the protected

act and the detriment the Tribunal has to examine the reason for the treatment of the claimant. This requires an examination of the respondent's state of mind. Guidance can be obtained from the cases of **Nagarajan v London Regional Transport** [1999] IRLR 572, **Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830**, and **St Helen's Metropolitan Borough Council v Derbyshire [2007] IRLR 540**. In this latter case the House of Lords said there must be a link in the mind of the respondent between the doing of the acts and the less favourable treatment. It is not necessary to examine the motive of the respondent see **R (on the application of E) v Governing Body of JFS and Others [2010] IRLR 136**. In **Martin v Devonshires Solicitors EAT0086/10** the EAT said that:

> "There would in principle be cases where an employer had dismissed an employee in response to a protected act but could say that the reason for dismissal was not the act but some feature of it which could properly be treated as separable."

72**.** In establishing the causative link between the protected act and the less favourable treatment the Tribunal must understand the motivation behind the act of the employer which is said to amount to the victimisation. It is not necessary for the claimant to show that the respondent was wholly motivated to act as he did because of the protected acts, **Nagarajan**. In **Owen and Briggs v James [1982] IRLR 502** Knox J said:-

> "Where an employment tribunal finds that there are mixed motives for the doing of an act, one or some but not all of which constitute unlawful discrimination, it is highly desirable for there to be an assessment of the importance from the causative point of view of the unlawful motive or motives. If the employment tribunal finds that the unlawful motive or motives were of sufficient weight in the decision making process to be treated as a cause, not the sole cause but as a cause, of the act thus motivated, there will be unlawful discrimination."

73. In **O' Donoghue v Redcar and Cleveland Borough Council [2001] IRLR 615** the Court of Appeal said that, if there was more than one motive, it is sufficient that there is a motive that is a discriminatory reason, as long as this has sufficient weight. Conscious motivation is not a prerequisite for a finding of discrimination. It is therefore immaterial whether a discriminate or did not consciously realise they were prejudiced against the complainant because the latter had done a protected act. An employer can be liable for discrimination or victimisation even if it's motives for the detrimental treatment are benign.

74. The Court of Appeal confirmed, in **Deer v University of Oxford [2015] EWCA** that the manner in which a grievance is treated by the employer can amount to victimisation if the grievance process is less favourable than it would have been were it not for an earlier claim brought by the employees, even if the grievance was bound to fail. That latter fact will be relevant to compensation, but does not defeat the victimisation claim.

Burden of Proof

75. Section 136 of the Equality Act 2010 states:

> "(1) This Section applies to any proceedings relating to a contravention of this Act.

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

(3) But sub-section (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.

(5) This Section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to –
(a) an Employment Tribunal."

76. Guidance has been given to Tribunals in a number of cases. **In Igen v Wong [2005] IRLR 258** (a sex discrimination case decided under the old law but which will apply to the Equality Act) and approved again in **Madarassy v Normura International plc [2007] EWCA 33.**

77. To summarise, the claimant must prove, on the balance of probabilities, facts from which a Tribunal could conclude, in the absence of an adequate explanation that the respondent had discriminated against him. If the claimant does this, then the respondent must prove that it did not commit the act. This is known as the shifting burden of proof. Once the claimant has established a prima facie case (which will require the Tribunal to hear evidence from the claimant and the respondent, to see what proper inferences may be drawn), the burden of proof shifts to the respondent to disprove the allegations. This will require consideration of the subjective reasons that caused the employer to act as he did. The respondent will have to show a non-discriminatory reason for the difference in treatment. In the case of **Madarassy** the Court of Appeal made it clear that the bare facts of a difference in status and a difference in treatment indicate only a possibility of discrimination: "They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".

78. In the case of **Pnaiser v NHS England [2016] IRLR 170,** EAT, Simler P said that whilst Tribunals might find it helpful to go through the two stages suggested in **Igen v Wong** , it is not necessarily an error of law not to do so and in many cases moving to the second stage is sensible. She warned against falling into the trap of substituting 'motive' for causation in deciding whether the burden of proof has shifted. In that case the Tribunal had erred in effectively requiring the claimant to show that the only inference which could be drawn from the primary facts was a discriminatory one. This was too high a hurdle and in fact a claimant is only required to demonstrate a prima facie case that the putative discriminator has consciously or unconsciously taken into account, in that case, something arising from disability, in order for the burden to shift.

79. The Supreme Court made clear in **Efobi v Royal Mail [2021] UKSC 33** , it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish victimisation. But they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

80 In **Griffiths-Henry v Network Rail Infrastructure Ltd [2006] IRLR 865**, EAT It was said that in order for the burden of proof to shift, the claimant is not required to provide any positive evidence that the difference in treatment was based on race.

81. In Harvey on Industrial Relations and Employment law it is stated

> " If unreasonable conduct therefore occurs alongside other indications (such as under-representation of women in the workplace, or failure on the part of the respondent to comply with internal rules or procedures designed to ensure non-discriminatory conduct) that there is or might be discrimination on a prohibited ground, then a Tribunal may find that enough has been done to shift the burden onto the respondent to show that its treatment of the claimant had nothing to do with the prohibited ground. Similarly – once the burden of proof has shifted, as Girvan LJ explained in **Rice v McEvoy [2011] NICA 9, [2011] EqLR 771** – while the test is not to ask what a reasonable employer would have done, action which is wholly unreasonable may assist in drawing inferences that the employer's purported explanation for his/her actions was not the true explanation.
>
> HHJ Peter Clark in The **Home Office (UK Visas & Immigration) v Kuranchie UKEAT/0202/16** (19 January 2017, unreported) confirmed that 'statistical' evidence that may tend to show a discernible pattern of treatment by the employer to the claimant's racial group could lead a Tribunal to infer unlawful discrimination. He gave an example of a race discrimination case in which racial statistics were held to be a relevant consideration, that of **Rihal v London Borough of Ealing [2004] EWCA Civ 623, [2004] IRLR 642**. The presence of such evidence can amount to the 'something more' than the difference in protected characteristic and treatment as Mummery LJ described was needed in **Madarassy v Nomura** so as to shift the burden of proof."

82. **Time limits**

Section 123 of the Equality Act 2010 states:

> (1) ...Proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
> (b) such other period as the employment tribunal thinks just and equitable.
> ...
>
> (3) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
> (b) a failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

83. The Court of Appeal made it clear in **Hendricks v Metropolitan Police Comr [2002] EWCA Civ 1686,** that in cases involving a number of allegations of discriminatory acts or omissions, it is not necessary for an applicant to establish the existence of some 'policy, rule, scheme, regime or practice, in accordance with which decisions affecting the treatment of workers are taken'. Rather, what she has to prove, in order to establish 'an act extending over a period', is that (*a*) the incidents are linked to each other, and (*b*) that they are evidence of a 'continuing discriminatory state of affairs'. The focus of the enquiry should be on whether there was an “ongoing situation or continuing state of affairs” as oppose to “a succession of unconnected or isolated specific acts”. It will be a relevant, but not conclusive, factor whether the same or different individuals were involved in the alleged incidents of discrimination over the period. An employer may be responsible for a state of affairs that involves a number of different individuals.

84. The Tribunal has discretion to extend time if it is just and equitable to do so, the onus is on the claimant to convince the Tribunal that it should do so, and 'the exercise of discretion is the exception rather than the rule' (**Robertson v Bexley Community Centre [2003] EWCA Civ 576** per Auld LJ at para 25).

85. The Tribunal had the benefit of detailed written and oral submissions provided by Mr Johnston on behalf of the claimant and Ms Callan on behalf of the respondent. These were helpful. They are not set out in detail but both parties can be assured that the Tribunal has considered all the points made and all the authorities relied upon, even where no specific reference is made to them.

Conclusions

86. The claimant is Asian British with Pakistani heritage and contends that the respondent treated her the way alleged because of race, colour, ethnic origin.

87.The Tribunal has considered whether any of the allegations were out of time as occurring before 9 April 2021. If the Tribunal had found out the claimant’s allegations prior to 9 April 2021 had been well-founded then the Tribunal would have found that any such allegations would have been part of a course of conduct extending over a period so that there were no jurisdictional issues. In any event, the victimisation claims were presented within time.

88. It was agreed that the outstanding issues identified in the Scott schedule following the orders of Employment Judge Cox on 2 March 2022. These have been carefully considered by the Tribunal and were as follows *(the numbers remain as in the original Scott schedule):*

3. After February 2019 Danielle Wilson reallocated the statutory function “Children Missing Education” from the claimant to Amy Petschack.

89. This is an allegation of direct discrimination. The comparator is stated to be a hypothetical comparator and Amy Petschack.

90. The claimant's case was that she carried out CME work prior to the restructure.

91. The respondent's case was that that claimant was appointed to her role as Attendance Lead on 15 October 2018 after the restructure was implemented and she never had responsibility for the Children Missing Education (CME) statutory function. The job description (page 131) refers to a Key Purpose of maintaining links and sharing of information with Area Teams and CME case work.

92. Danielle Wilson was not responsible for the first reorganisation. There was a reorganisation of the respondent's Children's Services and it formed part of a £13 million costs saving. Danielle Wilson was not involved in the decisions and had to have an interview for her own new post at that time.

93. The respondent wrote to the heads of schools stating that the CME function was continuing (462). It is submitted by Mr Johnston that this is at odds with the respondent's case that CME work "slipped between the cracks" as a result of the 2018 restructure. The Tribunal does not accept that submission. the letter to the heads of schools indicated that the CME function was continuing. It was later realised that it was not being carried out.

94. The statutory function of CME was lost in the 2018 reorganisation. This was surprising. Neither Marium Haque nor Danielle Wilson were involved in the decision making in that reorganisation. The Tribunal is not satisfied that there was a reorganisation in which the important statutory duty was lost in order to discriminate against the claimant.

95. Marium Haque realised that the respondent was not carrying out the CME work. The re-establishment of the CME function was carried out by Marium Haque together with the previous Strategic Manager, both of whom were of Asian origin. Marium Haque gave clear evidence that when she arrived at the respondent there was no CME team. Marium Haque obtained funding towards the end of 2018. She was not aware that the claimant had previously had responsibility for the CME team and she agreed with the previous Strategic Manager that the team should be located within the safeguarding team and not within the attendance team.

96. The business case provided by Danielle Wilson was issued at Marium Haque's instruction by Danielle Wilson in the absence of the Strategic Manager.

97.There was no credible evidence that the reintroduction of the CME function within the safeguarding team was less favourable treatment because of the claimant's race

98. The Tribunal is not satisfied the claimant has established facts from which it could conclude that the respondent had subjected the claimant to an act of discrimination.

> *5. May 2019 to the present. Danielle Wilson has required the claimant to report to her at the start of each working day whilst working remotely. The claimant's white colleagues have not been subject to this obligation when home working.*

This is an allegation of direct discrimination or, in the alternative, harassment. The comparators are Tara Watson and white managers when working from home.

99. Kate Hopton gave clear and credible evidence that prior to Danielle Wilson's sick leave she had been expected to report to Danielle Wilson by email whenever she worked remotely. She also said that she updated her outlook calendar to show what she was doing and had used Microsoft Teams messaging as an alternative means of checking in at the start of each day since September 2021.

100. Paul Harkin, who shared the job with the claimant, was not required to report in because he, invariably, attended the office and was not working remotely.

101. The Tribunal had sight of a note from a managers meeting on 14 May 2020 (208). The claimant and Danielle Wilson were in attendance and it was stated "WFH continues – morning email, calendar etc as has been."

102. Tara Watson sent an email to the claimant (492) stating that she had never emailed anyone to let them know that she had logged in when working from home. "I logged my start of work by adding an entry to my outlook calendar."

103. The Tribunal accepts that this was the policy applied by the respondent. When working from home, the team member should report by email or provide outlook calendar entries.

104. It was not established that the claimant was required to carry out anything more than others and the Tribunal is not satisfied that the claimant has established facts from which it could conclude that the respondent had subjected the claimant to an act of direct discrimination or harassment on grounds of race.

8. 6 June, 11 July, 9 October 2019, 12 March 2021 and 7 October 2020 Danielle Wilson conducted supervision meetings with the claimant in a hostile manner and were recorded inaccurately.

This is an allegation of direct discrimination or, in the alternative, harassment. The named comparators are Lindsey Fallon, Amy Petschack and Kate Hopton

105. It was submitted by Ms Callen that this was a generalised allegation lacking cogent evidence to support it.

106. Mr Johnston referred to a stark factual dispute as to how Danielle Wilson conducted supervision meetings with the claimant and relied upon his overarching submission that Danielle Wilson's evidence in respect of the CME work tainted the whole of her evidence.

107. The Tribunal is not satisfied that Danielle Wilson's evidence with regard to the CME work was lacking in veracity or was tainted. She gave careful and detailed answers. The evidence provided by the claimant with regard to the position prior to the 2018 reorganisation was unclear. She was distressed and confused as to who she managed and how many employees she managed.

108. The notes of supervision meeting on 11 July 2019 (189) show that the claimant was feeling insecure and that her job had changed since her return to work. There was a concern about the work now being "traded" to schools. This was one of the reasons why the claimant felt that her job was insecure. The notes were not indicative of Danielle Wilson acting in a hostile manner. She had apologised about the wording around traded work and agreed that it had not been accurate. Danielle Wilson explained that she was trying to manage the situation so the claimant did not feel she was being directed by another colleague.

109. There was no credible evidence that the supervision meetings with the claimant were carried out in a different manner from those of the named comparators or a hypothetical comparator or that this was an act of harassment on grounds of the claimant's race.

110. The allegation that there is a failure to accurately record what had been discussed and that was an act of direct discrimination or harassment was not established. The notes show that Danielle Wilson apologised for the wording around traded work which had been sent in haste.

111. The Tribunal is not satisfied that the claimant has established facts from which the Tribunal could conclude that the respondent had subjected the claimant to an act of direct discrimination or harassment on grounds of race.

> *16. 5 May 2021. Danielle Wilson missed the claimant out of an email to all managers which the claimant understands related to the restructure.*
>
> *This is an allegation of direct discrimination and, in the alternative, harassment. The alleged perpetrator is Danielle Wilson. The comparators are Katie Hopton, Amy Petschak, Lindsey Fallon and a hypothetical comparator.*

112. Mr Johnston submitted that the evidence of Danielle Wilson was deeply unsatisfactory as she appeared to suggest that she deliberately did not include managers who were not in work at the time and also that the omission of the claimant was an innocent mistake. In those circumstances, the inference should be that the omission was deliberate.

113. The respondent's case is that Danielle Wilson was extremely busy. She wanted a quick response. It was not the claimant's day at work and informing Paul Harkin, her job share, was sufficient. The email was also sent to another Asian member of staff.

114. When it was pointed out by the claimant that she had not been sent the email Danielle said that she was "hugely sorry" that she had missed the claimant off.

115. The Tribunal has considered all the evidence. The reasons given by Danielle Wilson varied. She did say that it was an accident and also that it was because the claimant was not in work and she had sent it to her job share partner. However, the Tribunal does not consider that this shows that the omission of the claimant from the email was deliberate or on grounds of the claimant's race.

116. The Tribunal is not satisfied with the claimant has established facts from which the Tribunal could conclude that the respondent had subjected the claimant to an act of direct discrimination or harassment on grounds of race.

> *17. 14 May 2021. Bullied and undermined by Danielle Wilson during the phone call. She accused the claimant not working in line with "Bradford Behaviours" and querying the claimant's absence on 13 May 2021, despite being told it was Eid.*
>
> *This is an allegation of harassment, the alleged perpetrator was Danielle Wilson.*

117. The respondent's case is that the claimant had failed to follow the proper procedure for booking annual leave and that she had done this on a number of previous occasions and her behaviour at the meeting on 12 May 2021 was not in accordance with the Bradford Behaviours.

118. Maroof Shah, the claimant's sister witnessed the telephone conversation and said that she could hear Danielle Wilson raising her voice. She said that she felt that the behaviour was highly unprofessional and the claimant was visibly upset. Maroof Shah said that she took the notes and passed them to the claimant's solicitors but they were not provided to the Tribunal.

119. Kate Hopton gave evidence that the claimant's behaviour at the meeting on 12 May 2021 was contrary to the Bradford Behaviours and had raised suspicions and anxieties across the staff. The claimant had attended the managers meeting on 15 April 2021 when they were informed about the restructure, the Trade Unions had been consulted and they were reassured by Danielle Wilson that no jobs would be lost. However, the claimant had chosen to raise issues at the staff briefing meeting.

120.Kate Hopton said that, at the staff briefing meeting, the claimant asked questions about job stability and what would happen if the traded team were not funded. She said it felt like a personal attack on Danielle Wilson.

121. Danielle Wilson was concerned about the claimant's behaviour and her challenging actions at the meeting. This led to Danielle Wilson raising matters with the claimant. Also, with regard to querying the claimant's absence and the reference to Eid, the concern was that the claimant had not complied with her obligation to follow the annual leave booking procedure and there had been issues with regard to the claimant not following this procedure in the past. The Tribunal accepts that the claimant was distressed in the conversation and that Danielle Wilson raised her voice.

122. There was no credible evidence that Danielle Wilson's behaviour during the telephone call was related to the claimant's race and the Tribunal is not satisfied that there was an inference that could be drawn that the behaviour by Danielle Wilson was motivated by the claimant's race. The burden of proof has not shifted to the respondent in the circumstances.

123. The Tribunal is not satisfied with the claimant has established facts from which the Tribunal could conclude that the respondent had subjected the claimant to an act of harassment on grounds of race.

> *18. 27 May 2021. Marium Haque confirmed that the claimant would continue to report directly to the first respondent and Danielle Wilson.*
>
> *This is an allegation of victimisation perpetrated by the first respondent. The protected act was the claimant's grievance of 19 May 2021*

124. The claimant was required to continue with Danielle Wilson as her line manager. She was told that she could move to a different part of the service but without her team or she could continue with Danielle Wilson as her Line Manager. Both Mr Johnston and Ms Callan were of the view that it was appropriate for this allegation to be considered together with allegation 23, the proposal that the claimant could move teams and the conclusions are set out with regard to that allegation.

> *19. 16 June 2021. Marium Haque pressurised the claimant to attend a meeting with Danielle Wilson.*
>
> *This is an allegation of victimisation perpetrated by the respondent. The protected act was the claimant's grievance of 19 May 2021.*

125. Ms Callan submitted that this meeting did not take place. However, the Tribunal is satisfied that it did take place by way of a video link. The claimant had asked to be accompanied by her trade union representative. Marium Haque said she was conscious that they needed to have the meeting soon as possible. It was not a formal meeting. It was to discuss ongoing ways of working and in those circumstances it was not necessary for the claimant to be accompanied..

126. Marium Haque had informed the claimant that some of the matters that have been raised in the grievance were decisions that had been made prior to the appointment of Danielle Wilson as Strategic Manager or were decisions made by Marium Haque. If the claimant did not wish to be line managed by Danielle Wilson she was told that she could move her to the Admissions Team under a different manager but it was not proportionate for her whole team to be moved. As Danielle Wilson managed a wide range of several teams, over 600 staff, Marium Haque decided that she could not be moved and the claimant would continue to be managed by Danielle Wilson. The claimant said that, with much hesitation, she had to agree.

127. Once the decision had been made that these two senior members of staff should work together, subject to oversight by Marium Haque, the Tribunal is satisfied that the respondent had a genuine belief that a meeting had to take place to discuss the interim management arrangements.

128. It was not established that there were facts from which the Tribunal could conclude that the respondent had subjected the claimant to a detriment that was motivated by the protected act. The Tribunal is not satisfied that the bringing of the grievance had any material influence on the need for or the pressure to have a meeting. It was necessary for the continued working relationships. It was not a detriment to the claimant and was not an act of victimisation.

21. Between April 2021 and 1 September 2021. During the most recent restructure the claimant's responsibilities were reduced. The respondent removed from the claimant's line management the "Prosecution Team". In contrast, white managers were provided with more responsibility.

This is an allegation of direct discrimination. Perpetrators are identified as the respondent and Danielle Wilson.

The comparators named are a hypothetical comparator, Amy Petschak, Kate Hopton, Jenny Fox and Lindsey Fallon

129. The prosecution team was removed from the claimant's responsibility during her lengthy absence and not returned to her during her phased return. Ms Callan submitted that this allegation fails on its facts as the claimant was treated the same as her job share partner.

130. The Tribunal has considered all the evidence and accepts that there was no significant difference between treatment of the treatment of the claimant and her white job share partner.

131. In those circumstances, the Tribunal is not satisfied that it was established that there were facts from which the Tribunal could conclude that the respondent had subjected the claimant to an act of direct discrimination or harassment on grounds of race.

22. 19 May 2021 to 21 October 2021. The claimant alleges that the Respondent has failed to conduct the grievance within the timescales set by the Grievance Procedure when it delayed in assigning or instructing an Investigating Officer.

This is an allegation of direct discrimination and victimisation. The protected act being the claimant's grievance of 19 May 2021 and the comparator is identified as a hypothetical comparator.

132. This is an entirely separate issue from the other allegations of victimisation. The respondent's grievance resolution procedure provides timescales to ensure that grievances are dealt with promptly. It is provided that the manager should meet with the employee raising the grievance within five working days of receipt of the grievance form. After necessary enquiries having been made the meeting should usually be reconvened within 10 working days. If the grievance is sufficiently serious or complex then the employee will be informed when the investigation is expected to be completed and when it is likely that the grievance meeting will be reconvened.

133. It was submitted by Mr Johnston that this allegation is more appropriately considered as victimisation because Marium Haque was the putative discriminator.

134. He submitted that there was no adequate explanation for the delay in progressing the claimant's grievance. The only tentative explanation advanced by Marium Haque related to concerns about Danielle Wilson's health. He said that this does not provide a proper explanation for the delay in failing to instruct Liz Vere to carry out her

investigations. It was submitted that the Tribunal should conclude that the inordinate and inexcusable delay in taking the necessary steps to initiate an investigation into the claimant's grievance was materially influenced by the fact that the grievance in question included serious allegations of discrimination.

135. The grievance was raised with Mark Douglas on 19 May 2021 followed by an email on 21 May 2021 (280) setting out the grievance.

136. The claimant was told that Liz Vere had been approached by HR in early July 2021 (page 318). The ET1 was presented on 9 September 2021. Danielle Wilson commenced long-term sickness absence on 16 July 2021

137. The grievance investigation was not commissioned until 14 September 2021.

138. The submissions made by Ms Callan referred to the claimant not taking up invitations to proceed with the grievance(566) However, that was in August 2022, once the Tribunal hearing had commenced.

139. It was conceded on behalf of the respondent that the grievance had not been handled well. There were numerous delays. One of the reasons given to the Tribunal was that Danielle Wilson was seriously ill.

140. There is no adequate explanation for the delay in dealing with the claimant's grievance. The investigation could have been commenced by holding a grievance meeting with the claimant. Indeed, Mr Johnston submitted that there was absolutely no adequate explanation for the delay in progressing the claimant's grievance and the only tentative explanation advanced by Mariam Haque concerned Danielle Wilson's health. This does not provide a proper explanation for the delay in providing instructions to Liz Vere, the independent investigator.

141. The claimant and her trade union representative had raised issues about the delay. The Tribunal accepts Mr Johnston's submission that there was an inordinate and inexcusable delay in taking the necessary steps to instigate an investigation into the claimant's grievance.

142. It was submitted by Mr Johnston that the allegation of direct discrimination with regard to this allegation is somewhat problematic as the putative discriminator would be Marium Haque. In any event the Tribunal does not accept that there was any evidence that this treatment was on grounds of claimant's race.

143. The Tribunal is satisfied that it was established that there were facts from which it could conclude that the delay in dealing with the grievance was because of, or materially influenced by, the grievance alleging race discrimination. The investigation should have commenced shortly after the claimant was informed that Liz Vere had been identified on 12 July 2021.

144. The respondent has not provided any adequate explanation for the delay in progressing the investigation. The Tribunal finds that the motivation for the delay was materially influenced by the grievance against a senior manager. Whether this was conscious or unconscious motivation, it was influenced by the fact and nature of the grievance.

23. Between 10 and 17 June 2021. The proposal that the claimant move teams.

This is an allegation of victimisation. The perpetrator being the first respondent. The protected act was the claimant's grievance of 19 May 2021.

145. The Tribunal heard that knock-on effect of moving Danielle Wilson, given her reporting lines, would have implications for a large number of staff who would be severely disrupted. Offering the option is not a detriment. It was not insulting to the claimant if viewed objectively.

146. As to the 'reason why' issue it was submitted by Ms Callan that the reason for suggesting the change was a practical, putative, solution. The solution put in place was for Marium Haque to monitor the relationship which was possible because the claimant was working from home at that time.

147. Mr Johnston's submission takes allegations 23 and 18 together for convenience. Marium Haque told the claimant that she should continue to report to Danielle Wilson even when the claimant was raising serious allegations of discrimination against Danielle Wilson. The only alternative that the claimant was offered at the end of the meeting on 10 June 2021 was that the claimant should be moved out of her team altogether and into an entirely separate team undertaking completely different work. He submitted that no (or no proper) consideration was given to the claimant's request that her reporting line should be changed whilst her grievance was ongoing.

148. Mr Johnston referred to it as a binary choice – the claimant would be required to continue to interact on a daily basis with the manager whom she alleged had subjected her to bullying and discrimination to the point that that was having an adverse impact upon her health or the second option would have resulted in the claimant being isolated from the rest of her team and losing management responsibility for them. He submitted that she was expressly told that she would not be able to keep her team if she transferred.

149. It was submitted, on behalf of the claimant, that the issue for the Tribunal is whether the treatment which the claimant asserts amounted to a detriment. The claimant was required to continue to report to Danielle Wilson, her manager against whom she had brought an allegation of racial discrimination. If not, she could move away from her team.

150. The Tribunal is satisfied that this was a detriment. The Tribunal must decide whether the detriment was materially influenced by the fact the claimant had raised a grievance in which she had made allegations of discrimination. Mr Johnston submitted that it is difficult to understand on what basis Marium Haque would be prejudiced against the claimant other than by the fact of nature of her grievance. He invited the Tribunal to conclude that Mariam Haque's attitude towards the claimant's line management going forward was materially influenced by the fact that the claimant had raised a grievance in which she had raised serious allegations of race discrimination.

151. Ms Callan submitted that Marium Haque was faced with dealing with a problem relating to two senior managers within her team. The practicalities were such that to

remove the claimant from Danielle Wilson's line management would necessarily entail offering that she should move to manage an area of work which required the same or similar skills to those she utilised in her Attendance Team Manager role. The knock-on effect of moving Danielle Wilson would have implications because a large number of staff would be severely disruptive. Ms Callan submitted that offering that option to the claimant was not a detriment in the Shamoon sense. Objectively viewed, It was not insulting to her. The claimant had choices given to her, but her suggestion that she be given paid leave was clearly not an option which the respondent could put in place.

152. The Tribunal has given very careful thought to this issue. The solution was put in place was for Marium Haque to monitor the relationship between the claimant and Danielle Wilson. This was possible because the claimant was working from home at that time.

153. This was a solution to control a continuing relationship between two senior managers. They were to continue within Marium Haque's team and the practicalities were such that a pragmatic solution had to be reached.

154. The Tribunal is not satisfied that the claimant has established facts from which the Tribunal could conclude that the respondent had subjected the claimant to an act of victimisation in respect of this allegation. The solution was that the relationship should continue as before with the assistance of Marium Haque's oversight. The Tribunal is satisfied that this was a pragmatic solution. It was not a detriment to the claimant. She reluctantly agreed to go along with that option. That was the position that was maintained as a result of the need for the working relationship to continue.

155. This was not a detriment to the claimant and, had it been a detriment, the Tribunal finds that it was not established that it was materially influenced by the protected act of raising the grievance. It was a practical solution to move forward with both the senior managers continuing to work in Marium Haque's team. This was not materially influenced by the raising of the grievance. It was necessary to continue the working relationship and the action taken would havebeen necessary whether a grievance had been raised or not.

> *24. 16 June 2021 until 20 October 2021. The claimant alleges that the respondent has failed to provide health and well-being support by failing to refer the claimant to Employee Health and Well-being.*
>
> *This is a claim of direct discrimination and victimisation by the respondent .The comparator is a hypothetical comparator and the protected act is the claimant's grievance of 19 May 2021.*

156. Mr Johnston submitted that it took over three months for an Occupational Health referral to be made in relation to the claimant who was alleging that she had been a victim of bullying and discrimination. There was no sensible explanation for the delay. Marium Haque was fully aware of the claimant's grievance and she continued to have involvement. It was incumbent upon Marium Haque to ensure that the referral was made and she had failed to do so.

157. Ms Callan submitted that Marium Haque had referred the matter to HR to arrange Health and Well-being support on 16 June 2021 (P.297)). The failure was not because of the protected act of the grievance raising race discrimination. There was no evidence to support the allegation that this was because of the claimant's race. It was a failure of the bureaucracy and a white person in the same situation would have been subject to the same delay.

158. Danielle Wilson went off on long-term sickness from 16 July 2021. In his submissions Mr Johnston states that it was incumbent upon Marium Hague to ensure that the referral was made and she manifestly did not do so. Kate Hopton made the referral on 16 September 2021(Page 339).

159. There had been an intention by Marium Hague to refer the claimant to Occupational Health. The claimant was to continue as a manager in Marium Hague's department. The Tribunal finds that the delay in referral to Occupation Health is unlikely to be motivated by the claimant's race. There were a substantial number of Asian employees within the team. The claimant was a manager within the department led by Marium Hague and the running of the department required the claimant to remain in work.

160. There was no evidence from which the Tribunal could conclude that the respondent had subjected the claimant to an act of direct discrimination.

161. The Tribunal has considered this allegation of victimisation. Marium Hague required the claimant and Danielle Wilson to work together, albeit with her oversight. Mr Johnston said that his submissions were essentially on the same basis as the allegation with regard to the delay in dealing with the grievance because it was said to be Marium Haque who was responsible for the delay.

162. Ms Callan submitted that the reason why the referral to Employee Health and Well-Being did not occur was not because of the grievance but a failure of bureaucracy.

163. The Tribunal is not satisfied that it was established that the failure to provide a referral to EHWB could have been by reason of the protected act of raising the grievance

164. This allegation is wholly different from that with regard to the delay in the instruction of an investigation officer for the grievance where the motivation, conscious or subconscious, was established to be by reason of the protected act once the burden of proof had shifted. It may well have been that there was a wish or hope, once again, conscious or subconscious, that the grievance might fade into the background once the reorganisation had settled into place and the assimilation applications or arrangements had been dealt with.

165. In respect of this allegation of the delay in the referral to Health and Wellbeing, such a motivation, whether conscious or unconscious, was highly unlikely as Marium Hague clearly wished the managers in her Department to work together. She had evinced an intention to make the reference through HR. The Tribunal is satisfied that this was a genuine intention to refer the claimant to Health and Wellbeing.

166. The burden of proof did not shift to the respondent and, if it had, the Tribunal is satisfied that the respondent has shown that the failure to make such a referral was a failure of bureaucracy.

167. In all the circumstances, the Tribunal finds that the claims of direct discrimination and harassment related to race are not well-founded and are dismissed.

168. The claims of victimisation by requiring the claimant to report to Danielle Wilson, pressurising the claimant to attend a meeting with Danielle Wilson, the proposal that the claimant moved teams and the failure to refer the claimant to EHWB are not well-founded and are dismissed.

169. The claim of victimisation by the failure to conduct the grievance procedure within the timescales set by the respondent's procedure succeeds and a remedy hearing will take place.

170. A further hearing will be listed to consider the question of remedy. If the parties' representatives are of the view that further Case Management Directions should be made for that hearing they are invited to agree suggested directions and provide them to the Tribunal.

Employment Judge Shepherd
28 September 2023
Sent to the parties on:

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For the Tribunal Office:

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