



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr E Ewwaraye

**Respondent:** London Borough of Merton

**Heard at:** Croydon (in person)

**On:** 6 to 10 and 13 February 2023

**Before:** Employment Judge Nash  
Ms M Foster Norman  
Mr S Sheath

**Representation**

Claimant: In person

Respondent: Mr Davies of counsel

## RESERVED JUDGMENT

1. The respondent did not directly discriminate against the claimant because of his race, contrary to section 13 Equality Act 2010.
2. The respondent discriminated against the claimant by subjecting him to race harassment contrary to 26 Equality Act 2010 by failing to take his race discrimination grievance seriously.
3. The respondent did not discriminate against the claimant by subjecting him to race harassment contrary to section 26 Equality Act 2010 in any other respect.
4. The respondent victimized the claimant contrary to section 27 Equality Act 2010 because it failed to take his race discrimination grievance seriously.
5. The respondent did not victimise the claimant contrary to section 27 Equality Act 2010 in any other respect.
6. The respondent did not subject the claimant to a detriment on the ground that he made a protected disclosure under section 43B and section 47B Employment Rights Act 1996.

# REASONS

1. Following ACAS early conciliation from 2 to 17 December 2019, the claimant presented his claim to the tribunal on 14 January 2020. Further particulars were provided on 16 September 2020. The claimant was granted permission on 28.7.21 to amend his claim.
2. At this final merits hearing the tribunal heard on behalf of the claimant from the following witnesses who provided written statements: –
  - a. The claimant
  - b. Mr Junior Nelson who worked in the respondent’s Transforming Families Team at the material time.
3. The tribunal heard on behalf of the respondent from the following witnesses who provided written statements: –
  - a. Ms Roberta Evans at the material time Head of Adolescent and Family Service (who provided two witness statements)
  - b. Ms Alison Jones, Head of Early Years, Family Well-Being and Early Help
  - c. Ms Jane McSherry at the material time the respondent’s Assistant Director of Education.
4. The respondent also relied on written statements from the following witnesses who did not attend the hearing: –
  - a. Mr James McGinlay the respondent’s Assistant Director for Sustainable Communities who determined the claimant’s grievance and
  - b. Ms Rachel Wardell the respondent’s Director of Children Schools and Families Department at the material time who determined the claimant’s appeal.
5. The tribunal had sight of an agreed bundle to 1434 pages. During the hearing more legible copies of four documents were provided, and two extra documents were added by consent.

## **The Claims**

6. The claims before the tribunal were: –
  - a. direct race discrimination under section 13 Equality Act 2010
  - b. race harassment under section 26 Equality Act 2010
  - c. victimisation under section 27 Equality Act 2010
  - d. detriment for making a protected public interest disclosure under section 43B and 47B Employment Rights Act 1996

## **The Issues**

7. The agreed list of issues provided to the tribunal is appended to this judgment.

**The Facts**

8. In March 2006, the claimant started work for the respondent as a manager in prevention of youth crime. He worked in the Youth Justice Service which was part of the Children Social Care and Youth Inclusion Division of the respondent's Children Schools and Families Department. Over the period of his employment with the respondent the claimant held a number of posts. He worked with gangs in youth crime prevention and provided support to vulnerable families. In 2010 to 2011 his role was upgraded. The claimant became the Operational Lead on gangs and serious youth violence. A gangs worker funded by The Mayor's Office for Policing and Crime (MOPAC) was placed in his team and reported to the claimant.
9. In January 2013, the claimant became the Operations Manager for the Transforming Families Team. This team was grant funded from central government rather than local authority funds. Its role was to work with vulnerable families at an early stage before matters became so serious that statutory social work intervention was necessary. The team's ethos was to prevent families and vulnerable young people suffering further problems and by early intervention turn their prospects around.
10. It was agreed that the claimant had an unblemished employment record. He had been nominated as employee of the year on occasion. The transforming families team won awards. The claimant's appraisals were all positive.
11. A significant difficulty for the tribunal was that at the time of the events material to this claim the parties were unable satisfactorily to explain the structure of the respondent's functions, both before and after restructuring. The claimant's witness statement shed little light on this, for instance failing to explain who his line manager was. Nevertheless, the claimant was a litigant in person and the tribunal accepted that he did not have a strategic overview. However, the respondent witnesses also provided little clear-cut evidence of the structure. The tribunal concluded accordingly that the respondent itself and the claimant were to some extent unclear as to departmental structure and who was responsible for what, and to whom they reported. The tribunal also heard of a number of seemingly interlocking or overlapping restructures and reviews of the respondent's functions.
12. After extensive questioning, the tribunal established that the respondent's Children Schools and Family Department was divided into 2 services. The service relevant to this claim was the Adolescent and Family Service headed by Ms Evans. This included the transforming families team headed up by the claimant, together with the youth justice team/youth offending team. Later the leaving care service and tackling exploitation service were added to the service.
13. On 1 April 2018 Ms Evans became head of service of the Adolescent and Family Services of which the Transforming Families Team was a part. Although the tribunal was provided with no reporting structure prior to the restructure, it proceeded on the basis that Ms Evans was either the claimant's line manager or the manager to whom he reported. It was agreed that the claimant was the only black manager out of 8 managers in this service. The tribunal was not informed of the race of the other managers, save that the respondent stated that the head of another team which reported to Ms Evans was mixed race.

14. From this time, if not before, as is not unusual in such local government settings, the department's financial situation was fluid and unsettled. Grants started and ended, there were frequent bids for funding and changes in funding - from the local authority, from central government and other funders. This was against a backdrop of austerity and cuts in local authority funds. Funding was a regular if not continual issue for the transforming families team. According to Mr Junior Nelson, who worked in the transforming families team, the team was accustomed to uncertainty around its funding and there were discussions in team meetings from late 2018/early 2019 about funding. In his witness statement the claimant explained that the team was used to uncertainty over its funding because of the nature of its functions.
15. The respondent created a Task and Finish Group to review the respondent's early help function. Early help did not only refer to young children. It referred to intervention with families and young people of any age, but at an early stage. The Group's purpose was to develop an early help system that was responsive and effectively prevented escalation of concerns. There was also a cut in Mayors Office for Policing and Crime Funding which affected the Adolescents and Family Service. The central government transforming families grant which significantly funded the transforming families team was also coming to an end.
16. This Group included the claimant, Ms Doyle Practice Development for The Early Years Service, Ms Alison Jones Head of Early Years, Ms Evans, and a number of managers who delivered early intervention services for the respondent. There were at least three meetings of the group during 2018. The group reviewed delivery models and looked to decide on a new delivery model. It produced a 28-page document. It was concluded that the preferred model was a single early help referral point, a "front door." Service Users reported that it was difficult to access the respondent's various early help services. There were a number of fragmented teams offering different services with, for instance, different application forms. It was difficult for referrers to access the services they needed. The document referred to the impact of grant funding difficulties for transforming families, and imminent department wide savings. The report from the task of finish group went to the Directors Management Team in January 2019.
17. It then transpired that the adolescent family services would not receive a supporting families grant in February 2019, which led to discussion of necessary cost savings. Ms Evans, who had budget oversight, told the tribunal that the transforming family team was in effect running out of money. There was a significant drop in funds available. Whilst the programme was originally funded up to March 2020, it would run out of money in about September 2019.
18. On 25 February 2019 Ms Evans said the plan was to use grant money to fill in the funding for transforming families from September 2019 until the expected end of the programme in March 2020. In supervision she and the claimant discussed a shortfall in the coming year of £118,000.
19. The tribunal concluded that whilst the claimant did not have a clear view of restructuring and potential cuts in the service and the team, he was aware that there were significant funding difficulties for the team, particularly in the latter part of 2019.

20. The Task and Finish Group was not the only review and restructure at this time. There was a reference in January 2019 to a restructure in the youth justice service.
21. As the transforming families programme was due to end in March 2020 but there was only funding until September 2019, the respondent would be overspending from September 2019. Accordingly, Ms Evans presented three options to the Directors Management Team meeting on 14 March 2019. The three options were: – closing the Transforming Family service, a proposal to cover the short-term gap in finance, and a proposal for a long-term delivery of an intensive family support service.
22. Although it was unclear to the tribunal how the various reviews and groups interacted and what the precise funding position was, the evidence showed that the respondent embarked on a restructure of its early help service in 2019. The tribunal accepted the respondent's account that the planning for the restructure was carried out at Head of Service level because this was appropriate to a wide-ranging systemic restructure covering a number of different areas. It would not have been practical to have involved a large number of managers, particularly when the input of most managers had already been captured by the task and finish group.
23. As the claimant was not a Head of Service, he was not included in the early help restructure planning and discussions in 2019. The restructure obtained the services of Ms Watson /Doyle to do its Secretariat work. She had the requisite skills, and her workload made it possible to free her up to do this. Although the tribunal heard no direct evidence of the claimant's workload at this time, there was no suggestion that he was anything other than very busy with his own duties. This was also consistent with later unchallenged accounts of the claimant's working day, for instance on one day he was unable to have his lunch until 5 pm.
24. At a transforming families team meeting on 14 March Ms Evans mentioned the Mayor's Office for Policing and Crime funding reduction. However, she did not say that Mr Jason Young, a serious youth violence worker's, post was at risk. The claimant had planned to tell Mr Young of the funding difficulties in a few days but had not done so before a meeting on 21 March.
25. As part of her management duties, Ms Evans met regularly with the MOPAC funded workers and their managers. This included the claimant and Mr Young. There was one such meeting on 21 March 2019 to discuss the Mayor's Office of Policing and Crime Funding and targets. In this meeting Ms Evans in effect gave Mr Young to understand that his post was at risk because of the funding cuts.
26. The claimant felt that Ms Evans had in effect ambushed Mr Young. This put the claimant in a difficult situation and undermined him in front of Mr Young. Mr Young thought that the claimant, as his manager, must have known that his post was at risk and was upset at the way he (Mr Young) had been told - in front of colleagues.
27. Ms Evans told the tribunal that she accepted that she had told Mr Young too much about the funding situation and his job being at risk, in a meeting in front of his peers. She accepted this was inappropriate and said that she had in effect blundered into telling Mr Young about the specifics of the funding situation. She accepted that she had mishandled the situation and that Mr Young's distress was understandable.

28. Mr Young was very upset both at finding out that his job was at risk and in the way that he had been told. Mr Young emailed a formal complaint to Ms Evans explaining that his work with gangs and serious violence meant that he was regularly exposed to threats of violence. Mr Young was so distressed that he was signed off sick for a considerable length of time.
29. Ms Evans, in her reply to Mr Young, apologised that she had not stopped the meeting to speak separately with him about the risk to his role. She offered to meet with him. She explained why his role was at risk. She said she had asked the claimant to meet with him to discuss targets, but she had not realized that the MOPAC meeting was so soon.
30. The claimant then emailed Mr Young agreeing that the funding issue was live but that there had been no decisions made. He told Mr Young that if he had known that the issue was to be discussed at the MOPAC meeting, then he would have met with Mr Young in advance to warn him.
31. The claimant told the tribunal that he had sought to discourage Mr Young from escalating his complaint against Ms Evans. Following discussions with Ms Evans, he encouraged Mr Young to meet with her. Because Mr Young was absent sick, the meeting did not take place until 16 May 2019. At this meeting Ms Evans advised Mr Young that as part of the early help restructure, his role might move to the tackling exploitation team. Mr Young told the claimant that Ms Evans had asked him whether he might be interested in moving. The claimant was unhappy that Ms Evans had suggested this to Mr Young without telling the claimant beforehand. He felt that Ms Evans had been “underhanded and undermining of his position”.
32. The departmental management team decided on 21 March 2019 to take the second of Ms Evans three options - a restructure across family support teams. According to the director, Ms Wardell, this would ensure a sustainable provision of services that was not reliant on grant funding. It was decided that Ms Jones Head of Early Years would be the head of the new service because she already had a number of early help services reporting to her. It was agreed that Ms Evans would support the process.
33. Ms Evans attended a meeting of the transforming families team on 27 March 2019 to inform the team about the funding situation and the decisions of the DMT. According to the minutes she told the team that there was going to be no restructure. Ms Evans told the tribunal that these minutes were incorrect and had not been passed to her for her comments. The minutes, according to Ms Evans, were incorrect on their face as they did not list her as an attendee but recorded her as speaking.
34. Ms Jones assisted by Ms Evans was by this time putting together the early help restructure. Ms Doyle/Watson drafted the job descriptions. There were a number of posts that were being removed and a number of posts being created.
35. According to Ms Evans, in about May 2019 she considered the remit of all the different functions within the restructure, including gangs work and criminal exploitation. The tribunal saw a flowchart where the various functions were put into something resembling a hierarchy, from most serious/highest intervention to less serious/preventative work. To illustrate, housing advice was at the bottom of the page (least serious and the lowest

intervention) whereas criminal exploitation work and offender support were at the top (most serious and highest intervention). Gangs key work (which the tribunal understood to be work with individuals at risk with gangs) was about two thirds of the way up the page and gangs group work was just over halfway up the page. Ms Evans concluded that gangs work was not appropriate to an early help service as it was essentially too serious and high intervention.

36. On 19 June 2019 Ms McSherry Assistant Director of Education and Ms Parkinson Interim Assistant Director for Children's Social Care and Youth Inclusion (the managers with responsibility for the early help restructure) sent the affected staff including the claimant an email concerning the restructure of the early help service. The email stated that the restructure would produce a new family well-being service. A project board had been set up which was jointly sponsored by Ms McSherry and Ms Parkinson. The coordinator was Rebecca Doyle working with the heads of service. According to the email, implementation of the plan was intended to provide an improved early help service, a new family well-being service, and contribute to departmental savings targets in light of the significant loss of funding from the troubled families programme.
37. The email explained that two decisions had already been taken. The new family well-being service would have its own "front door", and it would be managed by Alison Jones.
38. On 12 July, the respondent invited all affected staff to a launch of the staff consultation process for the early help restructure.
39. The AFS held management meetings roughly quarterly (in school term time) to prepare for AFS service meetings. At an Adolescents and Family Service meeting on 16 July 2019 where the claimant was present, Ms Evans said that she had not been involved in the restructure and could herself even be demoted.
40. The claimant contended that Ms Evans had not attended transforming team meetings between 18 July 2019 and 6 December 2019, but she had attended other team meetings under her remit. The claimant stated that he was not invited to adult adolescent family service management meetings during the same period.
41. On 17 July 2019, the claimant and Ms Evans had a meeting. According to Ms Evans, she told the claimant that staff were going to receive letters about voluntary redundancy as part of the early help restructure. The most contemporaneous accounts of this meeting were emails between the claimant and Ms Evans on 25 July. In these emails Ms Evans told the claimant that she had advised him on the 17<sup>th</sup> that all staff would be receiving letters about voluntary redundancy. The claimant countered that he did not recall her stating staff would be given voluntary redundancy letters by hand, but she had mentioned voluntary redundancy applications being included in the consultation pack. The claimant queried whether there would be voluntary redundancies because he had been told otherwise previously. The claimant said that he had left the 17 July meeting because Ms Evans started to discuss the consultation and he had told her that he did not want to discuss this.
42. In this email exchange, the claimant went on to say that Ms Evans had seen the claimant on 15 July and therefore could have told him about her plan to hand deliver the "said

voluntary redundancy letters". Ms Evans acknowledged in her reply she had missed the opportunity on 15 July to discuss further with the claimant.

43. Based on this email exchange, the tribunal found that the claimant did know the redundancy letters were going to be provided to his team, but he did not know how or when.
44. After 18 July 2019, according to Ms Evans, the respondent held no more AFS managers meetings because firstly it was the school holidays and secondly the meetings were no longer required or useful as it was unclear what the future service would be. Nevertheless, Ms Evans continued to meet with specific AFS managers including the claimant for specific reasons.
45. The respondent held the launch meeting for staff for the Early Help restructure on 18 July 2019. According to the presentation, the two key drivers of the restructure were (i) to improve outcomes and (ii) efficiency savings due to reduction in budgets. According to the presentation, the current service would cost £2.7 million, and the reorganized service would cost £2.04 million.
46. The tribunal had sight of the presentation. This included an organogram of the Department structure in June 2019, that is before the restructure. This showed the claimant as the team manager in the transforming families team. At what appeared to be the same level there was a team manager in the under-fives Supporting Families Team (this was the manager that the respondent described as mixed race and the claimant did not demur). There was a further team manager in the Bond Road Family Contact Centre (which dealt with contact between estranged parents and children).
47. The new structure would consist of one Head of Service (Ms Jones) with two service managers reporting to her, one for caseworker practice and the other for programs and projects. A further diagram showed that there would be a reduction in posts including from three full-time equivalent managers to two full-time equivalent managers. According to one slide, there might be redundancies and there would be a voluntary redundancy application form. There might be assimilation of roles by a competitive interview process.
48. At this stage it was planned that the claimant's role be assimilated to a new service manager post at the same grade, as one of the two service managers reporting to Ms Jones.
49. The timeline for the restructure was given as: –
  - a. one-to-one meetings between 22 July and 6 September 2019.
  - b. Staff consultation to end on 17 September.
  - c. The consultation response on 27 September.
  - d. October onwards-any redundancies.
  - e. The new structure would go operational in early 2020.
50. Mr Nelson said he was extremely surprised to see Ms Evans presenting with Ms Jones because he thought she had recently said she was not involved in the restructure.



51. During this meeting Ms Evans told some of the transforming families team (including a Ms Thompson) that the claimant was well aware of the direction of travel on the restructure. The claimant did not agree with this as he said he had many times that he was not aware.
52. There was no real dispute that the launch meeting did not go well, in that staff did not wholly welcome the proposals. Further, Ms Evans gave evidence that there were difficulties with handing out what were termed voluntary redundancy letters. (In reality these were letters placing members of staff at risk of redundancy which included voluntary redundancy options.) Staff wanted copies of the letters and management were not able to provide these on the day. Ms Evans gave evidence that human resources told her that the letters needed to be given to staff by hand.
53. On 22 July 2019 Ms Evans came to the transforming families team and asked Mr Nelson for a private meeting in which she handed him his letter stating he was at risk of redundancy. She also gave another one of the team their at risk letter. However, on that day she did not hand out redundancy letters to all staff who were at risk of redundancy. Some of the transforming families team who were at risk of redundancy were not provided with letters that day. This caused very considerable confusion and significantly unsettled the claimant's team. Ms Evans's explanation was that she wanted to hand over letters in person and only some members of staff were present.
54. The tribunal accepted that it came as a considerable surprise to the claimant that redundancy letters were provided to his team on a piecemeal basis rather than in an organized way. He had met Ms Evans earlier that day and she had not mentioned she was going to hand out redundancy letters. Ms Evans' explanation was that the claimant had refused a meeting about the restructure. She later accepted that she had missed an opportunity to tell him earlier that day that she was going to hand out redundancy letters to his team. Later the claimant raised a grievance about this amongst other matters. The grievance investigator agreed that Ms Evans' conduct on this occasion was undermining, and the claimant should have been informed in advance.
55. On 18 July Ms Evans invited the claimant to a "consultation one-to-one" meeting with herself and Ms Alison Jones to "discuss the proposed structure and assimilation with this" to take place on 22 July. The claimant refused the meeting without comment. (He had a meeting in his diary which clashed, although he did not explain this.) In his witness statement the claimant said that he refused the meeting because he was unclear why he was being invited to a meeting with 2 Heads of Service. Ms Evans sent another invite for one-to-one consultation. She explained he could have a union representative to accompany him.
56. On 24 July, a senior member of staff, Mr Shipman, the head of youth and community, came to the youth justice team to report a stabbing incident. An informal meeting developed including Ms Evans, the safeguarding lead and the criminal exploitation worker. The discussion involved whether a youth club should remain open that night due to the risk of retaliation. It was decided to keep the club open.
57. Although the claimant sat nearby, he was not invited to participate. About an hour after the discussion, Ms Evans sent emails to senior managers copying in the claimant alerting them to the incident. The claimant emailed back and asked why the stabbing had not

been discussed with him. He explained that his team had been working with one of the young people involved and had working knowledge of the situation. The claimant then became involved in the management of the situation using his and his team's contacts in the community to gain intelligence. As a result, it was decided that the club should in fact not open as the risk of retaliation was too great.

58. The claimant emailed Ms Evans explaining his serious concern that because he had not been immediately contacted about the stabbing, there was a delay in obtaining this intelligence which could have had grave consequences. In an email of 31 July Ms Evans stated that she believed that an email alert to the claimant was appropriate and sufficient. She made two proposals to improve timely information sharing to ensure that, in the future, the claimant was included in initial alerts and received notifications from police. Ms Evans referred to a more recent incident where she had immediately contacted the claimant. The claimant continued to email Ms Evans challenging why she had not immediately contacted him about the stabbing incident.
59. At around 5 PM that day, 24 July Ms Evans came to speak to the claimant to discuss their emails in person. Unfortunately, the claimant had had an extremely busy day and was only about to eat his lunch. The claimant set out his account of this encounter in an email to Ms Evans the following day. The tribunal accepted this as an accurate account.
60. Ms Evans asked him to discuss their emails. He said he was getting his lunch. She said that she assumed that it was therefore not a good time and he then said he was eating lunch. He then picked up his lunch bag to show it to her. Miss Evans said they could discuss the matter over lunch. In his email to Ms Evans he asked rhetorically, "why would I want to discuss this series of emails while eating my lunch". He said that speaking to Ms Evans, "ruined what little appetite I had". Ms Evans then said that the matter could be discussed in supervision. According to the claimant she was "clearly irritated".
61. Ms Evans emailed the claimant telling him that he should come to the individual consultation meeting and the claimant replied asking for further clarification as to the purpose of the meeting. In the view of the tribunal, Ms Evans's emails indicated that she was becoming impatient if not frustrated with the claimant's refusal to attend the consultation meeting. A one-to-one consultation meeting was finally agreed for 11 September.
62. Ms Evans offered to attend a transforming families team meeting on 31 July to discuss the reorganisation and take questions from staff. However, on 26 July the claimant told her that there was a calendar error and there was in fact no such meeting on that day. Ms Evans emailed the team saying that she would nevertheless make herself available in the conference room at that time for staff to ask questions. Although Ms Evans attended the conference room, no staff attended to ask questions.
63. According to Mr Nelson's witness statement, he did not apply for a vacancy in the youth justice team because it was made up mostly or entirely of white staff, and he felt that "his face did not fit" because he was black. He had an uncomfortable feeling that team members would watch him whenever he came into the office and stop talking when he entered the room. Nevertheless, team members regularly approached him about mutual clients.

64. The transforming family team staff were sent emails about vacancies in the restructure. In late July or early August 2019 Ms Evans came to see the team. She arrived early before the claimant. She encouraged the staff team to apply for existing vacancies in the restructure. The claimant said that the team felt they were being “poached” and the claimant felt he was being undermined as it had not been discussed with him beforehand.
65. According to Ms Evans, when she attended a meeting of the youth justice team, the team suggested doing something for Black History Month. She therefore put a diary entry in the calendar for the three youth justice team managers. However, according to Ms Evans, nothing came of this. The matter was never raised with the claimant. The claimant did not challenge Ms Evans’ account that nothing came of this idea.
66. The early help restructure consultation was due to close on 12 September 2019. The respondent received two counterproposals one from the claimant and the other from the under-fives team. Ms Evans and Ms Jones produced a report on the consultation and the two counterproposals. As a result, the period of consultation was extended.
67. On 25 September 2019, the claimant submitted a formal grievance complaining of racial discrimination, undermining, abuse of power, injury to feelings and dignity at work. He stated that “I have been undermined as a manager and subjected to racial discrimination and abuse of power by Roberta Evans”. He complained about Ms Evans’ conduct at the meeting of 21 March 2019 to Mr Young which had undermined him (the claimant). He also complained that Ms Evans had on 16 May 2019 offered Mr Young to move to the tackling exploitation team and he viewed this as undermining him (the claimant). He stated that the proposed role in the new structure was “far removed from the level of responsibility I currently hold” and the nature of his work. He said it amounted to a demotion of responsibilities and did not use his experience and strengths. He said that his experience was “shunned”. He said he had been offered a “role that for career reasons and lack of job satisfaction I am guaranteed to refuse.” The grievance also dealt with other historical matters relating to previous restructures.
68. He also stated that Ms Evans had a conflict of interest in respect of her interest in two private businesses which worked for the council. He implied that if Mr Young was moved to a different team, one of these businesses could charge for supervision. He also alleged that Ms Evans had failed to properly respond to a police request concerning a person of interest because this person was associated with one of the private businesses. He contended she had breached the council’s conflict-of-interest policy. He described it as “unethical” that Ms Evans was overseeing the restructure.
69. He grieved that he had been invited to the consultation meeting on 18 July 2018. He complained that Ms Evans had falsely told staff that she knew nothing of the restructure.
70. A theme running through the grievance was that the claimant did not agree with the entire thinking behind the restructure. One of the effects of the restructure would be that specialist services, such as gangs and youth violence would be broken up. The claimant believed that this was regrettable and would have a disproportionate adverse impact on ethnic minority communities.
71. According to Ms Evans and Ms Jones, the respondent considered the consultation responses and re-worked the restructure. The tribunal had sight of an email on 23.10.19

from Ms Evans to Ms McSherry stating “option B is replaced with the new structure we have been discussing most recently (mixed grade managers/leaders under the team manager)...This structure has 6 x ME11 posts taking the budget £30K over the original amount but we could remove one of the ME11 posts in a case work stream (this allows some cover for the cost of salary retention [in respect of the claimant]. With 5 x ME11 posts we still have one more ME11 post than there are workers that would be assimilated into them.”

72. On 7 November 2019, the respondent announced its amended and final early help restructure. Before this the claimant was told that, as a result of the amendments to the restructure, he would be assimilated into a post of deputy manager of the family well-being service, which was two grades lower than his current post, with two years’ salary protection. In the original version of the restructure, the claimant was assimilated into a post at his current grade. The respondent’s explanation for the amendment to the original restructure was that it concluded that the two managers reporting into Ms Jones needed to be qualified social workers. Because Ms Jones was not a qualified social worker, her reports needed social work qualifications. The claimant did not have a social work qualification.
73. Although the respondent’s policy required it to have a grievance meeting within 12 days, the grievance meeting did not take place for 2 months on 21 November 2018. Mr James McGinlay was the respondent’s Assistant Director for Sustainable Communities. He was responsible for services relating to the physical environment such as highways, commercial property management, and building control. He had five direct reports and an overall team of about 100. He worked a 5-day full-time role compressed into a three-day week.
74. Mr McGinlay was asked in early October if he would be the investigating officer for a number of grievances, including the claimant’s grievance. The respondent was looking for a person of Assistant Director level with availability. Mr McGinlay was told by HR that there were 3 (subsequently 4) grievances relating to Ms Evans which should be investigated by the same person. Mr McGinlay held a number of meetings with HR. According to his statement, Mr McGinlay was very busy but “no other assistant director was available. Decided that I was the best place to deal with the grievance. Undertaking multiple grievances at the same time a lot of additional duties into my already busy working week.”
75. Mr McGinlay stated that he had to set up meetings with the various members of staff and familiarise himself with the grievance process and forms. He described the grievances, whilst having some commonalities, as complicated and lengthy. He also needed to learn about the structures within the relevant directorate and the restructure. The tribunal accepted Mr McGinlay’s evidence that this was a complex process which took considerable time to understand - when he had the time available to do so.
76. Mr McGinlay requested that an external investigator be considered. However, “I understand that this was rejected based on the number of factors including cost, the fact that an outside investigator would have to had familiarise themselves with our policies and procedures and sourcing a suitable individual would delay matters.” Mr McGinlay feared that, unlike an outside investigator, he would not be seen as sufficiently independent.

77. According to Mr McGinlay, “there was also some discussion about (Ms Wardell) commissioning some race equality advice for me... I did not ask (Ms Wardell) to provide this as I thought that HR would be able to provide race equality advice I might need. Later on 7 January 2020 (HR) sent me definitions of race discrimination.” The tribunal had sight of this, being seven short paragraphs providing no more than a brief definition of the different types of discrimination under the Equality Act. It referred to links to other documents which were not enclosed.
78. Mr McGinlay said that he told HR he could not commit to the normal grievance timescales but “I would do my best” in light of his heavy work commitments.
79. According to the claimant, he and Mr McGinlay met on 21 November to discuss the grievance. Mr McGinlay asked the claimant to clarify his grievance and the claimant refused to do so. The claimant accepted he became upset. Mr McGinlay understood the grievance to be that the restructure was Ms Evans bringing to fruition a long-standing desire to delete the claimant’s post and see him dismissed. The claimant said he felt he was the victim of race discrimination and that Ms Evans was responsible. The claimant said that respondent “could do better with regard to equalities”. The claimant said Ms Evans had conflicting interests between the restructure and her private business interests.
80. Mr McGinlay told the claimant that there would not be a decision before Christmas. He provided notes of the meeting on which the claimant commented.
81. Ms Evans stated it was on 27 November that she first found out that the claimant’s grievance (against her in part) included allegations of race discrimination. Until then she had understood it to relate only to the restructure.
82. On 6 December 2019 Ms Wardell on behalf of the respondent heard the claimant’s appeal against being assimilated into a lower grade post under the restructure. She told the claimant that she had received a number of appeals about the restructure which his claimant was one. She would respond to him on points particular to him and provide a common response to common issues. The claimant stated that he did not believe that Ms Wardell was sufficiently independent to hear the appeals because he understood that she would be signing off the restructure. Ms Wardell stated that HR had advised that because she was not involved in making decisions – as opposed to signing off – she was sufficiently independent.
83. During the hearing, the claimant spoke at length about a number of issues and the tribunal found it difficult to clearly establish the grounds on which he made his appeal. For instance, the claimant went into some detail about historical restructures and job grading. He said he had been told about the original decision in July less than half an hour before the staff presentation. The claimant stated that he did not blame Ms Jones, but Ms Evans, for the reduction in his new grade.
84. Based on the claimant spending some time discussing the employment case of *Royal Mail v Jhuti*, the tribunal concluded that the claimant was in effect saying that Ms Jones had been innocently duped by Ms Evans into demoting the claimant on racial grounds.

85. The claimant said that he disagreed with the fundamentals behind the restructure proposals. He said this was the third restructure of the transforming family service.
86. Ms Wardell wrote to the claimant on 13 December 2019 rejecting his appeal. She dealt with three issues as follows.
87. Firstly, the claimant's complaint that the respondent had unilaterally changed his terms and conditions of employment by means of dismissal. She rejected this on the basis that he was not dismissed but assimilated into a suitable alternative post.
88. Secondly, the downgrading of the assimilated role. She said that the respondent's policy only permitted such a challenge after 6 months in the new role. At this point, the claimant would have an opportunity to challenge.
89. Thirdly, she considered the past issues in the directorate. She considered the motivation for the current restructure. She said this was driven by factors including the cut to the troubled families grant, the need to budget, the need for cuts to balance the budget, and the need to streamline and make more accessible the early help services. The effect of the early help restructure was to cushion the transforming families team from the worst effects of the cuts to its grant.
90. She finished by stating, "Nevertheless I consider your past experience is likely to make you suspect the underlying motivation for the new structure. I sympathise with the concerns you have expressed and I do not rule out that the grievance procedure may find in your favour in relation to past or more recent decisions".
91. Mr McGinlay interviewed Ms Evans about the grievances on 17 December 2019. Ms Evans provided him with a number of emails to support her response and provided her comments on the interview notes.
92. The respondent implemented its restructure. On 24 January 2020 Ms McSherry sent an email to the claimant to say that Ms Jones had fed back to her, "how helpful and supportive you are being with the implementation of the new family well-being service and I wanted to take the opportunity to say thank you for assisting her with this, it is much appreciated." The tribunal took this as evidence that, whatever the claimant's concerns about the restructure and how the respondent had treated him personally, he acted with the utmost professionalism during this period.
93. The claimant presented his claim form to the employment tribunal in January 2020.
94. Mr McGinlay wrote to the claimant on 24 January stating he aimed to complete all the grievance interviews by the end of February 2020. In the event he completed the interviews by 17 February. That day he emailed HR saying he was concerned that "a lot of the issues raised across all four of the grievance hearings that I have been undertaking related to issues of alleged racism and discriminatory behaviour towards black members of staff.... I am requesting that I am assisted by some external independent advice with experience and skills in this area to provide a critical friend... This will provide assurance to the staff... that the council has taken this matter seriously. Can you advise how this advice will be forthcoming."

95. HR forwarded his email to Ms Wardell saying that when Mr McGinlay had agreed to take “this complex group of grievances” it had been discussed that “a potential flaw could be due to the racial nature of many aspects of the complaints that he was a white male”. HR provided Ms Wardell with a costing of about £800 a day. However, in the end this was refused. Mr McGinlay believed HR were concerned about setting a precedent and data protection issues as well as cost.
96. Mr McGinlay took annual leave in March 2020 and then the country went into Covid lockdown. Mr McGinlay’s then transitioned permanently to homeworking. He said the pandemic and lockdown “dramatically affected” his work. He had daily meetings and had to deal with the respondent’s response to lockdown. The tribunal accepted this evidence because lockdown had a fundamental impact on local authority functions and many of those reporting to Mr McGinlay were key workers.
97. According to his statement, in July/ August 2020 with the easing of restrictions Mr McGinlay started to go back to his normal day job although he was still heavily involved in Covid matters. He resolved one of the grievances but not the claimant’s. Mr McGinlay said he was then taken up with reacting to the changes in lockdown and economic activity through summer and autumn 2020. He accepted that “work on the grievances stalled” and it was not until early 2021 that he gave them “the time and consideration they required”.
98. The respondent sent Mr McGinlay’s decision on the grievance to the claimant on 9 April 2021, over 18 months after the claimant had submitted the grievance.
99. Mr McGinlay’s decision characterised the claimant’s grievance as Ms Evans having discriminated on racial grounds and having been unfair in her treatment of black members of staff during the restructuring process. Further, she had abused her power in relation to private business interests and had underlined the claimant’s management role during restructure.
100. Mr McGinlay expressly did not consider the restructure in general but only the assertion as to racial discrimination in certain posts, and Ms Evans undermining the claimant. Mr McGinlay said that he would not consider the restructuring process and the decision to in effect downgrade the claimant on the stated grounds that he lacked a social work qualification, because this was outside of his remit. Nevertheless, he made a finding that the changes to the claimant’s role were not racially discriminatory but due to the requirements of the role and the claimant’s lack of a social work qualification.
101. Mr McGinlay did not find that Ms Evans discriminated against Mr Young on 21 March because the external funder had cut funds which endangered Mr Young’s post. Therefore, there was no race discrimination.
102. He found that Ms Evans had undermined the claimant in the meeting of 21 March 2019 and subsequent communications. He also “would expect manager to have been informed that the staff were due to receive (redundancy) letters and to be communicated ...and I do not see evidence of this”. He pointed out this would enable a manager to provide pastoral support particularly in a major staff restructure. The claimant should have been informed “as a matter of course”. He found that Ms Evans handled the situation in a way that could be seen as undermining the claimant.

103. Mr McGinlay stated that he did not intend to comment substantively on the conflict of interest business allegations against Ms Evans because this had been considered by an internal audit review.
104. Mr McGinlay concluded that there was poor communication between the senior management and teams during the restructuring proposals and process but that there was no evidence to suggest Ms Evans was racially motivated. He recommended the respondent apologise to the claimant for his understandably feeling undermined by the handing out of the redundancy letters and the meeting on 19 March 2019.

### **The Law**

105. The law in respect of discrimination is found in the 2010 Equality Act as follows: –

#### **13 Direct discrimination**

(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.

...

(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.

#### **26 Harassment**

(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.

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(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.

#### **27 Victimisation**

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

(a) B does a protected act, or

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

(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.

136 Burden of proof

This section applies to any proceedings relating to a contravention of this Act.

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.

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

106. The law in respect of protected disclosures is found in the Employment Rights Act 1996 as follows: –

43B Disclosures qualifying for protection.

(1) In this Part a “qualifying disclosure” means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

...

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

...

47B Protected disclosures.

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

(1A) A worker (“W”) has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a) by another worker of W’s employer in the course of that other worker’s employment, or

(b) by an agent of W’s employer with the employer’s authority,

on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker’s employer.

(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker’s employer.

(1D) In proceedings against W’s employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—

(a) from doing that thing, or

(b) from doing anything of that description...

**Submissions**

107. The respondent provided a written skeleton argument and also made oral submissions. The claimant made oral submissions.

**Applying the law to the facts**

Direct Race Discrimination Section 13 Equality Act 2010

108. In this case, the acts relied upon by the claimant were not inherently discriminatory, therefore (as per *James v Eastleigh Borough Council* [1990] IRLR 572), the Tribunal must look for the operative or effective cause. This requires consideration of why the alleged discriminator(s) acted as they did. Although their motive will be irrelevant, the Tribunal must consider what consciously or unconsciously was their reason? This is a subjective test and is a question of fact.
109. The tribunal reminded itself of the guidance in *Nagarajan v London Regional Transport 1999 ICR 877, HL* (a case under legacy race legislation) as follows,
- ‘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.’
110. It does not matter if the decision-maker was consciously or subconsciously racially motivated. The tribunal asks why they acted as they did.
111. The Tribunal also had regard to the comments of Lord Phillips, then President of the Supreme Court, in *R (E) v Governing Body of JFS* [2009] UKSC 15, also a case under legacy race discrimination. In deciding what were the grounds for discrimination, a Tribunal is simply required to identify the factual criteria applied by the respondent. This is simple shorthand for determining whether the prescribed factor operated on the alleged discriminator’s mind. Whilst any discriminatory reason must be an effective cause of treatment, it does not have to be the only reason.
112. The Equalities and Human Rights Commissions Employment Code states that the protected characteristic needs to be a cause of the less favourable treatment, but it does not need to be the only or even the main cause.
113. Further, the House of Lords in *Najaragan* stated that for discrimination to be made out “racial grounds” (the material test at that time), it must have a significant influence on the decision. According to *O’Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor 1997 ICR 33, EAT*, the discriminatory reason does not have to be the main reason, as long as it is an effective cause. See also the judgment of the *Employment Appeal Tribunal in Amnesty International v Ahmed* [2009] IRLR 884.
114. As to the burden of proof, the Tribunal directed itself in line with the guidance of the Court of Appeal in *Igen Ltd v Wong and Others* CA [2005] IRLR 258. At the first stage, the Tribunal has to make findings of primary fact. It is for the Claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of discrimination. At

this stage of the analysis, the outcome will usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal. It is important for Tribunals to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination and in some cases the discrimination will not be an intention but merely an assumption.

115. The Court of Appeal reminded Tribunals that it is important to note the word “could” in respect of the test to be applied. At the first stage, the Tribunal must assume that there is no adequate explanation for those facts. At this first stage, it is appropriate to make findings based on the evidence from both the Claimant and the Respondent, save for any evidence that would constitute evidence of an adequate explanation for the treatment by the Respondent.

116. However, the burden of proof does not shift to the employer simply on the Claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination. “Could conclude” must mean that a reasonable Tribunal could properly conclude from all the evidence before it; see *Madarassy v Nomura International* [2007] IRLR 246. As stated in *Madarassy*: -

“the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal could conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination”.

117. If the Claimant does not prove such facts, the claim will fail.

118. If, on the other hand, the Claimant does prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed the act of discrimination, unless the Respondent is able to prove on the balance of probabilities that the treatment of the Claimant was in no sense whatsoever because of her protected characteristic, then the Claimant will succeed.

119. The Tribunal also directed itself in line with *Hewage v Grampian Health Board* [2012] UKSC 37 that the burden of proof provisions will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. They have nothing to offer where the tribunal is able to make positive findings on the evidence one way or the other.

120. In *Laing v Manchester City Council* [2006] ICR 1519, the EAT stated that:

“No doubt in most cases it will be sensible for a Tribunal formally to analyse a case by reference to two stages. But it is not obligatory on them formally to go through each step in each case... An example where it might be sensible for a Tribunal to go straight to the second stage is where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question whether there is such a comparator – whether there is a prima facie case – is in practice often inextricably linked to the issue of what is the explanation for the treatment, as Lord Nicholls pointed out in *Shamoon* .... it must surely not be inappropriate for a Tribunal in such cases to go straight to the second stage. ... The focus of the Tribunal’s analysis must at all times be the question of whether or not they can

properly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a Tribunal to say, in effect, “there is a nice question as to whether or not the burden has shifted, but we are satisfied here that, even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race.”

121. In *Chief Constable of Kent Constabulary v Bowler EAT 0214/16* Mrs Justice Simler (then President of the EAT) stated that tribunals,
122. “...must avoid a mechanistic approach to the drawing of inferences, which is simply part of the fact-finding process. All explanations identified in the evidence that might realistically explain the reason for the treatment by the alleged discriminator should be considered. These may be explanations relied on by the alleged discriminator, if accepted as genuine by a tribunal; or they may be explanations that arise from a tribunal’s own findings.’
123. In respect of each of the five acts relied upon by the claimant, the tribunal considered whether the respondent acted as alleged, whether any such conduct amounted to less favourable treatment, and if so whether this was because of the claimant’s race, as follows.
124. *Ms Evans excluding the claimant from discussions about the early help restructure prior to July 2019.*
125. It was not disputed that the claimant was not included in the planning for the early help restructure after the conclusion of the work of the task and finish group. It was not disputed that the members of staff engaged in discussions about the early help restructure at the material time were white, Ms Evans, Ms Jones, Ms Brown as well as Ms McSherry and Ms Parkinson. However, applying *Madarassy*, this was not sufficient on its own for the burden of proof to pass to the respondent. The tribunal had to consider whether it could reasonably and properly conclude from all the evidence before it that that the reason the claimant was not included in discussions was his race.
126. The tribunal concluded from the evidence that the reason the claimant was not included was not his race for the following reasons. The claimant was involved by the respondent, including Ms Evans, in the earlier discussions which fed into the restructure. From the list of attendees at the task and finish group, the claimant, the team leader at the Bond Road contact site (which team was also included in the early help restructure) and the Multi Agency Safeguarding Hub team leader were the only team managers attending the task and finish group. The other attendees appeared to be of higher seniority, Heads of Service and the like.
127. His involvement ceased once the process moved to the next stage, implementing the work of the task and finish group into an actual plan. Those involved in the restructure were all at higher levels of seniority than the claimant. There was no suggestion that, for instance, the Bond Road team manager (who was white) was involved in the early help restructure after the task and finish group completed its work. It was credible that the respondent, considering a large-scale sensitive reorganisation, could only practically

proceed by limiting consideration to a small number of people. It had taken steps to obtain soundings from a wider group of lower-level managers including the claimant via the task and finish group.

128. Whilst the tribunal did not understand the claimant to be relying on Ms Brown/Doyle as an actual comparator, it understood him to be asking the tribunal to draw inferences from the fact that she, a white person, at a lower grade and seniority than himself, was party to the discussions. The tribunal did not draw such inferences because there was a good reason why Ms Doyle was involved. Because the decision-makers and planners for the early help restructure were few in number, and had senior management responsibilities to carry out, they needed in effect a secretariat function. There was no suggestion from the claimant that he had the availability or the skills to perform this function. This was illustrated by the fact that on 24 July he was unable to take his lunch until 5 PM, although this was a very busy day due to the stabbing. The tribunal was informed that Ms Doyle was available, and the documents show that she performed the function, for instance by preparing job descriptions.
129. *Ms Evans not inviting the claimant to the adolescent family service management meetings between 18 July and 6 December 2019.*
130. The tribunal found that there were no adolescent family service management meetings during this period. This was due to school holidays and the lack of clarity as to the shape of the service following the ongoing restructure. This was the respondent's case, and the tribunal did not understand the claimant to say that there were any such meetings at the material time.
131. *Ms Evans excluding the claimant from a discussion about cases involving gangs and serious youth violence on 21 March 2019.*
132. It was agreed during the hearing that the date of 21 March 2019 was an error, and the claimant was referring to the stabbing incident on 24 July 2019. It was not in dispute that when Mr Shipman the senior manager approached the youth justice team, there was a discussion about how to proceed and the claimant was not involved. It was not in dispute that the claimant was nearby at the time although he did not overhear. Therefore, it would have been necessary to actively seek him out. Ms Evans did inform the claimant within about an hour, but her purpose was not to seek his input, but to inform.
133. Events later that day illustrated that the failure to involve the claimant in the discussion about the stabbing was an error. Once the claimant and his team were involved, the decision to keep the club open was reversed. The claimant was not only the operational lead for gangs but also a specialist in youth violence. Therefore, even if the stabbing was not gang-related (and tribunal was not in a position to make such a finding), the claimant was an obvious person to involve in the discussion with obvious knowledge and skills that might be useful. Further, he was physically nearby. Ms Evans accepted on 2.9.19 that she was wrong not to have involved the claimant at first. As a result, the tribunal accepted that the burden shifted to the respondent.
134. The Claimant having proved on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed the act of discrimination, the burden passed to the Respondent to prove on

the balance of probabilities that the treatment of the Claimant was in no sense whatsoever because of race.

135. The tribunal accepted that the respondent had discharged the burden on it for the following reasons. There was no real challenge to this being an unplanned ad hoc discussion. Mr Shipman approached the youth justice team, the obvious first point of contact. The claimant, as he told Ms Evans in their email discussion, did not criticise Mr Shipman for this. The tribunal heard no evidence to indicate that stabbings were a regular occurrence and therefore concluded that staff would be reacting to an unusual situation. The tribunal found Ms Evans evidence - that this was a spur of the moment discussion rather than a planned meeting - to be plausible in these circumstances.
136. The tribunal noted that no one in the discussion, which included two senior managers – Mr Shipman and Ms Evans then and two other youth justice team members, contacted the claimant. Whilst Ms Evans was the manager and therefore had a responsibility to lead, her failure to contact the claimant did not set her apart from other participants in the discussion.
137. The tribunal also noted that, albeit in very different circumstances, Ms Evans had experienced difficulties when she tried to engage with claimant. She had invited him to his individual consultation meeting in respect of the restructure by calendar invite on 18 July stating, they “would like to discuss the proposed structure and your assimilation with this. Could we meet on Monday?”. This meeting was of self-evident importance to the claimant personally and the Department in general. The claimant agreed that the reason given was to discuss the proposed restructure and his assimilation within this. Nevertheless, he declined the meeting without comment. When Ms Evans sent a second invite to this meeting he again failed to agree to attend and asked for clarity regarding the purpose of the meeting. He continued to fail to attend the meeting and it only took place on 11 September.
138. Whilst this by no means provided a good reason for Ms Evans’ error in failing to seek out the claimant the next morning, it does provide a non-racial motivation for any subconscious reluctance to engage with him that morning. This would be particularly so in an urgent unplanned discussion about a serious and disturbing incident.
139. *Ms Evans not attending the transforming families team meetings from 18 July to 6 December 2019.*
140. Ms Evans agreed that she had not attended any meetings. It was agreed that she had attended transforming families team meetings before July. However, it was not disputed that she had tried to attend the first transforming families team meeting in the period - on 31 July 2019. Unfortunately, the meeting was not going forward and had been left in the calendar in error. Nevertheless, Ms Evans made herself available to the transforming families team that day, but no team member approached her.
141. According to Ms Evans, the next team meeting was in late August 2019 when she was on annual leave.
142. The tribunal considered if the claimant had shown facts on which he could conclude that Ms Evans reasons for failing to attend the meetings during the material period was

because of the claimant's race. In his witness statement he gave unchallenged evidence that he was the only black manager in the adolescent family service out of eight. The claimant contrasted Ms Evans' failure to attend his team meetings with her attendance at meetings of other teams that reported to her, where the manager was not black.

143. The tribunal had sight of documents recording Ms Evans organising a meeting of the youth justice managers, one of her other teams, on 4 September 2019. Ms Evans also attended a meeting of the youth justice team, on 15 October 2019. She stated that the operations manager arranged this specifically to discuss savings targets. Ms Evans said she did not recall attending any of the tackling exploitation team meetings in the relevant period. Although the claimant in his witness statement contended that she had attended meetings of the tackling exploitation team, the document on which relied related only to the youth justice team meeting on 4 September.
144. Ms Evans stated that it was not her usual practice to attend team meetings in her service, including the transforming families team, unless she was invited or there was a specific reason to attend. For instance, it was agreed that she attended a transforming families team meeting on 27 March to provide updates about funding and the restructure. The tribunal noted that the failure to record her as an attendee was consistent with her account that she did not usually attend the meetings.
145. The tribunal did not find that the claimant had shown facts from which it could conclude discrimination. There was no evidence that Ms Evans had attended a tackling exploitation meeting during the material time. There was evidence that she sought to attend a transforming families meeting and made herself available to the team although the meeting did not take place. She organised one meeting for the youth justice team (and was required to attend another budget meeting). The tribunal concluded that there was insufficient evidence to suggest any pattern of her treating the claimant's team differently from other teams.
146. *Ms Jones and Ms Evans discounting the claimant's experience and skills in gangs and serious youth violence work during the consultation period for the restructure and shaping the new service around the skill set and experience of another manager (agreed to be Ms Jones).*
147. The respondent accepted that it had altered its original restructure for the new service to fit around Ms Jones. She did not have a social work qualification and its case was it therefore changed the structure of the new service to ensure that both of her reports had social work qualifications.
148. The tribunal accepted that the effect of the restructure was that the respondent's gang function was split up. In the view of the claimant, the effect of the restructure was to make the respondent's gang function less effective. Before the restructure, there had been a dedicated team led by the claimant, the respondent's lead on gangs, including the dedicated gangs worker, Mr Young. It appears likely to the tribunal that following the restructure, the respondent was less able to take advantage of the claimant's experience and skills in gangs and serious youth violence work. The tribunal accepted that the claimant felt extremely strongly that this would result in a poorer service to the people of Merton and in particular, ethnic minority communities who were at disproportionate risk.

149. The claimant contended that the respondent had failed to take into account the disproportionate adverse impact on ethnic minority communities caused by its restructure. The tribunal accepted the claimant's contention that there was little evidence that the respondent had sought the input of vulnerable groups including ethnic minority groups on this point. The tribunal also accepted the claimant's evidence that there were long-standing concerns amongst local ethnic minority communities that there was insufficient ethnic minority representation in the respondent and in particular at management level. The claimant on a number of occasions made strong representations to the respondent that the restructure would result in local ethnic minority communities losing further confidence in the respondent because resources were not being effectively targeted towards their needs.
150. However, the tribunal accepted the respondent's submission that this was not an indirect discrimination case. The claimant was not arguing that a restructure which failed to meet the needs of ethnic minority communities would have an adverse disproportionate impact on ethnic minority staff. Accordingly, the tribunal did not hear evidence going to this, and was in no position to make findings as to the likely impact of the restructure.
151. The question for the tribunal was whether the claimant had shown evidence from which it could conclude that Ms Evans and Ms Jones discounted the claimant's experience and skills - in circumstances where it altered the restructure to fit around Ms Jones -, because of the claimant's race.
152. The tribunal was concerned that Ms Evans' answer to a question about the relevance of the public sector equality duty did not show that she had been provided with sufficient training to enable her to understand this fully. Her answer focused on the need to avoid race discrimination, rather than a more nuanced understanding of the duty, for instance, to take steps to meet the needs of protected groups where these are different from the needs of other people. The tribunal was not satisfied that the respondent had addressed its mind to the impact of breaking up the respondent's gangs and serious youth violence function as a result of the early help restructure, in light of possible equality impacts.
153. The tribunal also took into account the concerns expressed by local ethnic minority communities about the lack of ethnic minority representation at senior levels in the respondent. The tribunal considered in this context the fact that the claimant was the only black manager in the adolescent and family services prior to the restructure and that he was downgraded as a result of the restructure.
154. As a result of these factors, the tribunal found that the burden had passed to the respondent to show that its treatment of the claimant was in no sense whatsoever on grounds of his race. However, the tribunal found that the respondent had discharged the burden for the following reasons.
155. The respondent had shown a lengthy and detailed paper trail showing that the thinking and process behind the early help restructure was long and deep. It came out of the task and finish group which led into the early help restructure. A decision had been made for reasons that were clearly explained to reorganise the respondent's functions into an early help service. This, by its nature, divided the respondent's services according to whether they were deemed high or low intervention, or to put it another way, early or late intervention. This, of necessity, resulted in services such as gangs – which involved both



early and late intervention being split up. The respondent had explained what it saw as the advantages of the restructure which was an accessible front door for its early intervention services. The consequence, however, was that specialist services such as gangs lost what might be termed their structural integrity. Therefore, the claimant's skills and experience-which covered both early and late intervention - were not a natural fit with the new structure. There was, in effect, not an obvious place to put him.

156. The tribunal went on to consider whether the respondent had provided an explanation for the change in the claimant's grading between the original and final structure of the early help service. The Respondent's explanation was that it became clear that because they had decided early on that Ms Jones would be Head of Service, she needed both her reports to be qualified social workers. The tribunal found it difficult to judge whether this was a wise decision. However, it is not the function of a tribunal to determine whether this was a wise decision but only whether it was a genuine one or - whether consciously or unconsciously - there was a discriminatory motivation.
157. The respondent had a coherent explanation as to why the claimant was downgraded. The respondent had expressly described its first restructure plan as a draft subject to change. The tribunal had sight of flip chart records completed by Ms Jones and Ms Evans and the email of 23 October from Ms Evans which provided some evidence of worked through thinking about options.
158. The tribunal also took into account that one of the two new service managers who was reporting to Ms Jones was, according to the respondent's unchallenged evidence, mixed race. The respondent's evidence was that her grade was increased as a result of the restructure. The tribunal did not place considerable emphasis on this factor because the respondent had not provided statistical evidence as to the race of the staff affected by restructure. Nevertheless, the respondent's evidence was consistent with a non-discriminatory reason for the claimant's downgrading.
159. Accordingly, the tribunal accepted that the respondent had discharged the burden on it of showing that it had not contravened s13.

Race Harassment s26 Equality Act 2020

160. There are three essential elements for harassment claims under section 26(1). There must be unwanted conduct. It must have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment, and it must relate to the protected characteristic on which the claimant relies, in his case his black racial identity. In contrast to a claim for direct discrimination, there is no need to compare the treatment of the claimant to how someone of a different race was or would have been treated.
161. In *Richard Pharmacology v Dhaliwal 2009* [ICR 2009 EAT], (a case brought under legacy discrimination legislation), the Employment Appeal Tribunal recommended a Tribunal address all three elements. Nevertheless, the EAT acknowledged that in some cases there is a considerable overlap between the components of the definition.
162. The Tribunal reminded itself that conduct amounting to harassment must be of significant consequence. It directed itself in line with *Richmond Pharmacology v Dhaliwal* as follows:

“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.”

163. According to the EAT under its President in *Weeks v Newham College of Further Education [EAT 0630/11]*, environment means a state of affairs. Such an environment may be created by a one-off incident, but its effects must be of longer duration.
164. Further, according to the Employment Appeal Tribunal in *Insitu Cleaning Company Limited v Heads 1995 [IRLR 4]*, the question of whether an act is sufficiently serious is essentially a question of fact and degree for the Tribunal.
165. When it comes to the question of perception, the Tribunal reminded itself of *Pemberton v Inwood 2018 [ICR1291]* where the Court of Appeal instructed Tribunals to consider both whether the putative victim perceives themselves to have suffered the effect in question and whether it was reasonable for the conduct to be regarded as having that effect.
166. According to the EHRC Code, relevant circumstances can include the claimant's circumstances such as health, including mental health and capacity, cultural norms, previous experiences of harassment and can also include the environment where the conduct takes place.
167. Finally, the Tribunal reminded itself of the guidance of the Employment Appeal Tribunal in *Reed & Another v Stedman 1999 [IRLR 299 EAT]*, where Tribunals were reminded to take a cumulative approach to whether harassment has been established. It quoted with approval a USA Federal Appeal Court decision: -

“The trier of fact must keep in mind that each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the work environment might exceed the sum of the individual episodes”.

168. *Ms Evans informing Mr Young on 21.3.19 that his post was at risk and the claimant was aware of this.*
169. The tribunal had found that even if Ms Evans did not inform Mr Young of this in terms, that she gave Mr Young to understand that his post was at risk in this meeting.
170. The tribunal also accepted that Ms Evans also gave Mr Young to understand that the claimant had at least some previous knowledge of this. Ms Evans did not deny this in her statement which gave a full account of the meeting and the reasoning behind what she said. Further, in her email to Mr Young she stated, “I had only had the chance to speak to (the claimant) the week before and had not realized how quickly the (funder) meeting

was going to be held.” She also stated that she had asked the claimant to meet with Mr Young about targets.

171. The tribunal went on to consider if this conduct amounted to harassment related to race. Ms Evans’ account was that she had mishandled the meeting by in effect getting into a discussion about targets, and, therefore, funding of Mr Young’s post, without properly thinking it through. She realized that it had been inappropriate to let Mr Young know about the risk to his post in a meeting with a number of his colleagues; this should have been done in a separate meeting. In effect, Ms Evans said that she blundered into saying too much.
172. The tribunal did not find that this amounted to harassment related to race for the following reasons. There was no dispute that there was a genuine problem with MOPAC funding for Mr Young’s post. The claimant and, to a necessarily lesser extent, Mr Young knew that funding was an ongoing problem for the transforming families team and the gangs worker post. According to his witness statement, the claimant was intending to speak to Mr Young about funding issues about his post in supervision later than week. Therefore, Ms Evans had some reason to believe that the claimant had some knowledge of the issue.
173. In the view of the tribunal, Ms Evans allowed herself to get carried away in discussing sensitive matters relating to a junior employee in front of his manager and peers, without warning. In the view of the tribunal, it was yet more unfortunate that she sought to some extent to spread the blame by seeking to blame the claimant. However, the explanation was not racial – Ms Evans did not plan properly and in effect panicked and put some blame on the claimant. Whilst it was not good management, there was no evidence to suggest there was any racial motivation, conscious or sub conscious.
174. *Ms Evans asking Jason Young on 16 May 2019 how he felt about the idea of moving to the TEXT team*
175. There was no dispute that Ms Evans asked Mr Young this. The tribunal again accepted the claimant’s case that this was unprofessional of Ms Evans, and that the claimant could reasonably feel undermined by her doing this. Even though the Early Help restructure was ongoing, nothing had yet been announced. It would have been at the least common courtesy from a senior manager to mention to Mr Young’s manager that she was offering Mr Young the chance to move teams. The claimant, the tribunal understood, felt that Ms Evans was in effect trying to “poach” Mr Young.
176. However, if Ms Evans was indeed seeking to “poach” Mr Young, this provided a non-racial motive for her not telling the claimant first. Further, if Ms Evans had a racial motive for not telling the claimant, this did not fit particularly well with her trying to poach a black, rather than, say, a white, member of staff. There was no dispute that there were funding problems with Mr Young’s post. There was no suggestion that Mr Young’s moving teams would exacerbate this. Accordingly, the tribunal did not find that this amounted to harassment related to race.
177. *Ms Evans maintaining that she was not involved in the Early Help restructure planning and decision-making.*

178. According to the claimant, Ms Evans said words to this effect at a transforming families team meeting some time before the launch of the restructure. Further, she said this again at the Adolescent and Family Service meeting on 16 July. Mr Nelson corroborated this in his statement. The tribunal accepted that Ms Evans to a noticeable extent did seek to distance herself in front of staff from her being involved in the restructure.
179. The claimant's case, the tribunal understood, was that Ms Evans said this to the transforming families team because the manager, the claimant, was black. However, there was no suggestion that she had said anything different to her other teams, with white or non-black managers. Such a suggestion would have been inconsistent with her, on the claimant's case, saying a similar thing in the AFS meeting on 19 July 2019 before staff of different racial identities including a number of white staff. Accordingly, the tribunal did not find that Ms Evans' conduct was related to race.
180. *Ms Evans telling some of the claimant's staff on 18.7.19 that the claimant was fully aware of the direction of travel re: the restructure.*
181. The difficulty for the tribunal in making findings on this allegation was that the claimant was not present when Ms Evans allegedly made this remark. His account was that he heard about it from staff who were present, i.e., second hand. Ms Evans' account was that she did not recollect saying this. Ms Evans recalled one of the claimant's team, Ms Thompson, telling her that the claimant had told her (Ms Thompson) nothing about the restructure. Ms Evans then told Ms Thompson about the team meeting she had attended on 27 March when she told the transforming families team it would be part of the early help restructure. There was no dispute that she had done this.
182. In the circumstances, there was insufficient evidence to find that Ms Evans had told the claimant's team that the claimant was well aware of the direction of travel on 18 July. The tribunal only had one account of this meeting and it was not incoherent or implausible on its face.
183. *The respondent failing to treat the claimant's grievance of 25.9.19 seriously.*
184. The Tribunal reminded itself that it could only consider any failings by the respondent in respect of the grievance up to the date the employment tribunal claim was presented, 14 January 2020. Nevertheless, the tribunal was satisfied that the respondent's conduct in respect of the grievance after 14 January 2020 could shed a useful light on the respondent's conduct up to that date. Nothing specific occurred on 14 January 2020 was no reason to believe that the respondent's motivation changed after that date.
185. The tribunal found that the respondent had failed to treat the claimants' grievance seriously up to 14 January 2020. The respondent instructed a senior member of staff, Mr McGinlay. He very soon brought to the respondent's attention the fact that he had very limited time to deal with the four complex and interlocking race discrimination grievances. In the view of the tribunal, it was self-evident that Mr McGinlay would require considerable support, in light of his working a five-day week compressed into three days. Any doubt as to this was removed by Mr McGinlay asking the respondent to consider an external investigator.

186. This was exacerbated by Mr McGinlay's having to, in effect, start from ground zero on the grievances. He needed to learn about complex department structures in the middle of a restructure. Further, the tribunal found that Mr McGinlay did not have the personal or structural resources to carry out grievances involving race discrimination. Mr McGinlay was the respondent's own witness and it relied on his evidence that he tried to source support on race discrimination. All that was provided was a scant few paragraphs setting out definitions under the Equality Act. These paragraphs purported to link to further (presumably explanatory) documents but there was no evidence before the tribunal that they did so. The tribunal found that this was, self-evidently, unlikely to assist Mr McGinlay.
187. Accordingly, despite knowing that Mr McGinlay had very little time to carry out complex grievances, Mr McGinlay telling the respondent on more than one occasion that he could not keep to the procedural timetable but could only do his best, and that he was asking for help and support in respect of race discrimination grievances in particular, the respondent simply left Mr McGinlay to get on with it.
188. Further, the claimant's grievance meeting was not plain sailing. He refused to clarify his grievance, in circumstances where Mr McGinlay needed help. He became upset at the meeting. The tribunal was not surprised that it took Mr McGinlay in these circumstances until February 2020 to complete interviews.
189. He then immediately formally requested, because the grievances involved serious allegations of race discrimination against a member of staff, that he be provided with relevant advice and experience to assist him. This was not forthcoming.
190. After this, the grievance in effect fell victim to covid and lockdown. The tribunal, including its lay members, has considerable experience of employers who carried out thorough grievance and/or disciplinary processes during lockdown. Whilst the tribunal might understand that covid and lockdown causing some delay, it could not understand how there was a delay of over a year from the start of lockdown. There was no indication from Mr McGinlay's statement that HR or anyone from the respondent checked up on the progress of the grievance.
191. The tribunal found that up to 14 January 2020, the respondent did not take the grievance seriously for the following reasons. It assigned a manager, Mr McGinlay, who brought to its attention his lack of personal and structural resources. It failed to provide him with the resources he requested. The second request for support in respect of discrimination resulted in no more than a few scant paragraphs of minimal if any use. The fact that after 14 January it refused Mr McGinlay's request for support after he had finished his investigation, was corroborating evidence of this failure to take the grievance seriously. The fact that the respondent made, based on the evidence before the tribunal, no attempt to check up on the progress of the grievance for a year from March 2020 was further corroborating evidence.
192. The tribunal therefore considered if the respondent's treatment of the grievance related to race. There were a number of problems with the way the respondent approached the grievance but the majority of these related specifically to race. Mr McGinlay made several attempts to tell the respondent that he did not have the necessary skills and experience for a race grievance. He singled out the race elements of the grievance as where he needed support and help, both before embarking on his investigation, during the

investigation, and afterwards. The tribunal found it was the fact that the claimant's grievance was one of race discrimination which led to many of the respondent's failing.

193. The tribunal considered if the respondent's treatment of the claimant's grievance violated his dignity. The tribunal was not considering if the grievance was well-founded, rather it considered if the failure to treat it seriously violated the claimant's dignity up to 14 January 2020. The tribunal directed itself in line with *Betsi Cadwaladr University Health Board v Hughes and ors EAT 0179/13*:-

'The word "violating" is a strong word. Offending against dignity, hurting it, is insufficient. "Violating" may be a word the strength of which is sometimes overlooked. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence'.

194. The tribunal accepted that the respondent's failure to treat the grievance seriously up to mid-January 2020 was not the most serious violation of dignity, compared for instance to a physical assault. Nevertheless, a black employee's dignity was violated by such a disregard for a serious grievance about race discrimination. This was exacerbated by the other circumstances of the case – the claimant's grievance being one of four overlapping grievances. Further, there were objective reasons to treat the grievance carefully. The only black manager in a restructure was downgraded. In such circumstances, the claimant could expect the respondent to take allegations seriously. He sought to put his faith in his employer to investigate and it failed to take it seriously.

195. The tribunal also accepted that the treatment of the grievance amounted to a humiliating environment for the claimant. The humiliating environment for the claimant started, the tribunal found, when the respondent failed to comply with its own procedural timelines in respect of the grievance.

196. The tribunal accepted that the claimant perceived the treatment to have the proscribed effect. His evidence before the tribunal was coherent and plausible. The tribunal further accepted, for the reasons set out above, that it was reasonable for the claimant to feel that way.

197. Accordingly, the tribunal found that the failure to treat the claimant's grievance seriously up to the date he submitted his tribunal claim form constituted unlawful harassment related to race contrary to section 26.

198. *Ms Wardell ruling against the claimant's appeal despite a number of relevant issues were part of a live grievance investigation.*

199. There was no dispute that this had occurred.

200. The tribunal's finding that the grievance failures amounted to a breach of section 26 did not necessarily mean that Ms Wardell's deciding the disciplinary during the grievance investigation also amounted to harassment. Most relevantly, when Ms Wardell made her decision on 6.12.19, the claimant would not have expected his grievance to take another 16 months.

201. The tribunal did not find that this treatment was related to race. Ms Wardell was responsible for hearing appeals against a large-scale restructure involving many staff. This was one of the last steps in this large-scale project. The respondent had been working towards this for over a year. It was intending to implement the restructure imminently if it had not already done so. The respondent's process was that an appeal against re-grading could only occur after 6 months. In the view of the tribunal, Ms Wardell did not engage with the crux of the claimant's appeal – that Ms Evans had targeted him and that the entire restructure proposals were a bad idea.
202. However, the tribunal did not find that Ms Wardell's failure to pause the appeal came within the conduct proscribed by s26 and nor was it related to race. Whether rightly or wrongly, Ms Wardell as the senior manager faced with a large restructure going live would be extremely unlikely to accept at this late stage that the principles behind the restructure were unsound or to pause appeals. She had a clear non-discriminatory motive to keep to the schedule over any appeals.
203. *Ms Evans inviting the claimant to a consultation meeting with Ms Jones on 19.7.19.*
204. The tribunal could not find that this amounted to proscribed conduct under s26. The respondent was required to invite all affected staff to an individual consultation meeting. The tribunal was unclear why the claimant objected to this meeting, beyond the fact that he objected strongly to the post into which he was to be assimilated at the time – a post he said he was bound to refuse. He did refer to the interview being with two Heads of Service, but the tribunal could not see how this was disadvantageous. He was a senior employee being assimilated into a different post. There were no grounds to find that it was related to his race.
205. *Ms Evans handing out at risk of redundancy letters to member of the claimant's team without his knowledge on 22 July 2019.*
206. The tribunal had found that the claimant knew that his team were to receive the at risk letters, but he did not know that they were going to be handed to them, rather than, say, emailed. Considering the claimant's statement that he had lost the opportunity to reassure staff that they were not singled out, the tribunal understood the claimant's complaint to be the fact that some affected staff were handed letters on 24 July, but not others. This inevitably led to considerable confusion, which might have been mitigated if he had been involved and informed.
207. The tribunal had found that, in effect, the handing out of redundancy letters was badly mishandled by Ms Evans and the respondent. It was badly done. Ms Evans accepted that it was a "missed opportunity" to involve and inform the claimant beforehand. Mr McGinlay in his grievance outcome stated that he would have expected the claimant to have been informed as a matter of course, so that he could offer pastoral support. Mr McGinlay found this could be seen as undermining of the claimant.
208. The tribunal considered if Ms Evans' conduct was related to race. The tribunal found that it was not, for the following reasons. Ms Evans had attempted to meet with the claimant concerning the restructure. Whilst the meeting on 19 July was to discuss the claimant's position, nevertheless, the claimant simply failed to attend the meeting. In addition the claimant had walked out of a meeting on 17 July with Ms Evans when she started to

discuss the restructure. Whatever the rights and wrongs of this, the claimant had lost out on opportunities to be more involved in discussions about the restructure and how it impacted his team. Further, and more significantly, the tribunal found that the entire way the respondent handled the letters left a great deal to be desired. The letters were not ready at the launch meeting. In handing out the letters, Ms Evans was playing "catch up". HR advised Ms Evans she had to do it by hand so she could only hand letters to staff who happened to be present. This was another reason that it would have been far wiser to have involved the claimant.

209. The tribunal, echoing Mr McGinlay, could see why the claimant felt undermined and very frustrated. In effect, he had to deal with the fall out of the respondent's poor behaviour on his team. However, in circumstances where the claimant had failed to engage with Ms Evans about the restructure in two meetings (including walking out of one meeting) and her being involved in a very poorly executed redundancy exercise, the tribunal did not find that the reason the claimant was not consulted was his race.
210. *Ms Evans speaking to members of the claimant's team in his absence about vacancies in the Youth Justice Team and encourage them to apply around late July/ early August 2019*
211. The tribunal did not find that this amounted to proscribed conduct under section 26 for the following reasons. It was not clear that Ms Evans deliberately sought to avoid the claimant when speaking to his team. However, if she did, it was not surprising by this stage. The claimant had still failed to attend his individual consultation meeting. He had made it clear to Ms Evans at 5pm on 24 July that he did not want to engage with her. He told her that their exchange had removed his appetite. There were non-discriminatory reasons for her not to want to engage with him.
212. In any event, the tribunal could not find anything objectionable in Ms Evans encouraging members of the transforming families team - who were at risk of redundancy - to apply for vacancies. It was in the staff's interest to be encouraged to apply for available jobs in a redundancy situation.
213. The tribunal finally considered whether viewing the respondent's conduct holistically, it amounted to unlawful harassment. There was no evidence that the respondent's failings over the grievance were related to Ms Evans or Ms Jones, the other alleged discriminators. The treatment of the grievance was a discrete matter. Accordingly, the Tribunal did not find that viewed holistically respondent's conduct- other than that in respect of the grievance - amounted to unlawful harassment.

Victimisation under section 27 Equality Act 2010

214. The tribunal considered whether the four putative protected acts amounted to protected acts under section 27.
215. *The claimant's counterproposal to the restructure of 16 September 2019.*
216. The tribunal considered whether this amounted to an alleged contravention of the Equality Act under section 27(2)(d) or an act done for the purposes of or in connection with the Equality Act under section 27(2)(c).



217. The claimant in his counterproposal referred to the need to show due regard to the equality and diversity implications of the restructure. He stated that proposed restructure appeared to disregard these key issues. He referred to a risk of backlash from BAME communities. He said he was currently the only operational lead from a BAME community.
218. The tribunal accordingly found that the claimant's counterproposal was an act done for the purposes of or in connection with the Equality Act as it expressly raised Equality Act issues.
219. *The claimant's grievance of 25 September 2019 (page 883)*
220. The grievance stated in terms that it was complaining of racial discrimination. The claimant's began "I have been undermined as a manager and subjected to racial discrimination and abuse of power by Roberta Evans" The tribunal accordingly found that the claimant's grievance was an act done for the purposes of or in connection with the Equality Act as it raised in terms Equality Act issues.
221. *The claimant's grounds of appeal and what the claimant said in his appeal meeting on in December 2019*
222. In his appeal letter of 13 November 2019, the only reference to potential equality matters was a reference to the claimant wanting to see the equality impact statement. Accordingly, the tribunal did not find that the letter of appeal was in itself a protected act.
223. However, in his appeal meeting the claimant, according to the minutes, stated that "discrimination is not about people saying the "n" word, it is usually more subtle than that". He also said, "the further up the organisation the whiter it becomes". He referred in terms to racial discrimination. The tribunal accordingly found that the claimant's statements in the appeal meeting were an act done for the purposes of or in connection with the Equality Act.
224. *The employment tribunal claim form of 22 January 2010*
225. The bringing of any legal proceedings under the Equality Act comes within the definition in section 27 (2) (a) and is accordingly a protected act.

#### Causation

226. The Tribunal directed itself in line with *Igen Limited and Others v Wong and Others 2005 [ICR931]* where the Court of Appeal clarified that for an influence to be significant, it does not have to be of great importance. It is 'an influence which is more than trivial. We find it hard to believe that the principle of equal treatment will be breached by the merely trivial'.
227. Further, the Tribunal bore in mind the comments of the Employment Appeal Tribunal in *Villalba v Merrill Lynch & Co Inc and Others 2007 [ICR469]*: -

'We recognise that the concept of 'significant' can have different shades of meaning but we do not think it could be said here that the Tribunal thought that

any relevant influence had to be important ... if in relation to any particular decision a discriminatory influence is not a material influence or fact, then in our view it is trivial'.

228. Accordingly, the Tribunal considered whether any of the protected acts were a material influence on the respondent subjecting the claimant to any of the detriments relied upon.
229. The first set of detriments relied on were the same as the acts relied upon under section 13. The tribunal only considered those acts which it had accepted had occurred.
230. *Ms Evans excluding the claimant from discussions about the early help restructure prior to July 2019.*
231. This occurred prior to the first protected act, being the counterproposal of 16 September 2019. To the extent that there was any exclusion after 16 September, this was in relation to the reconsideration of the restructure following receipt of the counterproposals.
232. The tribunal did not find that the claimant's counterproposal had any influence on the way that Ms Evans and the respondent continued not to include the claimant in discussions. The claimant had not been included in discussions for reasons set out in full by the tribunal above since early 2019. The failure to include the claimant after receipt of the counterproposal was nothing more than a continuation of the respondent's previous practice. There was no reason to suspect that the respondent was influenced in continuing what it had done before by the claimant's counterproposal. This was corroborated by the fact that there was no suggestion that the respondent, following receipt of a counterproposal from another member of staff, included that member of staff in the discussions.
233. *Ms Evans excluding the claimant from a discussion about cases involving gangs and serious youth violence on 21 March 2019 (in reality 24 July 2019).*
234. This occurred prior to the protected acts.
235. *Ms Evans not attending the transforming families team meetings from 18 July to 6 December 2019.*
236. Some of this conduct occurred before the first three protected acts and some after. In respect of the conduct after 16 September 2019, the tribunal had found for reasons set out under section 13 Equality Act, that there was insufficient evidence to suggest any pattern of her treating the claimant's team differently from other teams.
237. *Ms Jones and Ms Evans discounting the claimant's experience and skills in gangs and serious youth violence work during the consultation period for the restructure and shaping the new service around the skill set and experience of another manager (agreed to be Ms Jones).*
238. The tribunal considered any conduct from 16 September, which covered the period when Ms Jones and Ms Evans amended the original restructure specifically to fit around the fact that Ms Jones did not have a social work qualification, resulting in the claimant being downgraded two grades. As set out above under section 13, the tribunal gave detailed

reasons why found that there were non-discriminatory reasons for the way that the early help restructure, and the downgrading of the claimant's role were handled.

239. The tribunal did not find that the references to potential racial issues and racial discrimination in the counterproposal had a material influence on the decision to change the new structure so that the two managers reporting to Ms Jones both had social work qualifications for the following reasons.
240. The counterproposal referred to the claimant as the only manager in the respondent's virtual gangs team. However, the counterproposal was in no way focused on allegations of race discrimination against the claimant personally. There was a single reference to the claimant's race and seniority in a proposal of over fourteen pages. The thrust of the counterproposal was that the proposed restructure had a disproportionate adverse impact on ethnic minority communities and that it was wrong to break up specialised gangs and serious youth violence team.
241. In effect, the claimant's counterproposal disagreed radically with the fundamentals behind the early help restructure. His counterproposal was intended to retain specialised functions such as gangs and serious youth violence, rather than in effect break these up according to how serious a matter was and what intervention it required. As the tribunal found for the reasons set out above, the decision to organise the respondent's functions horizontally (that is according to the level of intervention) rather than vertically (that is according to specialism) was baked into the early help restructure from the beginning. Ms Evans and the respondent had by September 2019 put very considerable resources into this. The changes determined after receipt of the counterproposals did not change in any way the fundamentals of the restructure. The changes simply amended the way that the new horizontal non-specialised structure was organised.
242. Accordingly, the Tribunal found that the equality references in the claimant's counterproposal from the claimant had no impact on the amendments to restructure decided upon after 16 September.
243. The second set of detriments relied on were the same as the acts of harassment relied upon under section 26.
244. *Ms Evans informing Mr Young on 21.3.19 that his post was at risk and the claimant was aware of this.*  
*Ms Evans informing Mr Young on 21.3.19 that his post was at risk and the claimant was aware of this.*  
*Ms Evans asking Jason Young on 16 May 2019 how he felt about the idea of moving to the TEXT team*  
*Ms Evans maintaining that she was not involved in the Early Help restructure planning and decision-making.*  
*Ms Evans telling some of the claimant's staff on 18.7.19 that the claimant was fully aware of the direction of travel re: the restructure.*  
*Ms Evans inviting the claimant to a consultation meeting with Ms Jones on 19.7.19.*  
*Ms Evans handing out at risk of redundancy letters to member of the claimant's team without his knowledge on 22 July 2019.*  
*Ms Evans speaking to members of C's team in his absence about vacancies in the Youth Justice Team and encourage them to apply around late July/ early August 2019*

245. These predated the protected acts.

246. *The respondent failing to treat the claimant's grievance of 25.9.19 seriously.*

247. The Employment Appeal Tribunal under its then President (Langstaff P) in *A v Chief Constable of West Midlands Police EAT 0313/14* considered a complaint of victimization on the basis of a failure to investigate a complaint fully (emphasis added):-

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

23. Here, therefore, there was significant work to be done, one might think, to get a victimisation claim off the ground where the essential complaint was that the Force narrowed the scope of the complaint because the Claimant had made a complaint. Put that way, it is not very promising. It might be different in some circumstances. An example might be if the particular nature of the complaint meant that it would not be discussed or dealt with in a way in which other complaints of a different nature would. For instance, if a particular employer found the prospect of dealing with a complaint of sexual harassment embarrassing to the extent that it took no action on such a complaint when otherwise it would have a duty to do so, or there was a well-established expectation that the complaint would be dealt with, it is in my view possible that a Tribunal might conclude that the omission to act, if it caused the victim of the alleged harassment a detriment in terms of the particular effects of her disappointed expectations, could conceivably come within the scope of victimisation. But it has to be said that regard to the section and words itself suggests that this is likely to be a rare event, for it postulates no particular adverse response to the making of a complaint apart from the fact of simply failing to deal with it...

248. The EAT was, in the view of the tribunal, troubled by the potentially circular nature of the reasoning that a failure to investigate a protected act in itself can amount to subjecting a claimant to a detriment because of that same protected act. A failure to properly investigate a complaint would rarely amount to victimization because of a protected act, where the protected act was the raising of the complaint itself.

249. However, the EAT expressly stated that if the particular nature of the complaint meant that it would not be treated as other complaints were, that might, in appropriate circumstances, amount to victimization under section 27. The conclusions of the EAT, albeit under its President, as to this exception were strictly obiter.

250. The tribunal viewed a failure to treat a grievance seriously as analogous to failing to investigate a complaint. Mr McGinlay did seek to investigate but he was not provided, in his view, with the tools to deal with the grievance properly, despite requests.
251. The tribunal had found that many of the respondent's shortcomings in its treatment of the grievance were because the grievance related to race discrimination. The tribunal had found that the race-related failings amounted to unlawful race harassment under section 26, as set out above. However, there were other shortcomings such as the choice of a grievance officer who did not have the time to investigate promptly. The tribunal had not found that this choice was because of or related to the fact that the grievance related to race.
252. From the start, the grievance officer expressly signaled to the respondent that he needed support to deal, specifically, with the race discrimination elements of the grievance. He repeated this call for assistance in January. The importance to the grievance officer of these two appeals was corroborated by his asking again for assistance after the date the claim form was submitted. There was no indication that Mr McGinlay had or would have requested help in dealing with a grievance related to, for instance, holiday entitlement. The fact that there were other reasons, apart from the race discrimination element of the grievance, which adversely affected how the respondent dealt with the grievance, did not mean that the race aspects were not important. The tribunal found that the race aspects were important, material and significant, and thus the causation test was made out.
253. Accordingly, the tribunal found that many, but not all the shortcomings in the grievance procedure were due to the fact that it was a race discrimination grievance.
254. The tribunal determined, again in light of *A v Chief Constable of West Midlands Police EAT 0313/14*, that the respondent's failures to take the grievance seriously amounted to a detriment up the date the claim was submitted to the tribunal. (The EAT expressly found an omission can amount to a detriment). This was because, by this time, the respondent had materially failed to comply with its timescales for grievances. The claimant had, or was entitled to have, a well-founded expectation that his grievance, making serious allegations, would be treated seriously and promptly. However, the tribunal noted that much of the detriment the claimant suffered occurred after the submission of the claim form, particularly the remarkable delay from March 2020 to April 2021.
255. *Ms Wardell ruling against the claimant's appeal despite a number of relevant issues were part of a live grievance investigation.*
256. When making her decision to rule against the claimant's appeal whilst the grievance was still live, Ms Wardell was aware of the grievance and what the claimant said in the appeal meeting. It was not clear whether she was aware of the counterproposal. However, the grievance expressed in clear terms the claimant's allegations of race discrimination.
257. The question for the tribunal was whether the allegations of race discrimination in the grievance and what the claimant said at the appeal had a material influence on her decision to proceed and reject the claimant's appeal.
258. The tribunal made detailed findings as to why Ms Wardell failed to uphold the claimant's appeal. The tribunal did not find that specific allegations of race discrimination had a

material influence on this. The allegations in the grievance were proceeding under the grievance procedure and at that point there was no evidence that Ms Wardell was aware of any problems with the grievance procedure.

259. Ms Wardell's failure to agree to provide any specialist support to Mr McGinlay in determining the race discrimination elements of the grievances was of a piece with her refusing to change tack on the process of the appeal because of an allegation of race discrimination. She failed to make any amendments to the respondent's procedure in respect of the race discrimination grievance despite Mr McGinlay's requests. She failed to make any amendments to the appeal schedule despite the claimant's grievance.

#### The Equality Act Time Point

260. The only act of discrimination found by the tribunal was the failure to treat the grievance seriously from early October 2019 to 14 January 2020. The tribunal had no difficulty in finding that this amounted to a continuing act. The respondent continued to fail to take the grievance seriously during this period.

#### Detriment following a public information disclosure

261. Under statute, a qualifying protected disclosure is made up of a number of elements.
262. Section 43B firstly requires a disclosure of information and fact. According to the Court of Appeal in *Kilraine v London Borough of Wandsworth* [2018] ICR 1850: -

“In order for a statement or disclosure to be a qualifying disclosure ... it has to have a sufficient factual content and specificity such as is capable tending to show one of the matters listed...” There must be a “minimum factual content”.

263. Secondly, the worker must reasonably believe that the disclosure was made in the public interest and tends to show one of the relevant failures under section 43B.
264. It is well established that if a worker incorrectly believes that a relevant failure under section 43B has occurred, this does not necessarily prevent there being a protected disclosure. To put it another way, there can be a protected disclosure even if the worker is wrong. The tribunal must be careful to assess the reasonableness of the worker's belief in the facts known to them at the time, not the facts later established by the tribunal. The Tribunal reminded itself of the distinction set out by the Employment Appeal Tribunal in *Soh v Imperial College of Science, Technology and Medicine EAT 0350/14* (a case where the worker had no personal knowledge relating to the relevant failure) between saying, 'I believe X is true' and 'I believe that this information tends to show X is true'.
265. The tribunal also directed itself in line with the case of *Darnton v Surrey* [2003] IRLR 133 at paragraph 29: -

“In our opinion, the determination of the factual accuracy of the disclosure by the tribunal will, in many cases, be an important tool in determining whether the worker held the reasonable belief that the disclosure tended to show a relevant failure.... The relevance and extent of the employment tribunal's enquiry into the factual accuracy of the disclosure will, therefore, necessarily depend on the circumstances of each

case. In many cases, it will be an important tool to decide whether the worker held the reasonable belief that is required by s.43B(1). ... We consider that as a matter of both law and common sense all circumstances must be considered together in determining whether the worker holds the reasonable belief. The circumstances will include his belief in the factual basis of the information disclosed as well as what those facts tend to show. The more the worker claims to have direct knowledge of the matters which are the subject of the disclosure, the more relevant will be his belief in the truth of what he says in determining whether he holds that reasonable belief.

266. The question of whether a worker has a reasonable belief under section 43B(1) is a mixed objective and subjective test. The worker must themselves genuinely believe that the information disclosed tends to show one of the relevant failures. In addition, that belief must be objectively reasonable for someone in the worker's personal situation and with their personal characteristics, including their skills and knowledge. It is not a question of whether a hypothetical reasonable person would have had that belief, but whether a reasonable individual with the personal characteristics of the worker would have had that belief.
267. According to the Employment Appeal Tribunal in *Korashi v Abertawe Bro Morgannwg University Local Health Board*, the threshold for the reasonable belief is a low one.
268. The tribunal therefore considered whether either of the putative disclosures relied on by the claimant were protected by section 43B.
269. *Information supplied in the claimant's formal grievance dated 25 September 2019 concerning an alleged failure by Roberta Evans to disclose information to the Police.*
270. This information was contained in a half paragraph of a seven-page grievance. It stated that a confidential email was sent to respondent managers including the claimant and Ms Evans in 2018. The police had asked if the respondent was aware of a person involved in gangs and serious youth violence work whom the police were treating as a person of interest. This person was, like Ms Evans, an associate of a private company Wardell Associates, however Ms Evans did not disclose this at the time.
271. The tribunal had sight of the original email dated 16 November 2018 from the Respondent's Head of Community Safety to Mr Shipman and the claimant, copied to Ms Evans. It asked if anyone was aware of the respondent using a named individual who was subject to investigation. Mr Shipman and the claimant promptly replied that they were not aware. Mr Shipman raised a link to Wardell Associates. Ms Evans stated that Wardell Associates had provided some training about 3 years ago. The claimant informed Ms Evans that he did not recall the specific individual providing the Wardell Associates training. She replied to senior managers that the any potential link to the respondent was 3 years ago.
272. Ms Evans had made a formal declaration of interest in respect of Wardell associates in April 2018 stating that she was a consultant. She provided further information on 26 July 2018 to senior managers including Ms Wardell stating she had a personal working relationship with them, and they commissioned her to deliver training.

273. The tribunal accepted that the grievance disclosed sufficient factual information which in the claimant's reasonable and genuine belief tended to show that there was a failure to comply with a legal obligation. The question was not whether the claimant was correct as to whether or not there had been a failure to comply with any legal obligation, only whether it was reasonable for him to believe so. The tribunal found that it was reasonable for the claimant to believe that there was a legal obligation on a senior local authority employee to comply honestly with requests for information from the police. Further the Tribunal accepted that it was reasonable for the claimant to believe that this matter was in the public interest; this was self-evident.
274. The tribunal found that the claimant's belief was genuine as his distrust in Ms Evans was demonstrated by the allegations he made against her. It was not clear how the conflict of interest allegations were relevant to the main thrust of the grievance, which was race discrimination and the restructure. This, the tribunal found, indicated that the claimant felt strongly about these matters and was convinced his concerns were genuine.
275. Accordingly, the tribunal found that information concerning the alleged failure by Ms Evans in respect of the person subject to police investigation amounted to a qualifying protected disclosure under section 43B Employment Rights Act.
276. *The information supplied in C's formal grievance dated 25 September 2019 concerning an alleged failure by Roberta Evans to disclose a conflict of interest*
277. In his submissions the claimant stated that he did not proceed with this as a protected act.

#### Causation

278. The tribunal went on to consider the question of causation, which is what if there was any influence did the protected disclosure have on the decision-makers in respect of any detriment.
279. According to the House of Lords in *Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL*, "detriment" means suffering a disadvantage of some kind. Whether something that amounts to a detriment must be assessed from the point of view of the victim. It is not necessary for there to be physical or economic consequences. An action or failure to act may amount to a detriment.
280. The tribunal went on to consider whether the claimant was subjected to a detriment on the ground that he had made the disclosure. The tribunal directed itself in line with *Fecitt and ors v NHS Manchester (Public Concern at Work intervening) 2012 ICR 372, CA*. A tribunal must determine whether the protected disclosure materially (that is more than trivially) influences the decision-maker who subjected the claimant to detriment.
281. The case law recognises that it is relatively rare for an employer to admit that it has subjected a worker to detriment for making a protected disclosure. On many occasions a tribunal will be invited to draw inferences to this effect. The Employment Appeal Tribunal under its President in *International Petroleum Ltd and ors v Osipov and ors EAT 0058/17* set out at paragraph 115 the correct approach to the burden of proof as follows:



(a) the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure he or she made.

(b) By virtue of s.48(2) ERA 1996, the employer (or other respondent) must be prepared to show why the detrimental treatment was done. If they do not do so inferences may be drawn against them: see *London Borough of Harrow v. Knight* at paragraph 20.

(c) However, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found.

282. The claimant informed the tribunal at the hearing that the detriment on which he relied was being informed of his new, downgraded position in the amended restructure. The tribunal accepted that this was a detriment as the claimant was demoted by two grades and received only 2 years of salary protection.
283. The tribunal did not find that the claimant had discharged the burden of proof on him to show that a more than trivial reason for his being downgraded in the amended restructure was the protected disclosure, for the following reasons. Whilst the protected disclosure was made shortly before the decision to change the restructure, the disclosure did not relate to a recent matter. It related to a matter in 2018.
284. There was no evidence before the tribunal to indicate that it was in any sense a live or relevant matter for the respondent or Ms Evans. In his grievance, the claimant implied that there was potentially some wrongdoing on Ms Evans' part in her failure in November 2018 to state her association with Wardell Associates.
285. The tribunal did not accept that Ms Evans might be motivated against the claimant by brief and not entirely clear reference to a matter that was over a year old. The salient allegation made by the claimant appeared to be that Ms Evans had not disclosed her association with Wardell Associates (in circumstances when the named individual was also associated with them). However, Ms Evans had made a formal conflict of interest disclosure in respect of Wardell Associates earlier that year, which was on the respondent records. In the view of the tribunal, it was unlikely that the claimant was aware of this conflict-of-interest declaration, or he would not have made the allegation.
286. The tribunal accepted that a manager can be negatively influenced by an incorrect public interest disclosure, even if they have nothing to hide. But the tribunal did not find that this occurred in this case. This was a relatively minor matter which was over a year old. Ms Evans and Ms Jones were concerned with a large-scale restructure. There was also no substantive evidence that Ms Evans was aware that the claimant had raised this matter (in half a paragraph) in his grievance until after the decision to downgrade the claimant was made.
287. Although the claimant did not rely on his disclosure in respect of Ms Evans' conflict of interest in respect of her business interests, for the avoidance of doubt, the tribunal would not have found that any such protected disclosure had a material influence on Ms Jones and Ms Evans' decision to assimilate the claimant into a downgraded role. The evidence in the bundle showed that Ms Evans had made a formal conflict-of-interest

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disclosure in respect of her private business interests. Further, her interest in the private businesses was later discussed in terms with senior management when the respondent was considering contracting with such companies to provide training. Further, there was also no substantive evidence that Ms Evans was aware that the claimant had raised this matter in his grievance until after the decision to downgrade the claimant was made.

Employment Judge Nash

Date 9 May 2023