EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 8000020/2024

Hearing held at Dundee on 26, 27, 28, 29 August 2024

Employment Judge McFatridge
Tribunal Member E Hossack
Tribunal Member T Lithgow

Miss N Wallace	**Claimant** **Represented by:** **Mr Russell,** **Solicitor**
Dundee City Council	**Respondent** **Represented by:** **Ms Morrissey,** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that the tribunal has no jurisdiction to hear the claimant's claims as they are time barred. The claims are dismissed.

REASONS

1. The claimant submitted a claim to the tribunal in which she claimed that she had been unlawfully discriminated against on the basis of sex and pregnancy/maternity by the respondent. The respondent submitted a response in which they denied the claims. They made the preliminary point that all or part of the claims were time barred. The case was subject

to a degree of case management. During the course of this the claimant's new representative who had not been instructed at the time the ET3 was submitted provided further and better particulars of claim. The claimant confirmed that the claims being made were pregnancy/maternity and sex discrimination in terms of both section 18(2)(a) and 18(3) and section 13 of the Equality Act. They also indicated there was a claim of victimisation under section 27 of the Equality Act. In addition to this they made claims under sections 80G and 80H of the Employment Rights Act 1996 in relation to the claimant's flexible working request. At a preliminary hearing it was decided that the issue of time bar would be dealt with at the final hearing of the claim. At the final hearing the claimant gave evidence on her own behalf. Evidence was led on behalf of the respondent from Lynne McBean Practice Manager with the respondent who had been responsible for the team the claimant had previously worked in which had subsequently been disbanded, Yvonne Beattie another Practice Manager with the respondent who had been involved in managing the claimant's return to work following pregnancy, James Ross a Senior Manager with the respondent who had dealt with the claimant's grievance and David Berry who was Acting Chief Officer of the Health and Social Care Partnership who had dealt with the claimant's grievance appeal, Stephen McClure a Team Manager with the respondent who had become the claimant's Line Manager also gave evidence on behalf of the respondent. A substantial bundle of productions was lodged and added to during the course of the hearing. On the basis of the evidence and the productions the tribunal found the following essential facts to be proved or agreed.

Findings in fact

2. The respondent is Dundee City Council who are a local authority. The claimant commenced employment with the respondent on 7 May 2018. She was employed as a Family Support Worker. Her statement of employment particulars was lodged (pages 50-54). Under Place of Work it stated:-

> "Your place of work is Ardler Social Work Office, c/o Ardler Primary School, Turnberry Avenue, Dundee DD2 3TP. You may be

required to work at such other place of employment in the Council's service as required."

3. As a Family Support Worker the claimant's role involved supporting social workers in assessment and rehabilitation work. She carried out home visits and supervision of contact, supporting families in the community.

4. Initially when the claimant commenced employment the social workers and family support workers were organised into teams. This was subsequently changed with the workers organised into localities. The Practice Manager would oversee three or four locality teams. The claimant's Line Manager was a Senior Family Support Worker Alison Hughes. She in turned reported to a Senior Team Manager who up until 2022 had been a Sonia Montgomery. Ms Montgomery then reported to a Practice Manager who was Lynne McBean. Lynne McBean reported to a further manager above her Alison Thewliss and that manager reported to the Service Manager who was a Glynn Lloyd. In late 2022 Sonia Montgomery left and the claimant's team was without a Senior Team Manager. For various reasons the team at that time was fairly low in numbers comprising just four social workers, three family support workers and the senior family support worker. When Sonia Montgomery left in the late summer of 2022, Lynne McBean took over the supervision of the team directly on a temporary basis whilst a replacement was sought for Sonia Montgomery. The claimant continued to be line managed by Alison Hughes the Senior Family Support Worker.

5. In or about February 2022 the claimant discovered that she was pregnant. This was whilst the team was still managed by Sonia Montgomery. The claimant had a history of miscarriages and was told the pregnancy was high risk. She had a Haemotoma. The claimant's blood group is O negative and any bleeding could have negative implications for the baby's health if the baby was a different blood group. The claimant discussed her pregnancy with Alison Hughes. The claimant was advised by her midwife to have a risk assessment carried out at work in early course.

6. In or about 10 April 2022 the claimant was involved in an incident where a female service user was verbally aggressive to her and threatened the

claimant. The service user threatened to “kick that bairn oot o’ her”. No actual physical assault took place but the claimant was shaken by the incident. Following the incident she submitted a violent incident report form which was lodged (pages 140-142). The claimant was absent on sick leave from 11 to 24 April.

7. A risk assessment was carried out on 12 May 2022. A copy of this risk assessment was lodged (pages 60-61). It noted that the claimant’s due date was 18 October 2022 and that the claimant was due to go on maternity leave from September 2022.

8. In the meantime, it was noted that the claimant as a pregnant mother was at particular risk due to Covid and that as a general rule in addition to advice regarding social distancing, car sharing and computer sharing only in emergencies the respondent had a policy that it would be appropriate for expectant mothers to work from home from the twentieth week of pregnancy onwards. The claimant discussed matters with Alison Hughes and Sonia Montgomery. The claimant’s role as Family Support Worker did not lend itself to working from home. The claimant’s mother worked for a part of the Social Work Department called MASH. Her mother worked from home. The claimant knew that this team was busy and arrangement was made that the claimant would move to the MASH team so that she could work from home once she reached the twentieth week of pregnancy. The claimant moved to the MASH team from the beginning of July.

9. The respondent’s legal obligation to carry out a risk assessment in terms of the Management of Health and Safety at Work Regulations 1999 was not engaged until the claimant submitted her MATB1 form which was dated 1 July 22. The form was lodged (page 58). By this time the risk assessment had already been carried out some seven weeks previously (on 8 May 22) and indeed the arrangement had already been made for the claimant to start at MASH and work from home with effect from July 22.

10. Although the claimant moved to the MASH team and commenced working from home from the beginning of July she was advised that her Line Manager for all HR purposes would remain as Alison Hughes. She would

only be managed by the management of the MASH team in respect of day to day work allocation and similar matters. Everything to do with other HR functions was to be dealt with by Alison Hughes. The claimant had a close relationship with Alison Hughes and spoke to her often. She considered her a friend. Although the claimant was working from the MASH team she kept in contact with her colleagues in her previous locality team. She had lunch with them. She also attended a leaving do for Sonia Montgomery. The intention at that time was that the claimant would continue working in the MASH team until she went on annual leave in September prior to her expected date of confinement of 18 October. She would then be returning to her locality team after her maternity leave was complete.

11. As noted above Sonia Montgomery who was the Team Leader left in the summer of 2022. Initially a recruitment exercise was undertaken and an individual who already worked within the Council was appointed to replace her. Unfortunately, that individual was then offered another post and decided not to proceed with her application to be manager of the locality team. Lynne McBean who had been Sonia Montgomery's manager had been managing the locality team on an ad hoc basis during the period after Sonia Montgomery left. She had been prepared to do this on the basis that the period during which she would be managing the team would be short lived and would effectively only be for a period of six to eight weeks before the new person took over. Once she found that the new person appointed would not be taking up the role she was aware that the role would then require to be externally advertised and the period before a replacement could be found would be much longer. Having discussed the matters with her own manager she decided that it would not be safe for the team to continue being simply managed by her. She simply did not have the time or spare capacity to carry out the appropriate level of supervision.

12. As a result, she decided that she would temporarily allocate the social workers and family support workers within the team to other locality teams. Essentially they would take their own case work with them but instead of being managed as one locality team by her, each worker would be allocated to another different team and managed by the manager of that

locality team. This would mean that the manager of that other team could supervise them to the appropriate level to ensure that their practice was safe.

13. At that time, the claimant was already working for the MASH team. Ms McBean saw no need to speak to her about any changes since effectively there would be no change so far as she was concerned. She would remain working in the MASH team with Alison Hughes as her direct Line Manager up until going on maternity leave and would then return to her team once her maternity leave was over. There was one other member of the claimant's locality team who was in a similar position in that they were currently not working in the team but was working on secondment to a different team. He will be referred to as "Mr. M". She saw no need to advise him of any changes either since so far as he was concerned there would be no changes and he would continue to be managed in the same way that he was already being managed. Ms McBean invited the other members of the team to a meeting which was to take place on Friday 16 September. As it happens Alison Hughes was not invited to the meeting either since it transpired she was on holiday that week. On 14 September Ms McBean sent an email to the members of the team who were being invited (all but three). The email was lodged (page 62). She said:-

> "Hi all
> I have sent a calendar invite for Friday at 10am for Claverhouse for us to get together – Alison is attending. Can you all please prioritise this meeting and if there are any contacts etc I will try and get cover for them.
> Regards"

14. The meeting duly took place on the morning of 16 September. It was attended by all of the members of the team apart from the claimant, Alison Hughes and Mr M who was the team member who was already seconded to another team. The meeting was chaired by Lynne McBean who was accompanied by her manager Alison Thewliss. Those present were told that as a temporary measure they were all being allocated new line managers and would be managed within different locality teams. Ms

McBean did not use the word disbanded and those present were advised that the intention was that once a new Service Manager had been recruited then the team would be put back together.

15. Immediately after the meeting, as Ms McBean and Ms Thewliss were walking back through the open plan office they happened upon Mr M. Alison Thewliss took the opportunity to advise Mr M what was happening although she said it would not affect him since he was already being managed outwith his previous locality team.

16. During the course of the 16th the claimant was contacted by various colleagues and became concerned as she understood that her job might be at risk in some way.

17. At 15:28 that afternoon she emailed Lynne McBean. The email was lodged. She stated:-

> "Subject – Seeking clarification
> Hope you are well
> Just looking for some clarification. I have heard from a few different professionals this afternoon that there are rumours that locality 2 has been disbanded? I'm obviously quite confused regarding this as I have not heard anything?"

Ms McBean responded at 20:19 on 19 September stating:-

> "Hi Nicola
> No the team is not being disbanded – at this time the workers are moving temporarily to other teams to be managed directly. This is due to the Team Manager post appointment not coming to fruition at this time.
> Are you currently on maternity leave?"

Ms Wallace responded at 7:30am the next day stating:-

> "Oh I had no idea at all so what happens to my post? No I don't leave until 3rd October unless a baby appears before then that is!" (page 63)

Ms McBean then responded stating:-

> "Hi, sorry I thought you were already on mat leave and Alison was on holiday. The team has been temporarily dispersed as it was felt that the team needed a direct line manager and that the temp cover by me was not sustainable. Hopefully we can get a resolution to the situation in the next 3-6 months.
> Apologies. Your post is still in the locality team and you will still be managed by Alison during the mat leave as you are now.
> I haven't had a change to speak to Alison as yet as she only comes back from AL today.
> Hope the rest of your pregnancy goes well.
> Just get in contact with me directly if you need anything else."

18. Thereafter the claimant duly went on maternity leave commencing on 3 October 2022. She had a daughter who was born on 12 October 2022. All went well with the birth.

19. During her maternity leave the claimant remained in contact with Alison Hughes her Line Manager. The claimant saw her contact with Alison Hughes as more in the way of a friend keeping in touch than any formal process. She met with Alison Hughes on three occasions and exchanged a substantial number of telephone calls and texts with her. During these conversations Alison Hughes did not provide her with any information in relation to what she would be doing when she returned from maternity leave or which team she would be allocated to.

20. At some stage in or about January or February 2023 the respondent made a decision that they would not fill the post of Team Manager for locality team 2 which was the team the claimant had previously worked for. They decided to allocate the funding for this post to a different post in another area of social work. Ms McBean attended a meeting in January where this proposal was discussed however at that stage no final decision was made. It is unclear at what point the decision became final. No formal steps were taken at this time to advise the former members of locality team 2 that this would be what was happening. It was simply left to the individual Line Managers to cascade the information down to the Social Workers and

Family Support Workers involved to the effect that their temporary allocation to be managed in their new teams would now be permanent. The claimant was not formally contacted but heard of the change from other former members of the team. The claimant discussed the matter with Alison Hughes who told her that she could not say much as she was herself now in a different team.

21. In anticipation of her return to work the claimant completed a flexible working request form and submitted it to the Council via Alison Hughes on or about 19 February 2023. The completed form was lodged (pages 66-70). In it the claimant stated:-

> "I would like consideration to be given to reduce my hours to 18.5 hours per working week on temporary basis for 12 months. Preferably over Wednesday full day, Thursday full day and Friday half day due to childcare arrangements.
>
> I wish to return from maternity leave officially on 29 May 2023 however as previously discussed with my manager I have a large amount of annual leave which I would wish to take from 29 May until the 18th August (60 working days) meaning I would return from annual leave to start work on 21 August. This would ensure I'm not return to work with a large amount of annual leave carried over.
>
> Also once a post has been identified for me I could then arrange KIT days however that does not feel appropriate to arrange these at the moment in time given I am unsure of which team/role this will be in."

22. The respondent have a policy for dealing with flexible working requests. This was lodged at page 146-147. With regard to timescale it states that the council will deal with a request for flexible working within three months of its receipt and that an extension to this time limit can only be made with the employee's agreement. It also states at point 3:-

> "3.1 Your manager will arrange a meeting with you to discuss the request as soon as it is practically possible and certainly within 28 calendar days of their receipt of the request. They will invite you to attend in writing.

> 3.2 Your manager will aim to give their response to your request at that meeting and to confirm the response in writing within 14 calendar days.
>
> 3.3 If your manager does not give their response at the meeting they must do so in writing within 14 calendar days of the meeting."

There are provisions for an appeal against the full or partial refusal of any request.

23. In practical terms flexible working requests are extremely common within the Social Work Department and are almost invariably granted. They are however usually granted for a maximum period of six months. This is so that both sides can see how things are working out and give the employee the opportunity to seek to review the detailed arrangements after six months. Within certain teams virtually everyone is working on the basis of a flexible working request.

24. Although the request was submitted on 19 February the claimant was not invited to a meeting to discuss it within 28 days.

25. In terms of sections 80F and 80G of the Employment Rights Act 1996 a request for a contract variation such as a flexible working request requires to be dealt with by the employer in a reasonable manner. The employer is required to notify the employee of the decision on the application within the decision period. The decision period is the period of three months beginning with the date on which the application is made or such longer period as may be agreed by the employer and the employee.

26. On 12 April Yvonne Beattie who was now the Practice Manager, having taken over from Lynn McBean sent an email to Alison Hughes who was the claimant's line manager. The email was lodged (pages 80-81). It stated:-

> "Hi Alison
>
> I have spoken with Karen Bowie and Janice Spence, Nicole will be placed in Janice's team on her return from maternity leave, can you advise her of this. Can you liaise with Janice and pass on the

temporary reduction in hours request Nicole completed and Janice can then make contact with Nicole to arrange KIT days etc.
Janice, Alison has advised Nicole that her request to work reduced hours will be for a six month period and then reviewed. Nicole is aware that her post is a FTFSW one and that we would not be reducing this to a part time post. It is important that Nicole knows this and the temporary reduction in working hours will not be a long term arrangement so she can if she wishes consider her options if PT working is something she wants on a permanent basis."

27. On 12 April Alison Hughes contacted the claimant by telephone. She asked the claimant how she was. She also said that she believed that a post had been found for the claimant and that someone would be in touch. She would be working on the Adolescent 2 team which would be managed by Janice Spence. She also told the claimant verbally that her flexible working request had been approved but only for six months. During the call the claimant told her that she needed definite confirmation of this since she had a provisional nursery place booked for her return to work and needed to know that the exact times she wanted had been approved. Alison Hughes told her that someone from management would be in touch. The claimant felt that the call was simply an informal one and she had been doing the school run when she took the call on her mobile. She anticipated that someone from management would be in touch to discuss matters with her in more depth to confirm the post and to confirm her flexible working request. She anticipated that she would get something in writing about her flexible working request.

28. It is not clear what contact there was between Alison Hughes and Janice Spence (if any) prior to an email which Alison Hughes sent to Janice Spence on 22 May 2023 some weeks later. This email was lodged (page 80). It stated:-

"Good afternoon Janice
I'm aware that Nicole Wallace is due back from maternity leave at the end of this month the 28th May and she is coming back to a post in your team. I sent you Nicole's flexible working request on 12 April 2023 and Nicole is aware that when she returns it is to your

team. Have you had any correspondence with Nicole in regards to this? Nicole is still attached to me in terms of management and annual leave etc. Nicole will have annual leave to use prior to returning to post and I am just wondering if there was anything that needs to be done in terms of her return to work, will it be me that does this or you?"

Ms Spence responded almost immediately stating:-

"Hi Alison, I haven't had any contact with Nicole and it may be helpful to organise a meeting with Nicole to discuss her return to work. I see Nicole intends to take annual leave to take her up to 21 August. Has she requested this via my view? Did you authorise the reduced hours as think there needs to be a further discussion around this? I would not be agreeing to 12 months at 18.5 hours." (page 79)

Alison Hughes then responded a few minutes later stating:-

"Yes Nicole intends to take annual leave we had discussed this prior to her maternity leave last year and agreed this in principle. This hasn't been requested yet but we would expect Nicole to do this this week, I'm not sure if she needs to be returned to work by a manager before she can take annual leave."

I have not authorised her reduced hours as it was clear from the outset that I was not going to be her manager on her return, because of this it was sent initially to Lynne then forwarded to Yvonne who then emailed me to tell me that I needed to send this to you. I then sent this to you on 12 April once it was identified that she would be coming to your team. I was told by Yvonne to make Nicole aware that her reduction in hours would be temporary for six months and would be reviewed at this point. I did on the 6th April which was obviously prior to it being identified she was coming to your team."

Ms Spence then responded a few minutes later stating:-

> "Can we set a date for a meeting? I can do Tuesday 6th June any time thanks."

Alison Hughes then responded stating:-

> "I can do 6 June in the afternoon is this with Nicole too? Could we do it at Linlathen, the meeting room here is free in the afternoon." (page 76)

Janice Spence then responded to ask if 3.30 was okay. On Thursday 25 May Alison Hughes wrote an email to Ms Spence stating:-

> "Yes that's fine for me you didn't say if you wanted Nicole at this meeting but I have spoken to her and she is not available that week. Do you want to go ahead with just us or rearrange?"

29. There is then no further contact and it would appear the meeting on 6 June did not actually happen. There was an email from Alison Hughes to Janice Spence dated 8 June 2023 (page 76) stating:-

> "Good afternoon Janice. My apologies for getting mixed up about Tuesday's meeting. I did call later on Tuesday afternoon and left you a voicemail. Do you want to arrange another time and do you want this meeting with Nicole?"

Ms Spence then responded on 3 August stating:-

> "Hi Alison, could we arrange a meeting with Nicole prior to her starting in my team. I can do Tuesday 15 August 2pm at Claverhouse?"

Ms Hughes then responded on 4 August stating:-

> "Hi Janice I'm sorry I can't do 15 August I am out of town on 14 and 15 August, can you offer any other times at week, if you could give a couple of times then I can check with my diary and Nicole what is best for us all. Happy to meet at Claverhouse."

Ms Spence then responded on 4 August stating:-

> "I can do next Monday 9 August at 2pm or Friday 11 August at 1pm." (page 74)

Ms Hughes then writes later on on 4 August stating:-

> "Hi Janice I have spoken with Nicole this afternoon to discuss a time for meeting. Nicole told me that she has being signed off work sick and has been issued with a fit note." (page 74)

Ms Spence responds saying:-

> "Thanks for letting me know how long is it for?" (page 73)

On 7 August Alison Hughes responds stating:-

> "Hi Janice, Nicole has been signed off for one month. I have received Nicole's sick line today and she is off sick as of today and I have recorded this on the sickness absence system and logged her fit note."

Ms Spence then writes to Ms Hughes on 7 August stating:-

> "Thanks, what is her reason on the fit note?"

Ms Hughes then responds stating:-

> "Hi Janice, her fit note states her absence is due to depression and anxiety, work related stress."

30. In the event no such meeting took place between the claimant, Ms Hughes and Ms Spence since matters were overtaken by other events.

31. As noted above the claimant had received a call from Ms Hughes on 12 April stating that her flexible working request had been approved for six months and that a new post had been identified for her in Janice Spence's team. The claimant had expected to hear further from management and for there to be a formal response to her flexible working request. As noted above the claimant saw her conversations with Alison Hughes as more in the context of a friendship rather than in a line manager-employee interaction. The claimant became concerned that she was not hearing anything and felt ignored and isolated. The claimant contacted her union

representative Roz Ronan and discussed her concerns. Roz Ronan said she would write to Lynne McBean on behalf of the claimant. Ms Ronan emailed Lynne McBean on 25 May 2023. The email was lodged (pages 173-174). It stated:-

> "Good afternoon Lynne,
>
> I hope this email finds you well and looking forward to the warmer weather.
>
> My query is in regards to our member Nicole Wallace, who has recently been absent from work on maternity leave, and is hoping to return to work after her A/L finishes on August the 21st. She still has not heard from her potential Team Manager who we believe is Janice Spence, and as far as we know Janice is aware of my member going off on A/L from Friday 26th May.
>
> Can I also raise another concern that she has been off for 9 months with her maternity leave, and has not heard from anyone in a management position.
>
> One other point to raise is the flexi working application has only been verbally given but no confirmation regarding to times and days.
>
> I feel there is a lot to be sorted before our member can pick up her role. So, can I suggest a meeting the day of Nicole's supposedly return to work (August 21st) so far I have the whole day free so would appreciate a time slot at your earliest convenience."

Ms McBean responded on 26 May (page 173). She stated:-

> "Hi Roz
>
> My understanding is that Nicole is to be placed in a team which is currently sitting with Yvonne Beattie. I am not sure if the details of this have been finalised.
>
> As Nicole is not due back to work for 3 months I think this gives time for this to be clarified.
>
> I thought Alison Hughes had been in touch with Nicole as her Senior Family Support worker – although she moved teams she had continued to undertake some tasks associated with her previous team.

> I am sure that Yvonne and the team manager will follow up the application for flexible working through discussion with Nicole. I am not clear there would be a meeting on the day she resumes work which would need to involve yourself as the practicalities will have been sorted out before then.
> Yvonne is off this week however will be back Monday to look into this.
> Regards"

The email was copied to Yvonne Beattie. Yvonne Beattie also responded to Ms Ronan on 26 May stating:-

> "Hello Roz
> I can see that Lynne has responded and I concur with her reply. Janice will be in touch with Nicole on her return from leave next week. There will be no requirement for a meeting involving a union representative on Nicole's return to work following her leave. Janice as her line manager can discuss her temporary flexible working arrangements and formally provide written decision and any agreement as per our policy."

This email was copied to Janice Spence. This email would have arrived with Janice Spence shortly after Alison Hughes' email of 25 May (page 77) where she confirmed that Alison Hughes would meet Janice Spence on 6 June but that Nicole could not attend as she was away somewhere on holiday that week.

32. The position at this point was that so far as Ms Beattie and Ms McBean were concerned it was settled that the claimant would be going to Ms Spence's team and Ms Spence would be meeting with her. Her union representative had indicated that the meeting need not take place until 21 August. No formal response had been made to the claimant's flexible working request but the claimant had been verbally told in April that this would be granted for an initial period of six months.

33. Although the claimant's union representative reported back to her the claimant was still concerned that she was hearing nothing concrete. At the beginning of July she decided to submit a formal grievance. The

grievance was sent to Audrey May and Glyn Lloyd of Dundee City Council by email dated 6 July 2023 (page 171). A copy of the grievance itself was lodged (pages 84-85). The respondent's grievance procedure was also lodged (pages 155-160). It is probably as well to set the terms of the grievance (pages 84-85) at length.

34. The claimant stated:-

> "My name is Nicole Wallace and I am currently an employee of Dundee City Council Children and Families Service. I wish to raise a formal grievance and discuss with you my concern regarding my treatment throughout pregnancy and maternity leave.
>
> In February 2022 I discovered I was pregnant. Given the nature of my job role and the risks involved I shared this information with my line manager and Team manager promptly as I understood I would have to have a risk assessment undertaken. I had complications during my pregnancy namely a hematoma on the outside of my placenta which meant I was classed as a high risk pregnancy. I contacted HR for advice re risk assessment who contacted my manager and advised them to undertake a risk assessment asap. This was actioned weeks later and my job role remained the same despite naming some concerns regarding violent or aggressive individuals which I was currently working with at the time.
>
> On the 29th of April I was supervising a contact when I was verbally abused with threats of physical violence towards myself and my unborn baby to my fear and alarm. I discussed this with my manager and an incident report was submitted. My job role remained the same despite this incident however I did complete an incident report.
>
> In July 2022 I was advised I would be undertaking work for the MASH team as my manager felt I could not fulfil my job role working from home given the nature of my job and COVID procedures meant I had to work from home from 20 weeks gestation. I was still managed by my current manager in Locality 2 and still undertook work for this team during this time.

On 16th September a meeting was held by Lynne McBean to discuss the disbandment of Locality 2. All employees of Locality 2 (along with employees currently not working) were invited to this meeting. I was not invited to this meeting despite still working. All employees were advised Locality 2 would be disbanded and were told during this meeting where their new posts would be. All employees were asked their views on their new roles and advised they would try to accommodate as much as possible. On the same day having heard about this from a member of staff in another team within the council, I emailed Lynne McBean to seek clarification and query why I was not invited to this meeting. Lynne advised this was potentially disbandment however hoped it would be temporary however I was not given a new post as I was about to embark on maternity leave a month later.

Since this date I have had very little communication from anyone other than my current line Manager from Locality 2 who is currently based in the kinship Team. I submitted an application for flexible working on 15/02/2023 to request part time hours and was advised I should/would receive a decision within 28 days. On this application I also stated I could not attend KIT days given I had no workplace or team at this time and also supplied my personal email and phone number as I do not have access to work email. This did not happen. I was informed via telephone call with my line Manager from Locality 2 on 12th April 2023 (56 days later) that she had received an email from another manager? Stating I would be moving to the adolescent team and my request had been approved for 6 months re flexible working. There was no further clarification given to this i.e. days/times etc and no formal acknowledgement. I was then told my new manager would be in touch. I have several reservations and anxieties regarding this move however I have no forum or contact to discuss this with. Since this date I have had no contact from anyone within the council. I returned to work on 29th May however I am on annual leave for some time after this however I have no clarification regarding my role or hours. I have now lost a nursery placement for my baby as I have not been in a position to confirm days and hours required and they could not hold a place.

I have been told that the move to the allocated team is not negotiable and given my incident before I undertook maternity leave with an adolescent I have serious anxieties regarding this role. I have visited the GP regarding this on several occasions and have been given medication for anxiety and depression and GP has concerns whether I would be fit to return to work given my mental state and anxieties regarding this role. I do not feel supported by Dundee City Council during my pregnancy and during my maternity leave and have spent my maternity leave anxious about my return to work. I am now due to return to work however with only weeks to go I still have no clarity on anything and have had no contact from anyone to discuss my anxieties. I have been looking for alternative employment whilst on maternity leave as I have such serious anxieties regarding returning. I have not been given the opportunity to undertake any KIT days before my annual leave (KIT days must be taken before any annual leave and during maternity leave according to policies) and therefore have lost out on this. I feel that due to being pregnant and being off on maternity leave I have been 'forgotten' and there has been very little support. I have shared my anxieties regarding my new role with my old line manager however given no one else has been in touch with me I cannot share this with my current manager and I also understand this is non negotiable so would have little impact regardless.

I am now receiving support from Dundee Adult Psychology Services and feel this whole experience has had a detrimental impact on my mental health. This has caused my maternity leave to be a negative and anxious time which again has had a huge impact on my mental health. I do not feel I have been treated fairly or in accordance with Dundee City Council Policies and Procedures and feel that the only option regarding this is to raise this as a formal grievance. My union rep contacted Lynn McBean before my return to work on 29th May to discuss these concerns however was told no meeting was required and I was advised to further wait to hear from my new line manager. Lynne McBean also stated that my request for flexible working would be discussed upon my return to work on 21st August which leaves me unable to secure childcare as

> I remain unsure of my working hours/pattern. As of today 6/07/2023 I still remain uncontacted by anyone and still have no clarification on my new role, hours, working pattern, manager or where to report to upon my return to work."

35. The claimant emailed her grievance to Glyn Lloyd who was the respondent's Head of Service at the time on 6 July 2023. Mr Lloyd responded on 7 July stating:-

> "I note the content of your grievance, which is clearly associated with the nature of support you've received whilst pregnant and during your maternity leave.
>
> As it appears that you have already attempted to resolve matters with both your line manager and Lynne McBean, I will arrange for a different manager to meet with you to discuss your concerns.
>
> We will aim to ensure that you receive a full response within 14 days and I'm conscious that you state in your letter that you're due to return to work on 21 August.
>
> I will arrange for a manager to contact you next week."

Thereafter Mr Lloyd approached James Ross who had recently joined Dundee City Council as a Senior Service Manager. They discussed matters and it was agreed that Mr Ross would deal with the grievance. Mr Ross was dealing with a number of HR matters at that time. Mr Ross first of all met with the respondent's HR adviser. There was a slight delay as the HR adviser was on annual leave. During this time the claimant contacted Mr Lloyd to say that she had not heard anything. Mr Ross then contacted her and confirmed that he would be doing it. He arranged a meeting with the claimant and her union rep which took place on 18 August. After that Mr Ross met with the other members of staff who were involved. He decided that he would try to meet with them in order of their involvement in the process. There were delays in this due to people being absent on annual leave. During this time he was aware that whilst he was investigating the grievance there was also an issue in that the claimant was off work sick and her sickness absence required to be managed. At the meeting on 18 August the claimant had made it clear that she could not see a return being to the adolescent team which was

managed by Janice Spence. She felt that she had been let down by the fact Janice Spence had not been in touch with her. The claimant said she wanted a post on a locality team. Mr Ross decided to accept the claimant's decision on this and investigated how he would get her into a team which she wanted to work in. This was a parallel process to the investigation of the grievance. He eventually decided to approach a Steven McClure who managed a team dealing with children with disabilities and their families and asked if he would accept Nicole into his team. Mr McClure agreed with this.

36. Mr Ross identified a potential post in the children with disabilities unit at the end of August. He emailed the claimant on 31 August. He emailed the claimant on 31 August advising her of this (page 101). The claimant responded a week later to say that she would consider the move but she would prefer not to make any definitive decision until the grievance position was concluded. In her email the claimant also confirmed that she had been signed off for a further period by her doctor and included a further sick line. On 10 September Mr Ross wrote to the claimant (page 100) and stated:-

> "Sorry for the delay in responding I had urgent matter to attend to. We agreed when we met that the grievance lodged would be investigated and we are in the process of doing so. We also agreed that the matter of redeployment would be explored separately. The post in the CWD is the only current vacancy and option, this cannot be left open ended as Steve will need to know if he should advertise this post. I think it's reasonable to give you until the 2nd October to make a decision on this. Your flexible working request was approved and would apply in this post. This is a FT post and is needed so when your flexible working request ends you have a full time position to access.
>
> I am sorry that Sam hasn't had the chance to explore the matter of your keeping in touch days, I have copied her in so she can respond to you.
>
> I hope this is satisfactory and always happy to discuss anything over."

37. In the meantime Mr Ross had met with Alison Hughes to discuss the claimant's grievance. Ms Hughes told Mr Ross that the risk assessment had been done albeit it was some time after the claimant had advised of her pregnancy. It was still prior to the date when the respondent was legally obliged to do a risk assessment. Mr Ross formed the impression that Ms Hughes had a very close and supportive relationship with the claimant. Though Mr Ross accepted that the risk assessment had been done he did not see any actual document confirming this, for that reason he decided that he would partially uphold the grievance in relation to the risk assessment. Mr Ross also met with Lynne McBean and then Yvonne Beattie and then Janice Spence. With regard to the grievance he divided this up into essentially four areas. The risk assessment was one and as noted above he partially upheld this. The second point he considered was a separate item was the issues regarding the disbandment of locality team 2. He decided that this would not be upheld. He spoke to the Head of Service in relation to this as well as Lynne McBean and Yvonne Beattie. He noted that recruiting a Team Manager had been difficult and that this had been attempted. He could see the logic of being unable to continue running the team as a separate team without a manager. This could be done by a Senior Manager for a few weeks but was not a solution. Alison Thewliss and Lynne McBean had met with the team to arrange a temporary dispersal. Everyone he spoke to said the meeting was not about disbanding the team but around arranging for the dispersal so that arrangements could be made for suitable management and supervision of the remaining staff. He noted that the claimant's position was that this meeting was about disbanding the team but he considered that the other witnesses were clear that it was simply about the dispersal of staff and that no decision had been made at that time to disband the team.

38. The third matter which he considered was a separate item was the failure to respond adequately to the flexible working request. He considered there were two parts to this. Managers believed the flexible working request had been approved but they had never properly communicated any of this to the claimant. He believed there had been a breakdown in communication in that Janice Spence thought that Alison Hughes had communicated this properly to Nicole. Alison Hughes' belief was that

whilst she had mentioned it to the claimant she had understood that Janice would be following this up and communicating it properly to the claimant. As a result the claimant had not received any official confirmation although she had been told by Alison Hughes that it was being approved. It was noted that Alison Hughes had regular contact with the claimant. He understood Alison had tried to bring Janice in but that that had simply not happened and Alison was unsure how far she could go in communicating the exact details with Nicole. He decided that this part of the grievance should be upheld.

39. The fourth matter he considered was lack of communication regarding the claimant's return to work. Whilst he noted that Alison Hughes the claimant's line manager had been in regular contact with her, she felt that the matter had not been dealt with properly. There had been no proper planning of her return to work and as a result she had missed out on things like KIT days.

40. Mr Ross communicated his grievance findings to the claimant in a letter which was sent to her on 5 October 2023. This was lodged (pages 86-87). In his grievance letter Mr Ross offered to meet with the claimant if she wished to discuss matters further. The claimant did not contact him. Mr Ross also indicated in his letter that the claimant had a right of appeal.

41. In the meantime Mr Ross also made arrangements for the claimant to take up the post with the disability team run by Steve McClure. Mr Ross wrote to the claimant's union representative and the various managers involved on 3 October confirming the arrangements which would be made for this (page 98). It was noted that Mr McClure would be in touch with the claimant following his return from leave on 9 October and that once the claimant was fit to return to work appropriate arrangements would be made.

42. The claimant submitted an appeal against the grievance outcome. The grievance appeal was addressed to Mr Colgan and dated 20 October 2023. Mr Colgan asked Mr David Berry the Chief Finance Officer of the Health and Social Care Partnership within the Council to deal with the grievance appeal. Mr Berry met with the claimant on 30 November 2023.

The claimant attended the meeting with her union representative. Mr Berry confirmed that he would be concentrating on the two areas where the previous grievance had not been upheld namely the risk assessment and the meeting regarding redeployment of staff from locality team 2.

43. Shortly after the claimant had submitted her grievance appeal and prior to the meeting with Mr Berry the claimant had submitted an application to ACAS for early conciliation. Mr Berry was aware of this. The claimant's application to ACAS was made on 26 October 2023. By mid-December Mr Berry had met with James Ross to ask him questions about his handling of the grievance and had decided on his outcome of the appeal. He wrote an email to Samantha Gellatly of the respondent's HR department on 14 December 2023 which was lodged (page 198). He stated to her:-

> "I've just met with James and talked through the case. What I'm leaning to is to split the 2nd point of the grievance re redeployment of staff from locality 2 into 2 elements – first being not being invited to the meeting to discuss – while I would set out the context with it being a temp position, she was in another role at the time etc I do think there should have been some communication with her to advise of what was happening – so would partially uphold that. In relation to the actual redeployment itself, I would not uphold that given the timescales involved etc nb as James has done already. Any views on that? Also conscious of the legal aspect of this too"

44. It was unclear whether or not he received any response to this however on 18 December Mr Berry wrote to the claimant setting out his outcome. The letter was lodged (pages 88-90). With regard to point 1 he stated that:-

> "I have now obtained a copy of the risk assessment which I understand was undertaken at a supervision session between yourself and Alison Hughes, your line manager at the time on the 12th May 2022. While this was shortly after the incident at work, after reviewing this I agree that it perhaps should have been done earlier in your pregnancy. However, I do believe that steps were

subsequently taken by management to reduce risk to you through your redeployment to MASH in July 2022. I see no reason to change the original decision in relation to this point so this remains partially upheld."

With regard to point 2 in relation to the failure to invite the claimant to the meeting in September 2022 he stated:-

"During the discussion, what appeared to me to emerge from your position was that one of the main issues from your grievance related to you not being invited to this meeting. Going back to your original grievance letter to Glyn Lloyd, while this was raised, it is not entirely clear if it is the lack of invite to the meeting or the lack of communication around future redeployment to another role that you have raised as a concern. I therefore suggest that what was considered to be a single point in the Stage 2 grievance is actually two related points as follows:

a) No invite to a meeting to discuss dispersal of Locality Team 2
b) Communication about future redeployment

In relation to point a), following review of the wording of the invite to team members, while not saying specifically what the meeting was in relation to, it was clearly an important meeting given the manager and organiser of the meeting, Lynne McBean, outlined that Alison (Leuchars – former Service Manager) would be attending with staff asked to prioritise this meeting and that if any contact arrangements had been made for that time, that Lynne would attempt to arrange cover for them. You advised that not all members of Locality Team 2 had been invited to the meeting including yourself and explained they were also not either working in the team at that time or were not at work. I note however from your letter to Glyn Lloyd that '*All employees of Locality 2 (along with employees currently not working) were invited to this meeting*.'

I understand that the nature of the meeting was to discuss the temporary dispersal of staff in the team for the short term due to the lack of appropriate team supervision following unsuccessful attempts to recruit to the team manager post. At that meeting,

those currently working in the team were advised that this temporary position was likely to continue to until around January 2023.

The reasons given for you not being invited to the meeting were that you were not currently in the team at the time given you were redeployed to the MASH team and that Lynne McBean thought you were already on your maternity leave which I understand was due to start shortly after that meeting. While I do not believe there was any deliberate intent to exclude you from the meeting, I would consider it best practice that all members of the team, whether still working in the team or not at the time, should have been advised of the situation and that an invite should have been extended to all. I therefore uphold that element of the grievance.

In relation to point b) I have seen an email exchange between yourself and Lynne McBean following the meeting when you sought clarification around rumours you'd heard from other professionals that Locality Team 2 had been disbanded. Lynne confirmed that the team had not been disbanded however *'at this time the workers are moving temporarily to other teams to be managed directly. This is due to the team manager post appointment not coming to fruition at this time'*, going on to ask if you were on maternity leave. I understand from management that a decision to permanently disband the team was not made until 2023 when you were on maternity leave. I conclude that at the time of the meeting and subsequent email exchange between you and Lynne that it was not management's long-term intention to permanently disband the team and given you were already in a redeployed post at the time, would not be affected by the change. I therefore do not uphold that element of your grievance.

Subsequent communication and planning support for your return to work has already been upheld at the Stage 2 grievance."

Mr Berry then went on to state:-

"I understand from interviewing James Ross that managers on Children and Families have been reminded of the importance of

> adhering to the Council's policies on pregnancy and maternity related matters in order to ensure the issues identified in your grievance which have been upheld should not be repeated in future."

The tribunal were satisfied on the basis of the evidence from Mr Berry that whilst he was aware of the claimant's legal proceedings at the time, the existence of these proceedings did not have any impact on the way that he dealt with the grievance or on its outcome.

45. In the meantime having been allocated to Mr McClure's team Mr McClure sought to have a meeting with the claimant. Mr McClure knew the claimant since his team had shared an office with her team previously whilst they were at St Fergus Primary School. He knew her well. They were on friendly terms. Mr McClure emailed her on 9 October (page 110). He did not receive a response from her initially so emailed her a reminder on 19 October (page 117). The claimant responded on 19 October to say that she had missed his email. She asked when it would be best for him to have a meeting and said she would try to arrange childcare (page 116). Mr McClure responded that day with suggested times and said he did not mind the baby being present. The claimant responded four days later to say that she had missed his email (page 116). He then responded on 24 October and the claimant then suggested meeting on 1 November. It was eventually agreed that they would meet on 1 November at the claimant's home. Prior to the arranged meeting on 30 October the claimant wrote an email to Mr McClure seeking to postpone the meeting as she said she had not had a great weekend and had an appointment with her psychologist. She said she didn't feel her head was in the right place to meet (page 113). Mr McClure suggested that they look at the following week and put something in provisionally but heard nothing further from the claimant (page 113). Mr McClure then wrote again to the claimant on 15 November saying that he had been asked to manage her absence and it would be helpful to have a meeting under the process. He said:-

> "I know things are difficult for you at the present time but I do need to have a chance to have a chat with you. No pressure at all just a chat. Is there a time next week we could meet up?" (page 112)

Eventually the parties agreed to meet on 21 November. Mr McClure attended at the claimant's home and had a discussion with her. He produced handwritten notes at the meeting which were lodged (page 119). Following this a further meeting took place on 15 January. The handwritten notes of this meeting are lodged (page 121). The claimant had absolutely no issues with Mr McClure's management of her and Mr McClure continues to manage the claimant's absence from work. As part of the absence management process the respondent instructed an Occupational Health report on the claimant which was lodged (pages 107-108). It was dated 15 May 2024. It noted that the claimant was currently not fit to return to work and it was anticipated that she would not be able to return to work until she saw a significant improvement in her symptoms and until perceived work related stressors were resolved. Further Occupational Health intervention was suggested. As at the time of the hearing the claimant remains absent from work.

46. The claimant's fit notes were lodged (pages 129-135). The reason for absence in each case is given as work related stress albeit in December 2023 it is also noted that the claimant was recently admitted to surgeons with gall bladder and abdominal pain. The claimant has been referred to a counsellor by her GP. This counsellor who describes herself as a Clinical Associate in Applied Psychology provided a report to the claimant's GP in July 2023 which was lodged (pages 136-137). It noted that a cognitive behavioural based approach of psychological therapy should be applied. It noted that the claimant was experiencing symptoms in line with generalised anxiety disorder. It went on to say:-

> "Ms Wallace may be predisposed to experiencing these symptoms due to experiencing adverse events during her childhood and domestic violence as an adult. Her current symptoms may be being perpetuated by on-going stressors relating to her employment. It is my recommendation that a Cognitive Behavioural based approach

> to psychological therapy be applied to help address Ms Wallace's symptoms at present. …"

Ms McCoull also produced an overview of the claimant's treatment dated 12 March 2024 which was lodged (pages 138-139). This confirms the claimant has been attending therapy. It noted that the claimant was experiencing nightmares and that these appeared to be directly related to trauma experienced during childhood. Ms McCoull stated:-

> "Following this new information, my updated opinion is that you are experiencing a mixed anxiety and depressive response to trauma, opposed to symptoms in line with Generalised Anxiety Disorder. However, it is still my understanding that your difficulties are being perpetuated by on-going situational stress, which include those related to your employment.
>
> Following the exploration of the content of your nightmares, we agreed to address these through the process of prolonged exposure, which is a CBT based technique that has been shown to be effective in processing of traumatic memories and the reduction of associated symptoms. We began this work on the 8 December 2023 and continued this into our appointment on 11 January 2024. However in our appointment dated 13 February 2024, we agreed to pause prolonged exposure owing to your upcoming tribunal as this is causing you significant distress. We have tentatively agreed to return to prolonged exposure work following the conclusion of your tribunal."

The claimant remains absent from work as at the date of the tribunal. It is her view that she is unlikely to be fit to return to work until the tribunal process is complete. Once the tribunal process is complete she would intend to recommence the therapy process she was undergoing with Ms McCoull. She did however find this therapy to be extremely distressing at the time which is why it felt she could not cope with this on top of the tribunal proceedings.

Observations on the evidence

47. The tribunal was of the view that all of the witnesses were genuinely trying to assist the tribunal by giving honest evidence. There were inevitably some differences due to the parties' different viewpoints and different interpretations of what had taken place. It was clear that when various documents were put to the claimant the claimant had underreported much of the contact which actually took place during her maternity leave. We accepted that the claimant was giving honest evidence as she saw it however it was clear that whilst the respondent understood Alison Hughes to be in touch with the claimant as the claimant's line manager the claimant tended to discount this contact and believed that Ms Hughes was contacting her more as a friend than anything else. It would certainly appear that if matters were raised by the client with Ms Hughes these were not reported up the chain of command. It was however clear from the documentary evidence that at various times when the claimant was saying she knew nothing about what was happening she had in fact been told about it by Ms Hughes. For example, it was the claimant's position in her grievance that as of 6 July she remained uncontacted by anyone and had no clarification of her new role, hours, working pattern, manager or where to report upon her return to work. It is clear however from the email from her union representative that the claimant knew that her new manager was to be Janice Spence and that she had been told verbally by Alison Hughes that her flexible working request had been granted. Given that her flexible working request clearly stated her new working pattern and hours the claimant was exaggerating slightly.

48. With regard to Ms McBean she was quite emphatic in her evidence that the reason that she had not invited the claimant to the meeting on 16 September was that the claimant was already working away from the team. She was clear that this was the reason since she had also not invited Mr M to the meeting since he was another member of locality team 2 who was currently working in a different team. She had also not invited Alison Hughes because Alison Hughes was on holiday. Whilst she vehemently denied that the fact the claimant was about to go on maternity leave influenced her the tribunal's view was that at some level she had in

her head that either the claimant was already on maternity leave or about to go on maternity leave and that as a result there was no need to tell her anything. The fact of the claimant's maternity leave did have some impact on her decision making.

49. With regard to Yvonne Beattie we accepted her evidence that her understanding of the position was that she had found a post for the claimant and told Alison Hughes, the claimant's line manager to convey this information to her and liaise with Ms Spence in dealing with the outstanding matters. We accepted that her understanding of the position was that Ms Hughes had dealt with this and that she was not really aware of what had happened after this. She was Janice Spence's line manager as well as Ms Hughes' line manager and she had given an instruction and expected it to be carried out.

50. The tribunal accepted the evidence of Mr Ross. He was quite candid in saying in his evidence that in his view the claimant had been effectively left on her own. He said that assumptions had been made by Ms Hughes that Miss Spence was dealing with matters and that Ms Spence felt Ms Hughes had already dealt with. There was an absence of communication and as a result the claimant had been effectively ignored. His view was that absolutely no-one had intended this but that there had been failures in communication which had led to this happening. Despite being pressed by the claimant's agent, Mr Ross refused to accept that his findings were in any way influenced by a desire not to uphold those parts of the grievance which would assist the claimant with her sex discrimination claim. The tribunal accepted Mr Ross's evidence on this.

51. The original intention of the respondent had not been to call Mr Berry. On what was due to be the last day of the hearing where it had been agreed that the parties would be simply making submissions the claimant's representative sought to lodge a further email which the claimant had just received as part of her subject access request. Though this was opposed by the respondent the tribunal agreed that we would allow the email to be lodged at page 198. Following this the respondent was also allowed to lodge additional emails either side of this. They also agreed that they would call Mr Berry who was the author of the email. Essentially we found

Mr Berry to be a patently honest witness and accepted that the grievance outcome was entirely his and that he was not in any way influenced by the fact that the claimant had by this time instituted ACAS early conciliation. We accepted his explanation of what he said in the email at page 198. Despite considerable pressure from the claimant's agent he was adamant that he simply wished to give HR a heads up as to what he was going to be finding in relation to the meeting. He was not in any way trying to tailor his response so as to avoid assisting the claimant's discrimination claim.

52. One matter which struck the tribunal and was adversely commented on by the claimant was that Alison Hughes who was the claimant's line manager and was the person who does appear to have been in contact with the claimant during her pregnancy was not called. She had been on the original witness list however the respondent's representative advised following the evidence of the claimant that she would not be calling her. She was actually in the building at the time and it would have been entirely possible for the claimant's representative to call her as a witness had he wished to do so however he did not. As a result, the tribunal did not have the benefit of the evidence from Ms Hughes. Our findings are therefore essentially based on what the claimant told us about her various contacts with Ms Hughes and the documentary evidence including what we can assume the claimant was told from the internal evidence of her own emails.

Discussion and decision

Issues

53. The claims being made by the claimant fell into two broad headings. The first was a claim under sections 80G and 80H of the Employment Rights Act 1996 in relation to the respondent's alleged failure to comply with their legal duties in respect of the claimant's application for flexible working. The second was a claim of discrimination in terms of the Equality Act. This was further broken down as being claims of maternity and pregnancy discrimination in terms of section 18 of the Equality Act in respect of those matters which took place within the protected period. The protected period in this case beginning in February 2022 and ending when the claimant's

entitlement to basic maternity leave ended on 26 May 2023. The claimant claimed that discrimination had continued after that date and the discrimination outwith the protected period was claimed to be direct sex discrimination in terms of section 13 of the Equality Act. There was also a claim of victimisation under section 27 of the Equality Act. This was in respect of the way that the claimant's grievance and grievance appeal had been dealt with. Essentially, this part of the claim focused on the decision by James Ross and Dave Berry in relation to point 2 of the grievance. (referred to by Mr Berry as point 2.1) It was the claimant's position that the decisions were perverse in the circumstances and were a deliberate attempt to avoid liability for the discrimination alleged and therefore a detriment which was relied upon in terms of section 27.

54. The respondent's position was that there had been no discrimination but that in any event the claims were time barred. With regard to time bar the claimant's primary position was that the claims were not time barred in that all of the discrimination claims were part of a continuing act which concluded with the victimisation which took place when the claimant received the grievance and grievance appeal outcome, both of which occurred during the primary limitation period of three months prior to the date the claim was lodged given that the grievance outcome was received on 5 October, ACAS conciliation began on 26 October 2023 and ended on 7 December 2023 and the ET1 was lodged on 6 January 2024. The respondent's position was that the victimisation had not taken place and that the other claims were time barred even if factually justified (which was not admitted). The claimant's secondary position if the tribunal was not with them on the issue of whether the discrimination continued into the primary three month period then it would be just and equitable to extend the time limit. Whilst it would appear logical to deal with the time limit question first, in respect of both the discrimination claims it is appropriate to decide first of all whether the last alleged act of discrimination (the victimisation) occurred or not and if so, whether this was part of a continuing act.

Discussion and decision

55. Both parties made full submissions. These were made in writing and supplemented orally. Rather than seek to repeat them at length they will be referred to where appropriate in the discussion below.

Claims under section 80H and 80G of the Employment Rights Act 1996 – flexible working

56. Section 80G of the Employment Rights Act 1996 imposes various duties on an employer. These include the duty to deal with the application in a reasonable manner and notify the employee of the decision on the application within the decision period. Section 80G(1B) states:-

> "For the purposes of subsection (1)(aa) the decision period applicable to an employee's application under section 80F is—
>
> (a) the period of three months beginning with the date on which the application is made, or
>
> (b) such longer period as may be agreed by the employer and the employee."

57. Section 80H provides a right to complain to an employment tribunal. It provides that no complaint can be made until either:-

> "(a) the employer notifies the employee of the employer's decision on the application, or
>
> (b) if the decision period applicable to the application comes to an end without the employer notifying the employee of the employer's decision on the application, the end of the decision period."

58. Section 80H(5) then provides:-

> "An employment tribunal shall not consider a complaint under this section unless it is presented—
>
> (a) before the end of the period of three months beginning with the relevant date, or
>
> (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not

> reasonably practicable for the complaint to be presented before the end of that period of three months."

59. In this case it is arguable that the claimant was advised of the outcome in her telephone conversation with Alison Hughes on or about 16 April in which case the primary three month time limit expired on 15 July. The claimant's position however is that the respondent required to confirm their decision in writing given that this is what the respondent's policy states and it is trite law that a reasonable employer will comply with their own policies when dealing with such matters. The claimant submitted her flexible working claim on 19 February 2023. The decision period therefore expired on 19 May 2023. The tribunal found that there was no agreement between the claimant and the respondent to extend this period. It therefore follows that any claim would require to have been made no later than 18 August 2023. The claim was not submitted until some months outwith this period.

60. The claimant did not lead any evidence as to why it had not been reasonably practicable for her to submit such a claim during the period up to August 2023. The claimant was being represented by her union at this point. She had submitted a grievance. It appeared to the tribunal that whilst we would agree with the claimant that the respondent dealt with the flexible working request very badly our view is that any claim in terms of section 80G and H was time barred and the tribunal has no jurisdiction to make an order in terms of section 80I. We should say that if we are wrong on the issue of jurisdiction it was the tribunal's view that it would have been appropriate that the respondent pay the claimant the maximum award of four weeks' pay under this heading. Although the claimant was told that her application was granted there was a singular failure by the respondent to engage with the claimant relating to her anxieties over this. They did not meet with the claimant to discuss the matter or reassure her as to the reason why the application was being granted for six months. It is clear from the claimant's grievance that she had concerns that although she had been told it had been granted, this grant may not be honoured by the new manager in the team to which she would eventually be allocated. None of these concerns were addressed. The respondent has policies in

this area for a reason. It is somewhat disheartening that having recognised the need for such policies they completely failed to implement them. That having been said however, the law is quite clear that any such complaint must be made timeously if the statutory compensation is to be payable. This claim was not submitted in time and the tribunal has no jurisdiction to hear it.

Discrimination claims

61. The claims were made under section 13, 18 and 27 of the Equality Act. The time limit for making such claims is contained within section 123 of the Equality Act. This states:-

> "(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> ….
>
> (3) For the purposes of this section–
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
>
> (a) when P does an act inconsistent with doing it, or
>
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

62. In order to determine the application of section 123 to the facts of this case the tribunal required to analyse the various parts of the claimant's claim and assign dates as to when these occurred so that we can determine whether the primary act took place within or outwith the period of three months prior to ACAS conciliation commencing on 26 October 2023. On the face of it anything which occurred prior to 25 August 2023 would have

taken place outwith this three month time limit unless it formed part of a continuing act which extended into the said period of three months. With regard to whether something could be regarded as a continuing course of conduct we agreed with the claimant's representative that it was irrelevant that various parts of the discriminatory conduct fell to be dealt with under different sections of the equality Act. If there had been a course of discriminatory conduct extending into the three month period prior to early conciliation being started than the claim would be in time.

63. The first complaint made by the claimant relates to the risk assessment. As noted above, it was clear that the risk assessment was carried out well before the obligation to make a risk assessment under the Management of Health and Safety at Work Regulations 1999. A risk assessment was carried out on 12 May 2022. If the failure to carry out the risk assessment was indeed an act of pregnancy discrimination then it occurred prior to 12 May 2022. If this claim is factually justified then the three month primary limitation period expired on 11 August 2022.

64. The second matter is the failure of Ms McBean to invite the claimant to the meeting on 16 September. If this were an act of pregnancy discrimination (and the tribunal were divided on this) then the primary limitation period expired on 15 December 2022.

65. Although not clearly pled, there was at least a suggestion from the claimant's representative that the failure to advise the claimant that locality team 2 was being permanently disbanded in or about January/February 2022 was a detriment amounting to unlawful pregnancy discrimination. We would agree with the respondent's representative that it is difficult to see this since the evidence was that no member of locality team 2 was given any official notification of the decision to disband the team in January/February 2022. If however it were to amount to unlawful discrimination then the primary limitation period would have expired at least by the end of May 2023.

66. The claimant complains of a failure to consult her about the decision to move her to the adolescent team managed by Janice Spence prior to her being told about this by Alison Hughes in her telephone call on 16 April.

The tribunal's view was that this decision was conveyed to her on that date. The claimant must have known about it because she refers to it in her grievance. This any such claim would have expired three months after Ms Hughes told her what was happening on 16 April. We would agree with the respondent's representative that in terms of law, failure to consult with her prior to a decision being made cannot be something which continues into the period after the decision has been made.

67. Subsequent to that there was a failure by Ms Hughes and Ms Spence to invite the claimant to a meeting to discuss matters. It appears that the claimant was in contact with Ms Hughes over this period since the claimant was in a position to tell Ms Hughes that she would not be available for a meeting at the time proposed. In the view of the tribunal, the correspondence between Ms Hughes and Ms Spence does not make good reading and shows a substantial lack of focus but the fact remains that on or about 25 May the claimant was asked to attend a meeting to take place on 6 June but stated that she was unable to attend because she was on a pre-arranged caravan holiday. There was absolutely nothing wrong with the claimant not being willing to meet for that reason but after 25 May it cannot possibly be said that the failure to fix a meeting is due to discriminatory reason. It is due to the fact that the claimant has said she is unable to attend a meeting on the date fixed. It is also noteworthy that at this time the claimant's union rep has advised the respondent that the meeting should take place on the claimant's return to work on or about 21 August. The tribunal's view was that any claim based on the failure to contact the claimant about her future placement had ended by around the beginning of June when it was clear the matter was being dealt with. If we are wrong in this and even if we were prepared to state that there was a failure to consult with the claimant that continued up to the point where she met with Mr Ross on 18 August this claim would still be outwith the primary three month limitation period.

68. The only claim made after this is the victimisation claim under section 27 of the Equality Act. This claim was added to the claims by amendment following the initial preliminary hearing in the case. The respondent's position was that it had been added shortly after the claimant's

representative became involved and that it was essentially a claim invented so as to meet the time bar problems which had already been identified by the Employment Judge at the preliminary hearing. There is no doubt that if the claimant was discriminated against by the outcome of the grievance communicated to her on 5 October then this would be within the primary limitation period. We also accepted the claimant's argument that if such a claim were well-founded then the claimant could at least argue that all of the earlier claims were part of the same course of conduct and were therefore in time. The tribunal therefore decided that we should first of all deal with the victimisation claim and come to a decision as to whether or not this was well-founded.

69. As noted above the claimant's position as set out in the further particulars was that the grievance outcome from Mr Ross in terms of point 2 was perverse and was a deliberate attempt to avoid liability for the discrimination alleged. In analysing this claim we require to apply the reverse burden of proof provisions which are contained within section 136 of the Equality Act. The tribunal required to first of all find whether there were facts from which the tribunal could decide in the absence of any other explanation that an inference of discrimination could be drawn and if the tribunal did so find then the burden of proof would shift to the respondent to show that in fact no contravention of the act had taken place. The tribunal is entitled to look at all of the evidence before it when deciding whether there are facts from which an inference of discrimination could be drawn.

70. In the case of the initial grievance outcome, Mr Ross's finding in respect of item 2 was:-

> "Redeployment of staff from Locality Team 2 – not upheld. The meeting that took place was not to discuss permanent redeployment but to discuss temporary dispersal of staff to ensure they had adequate management support. Not at all staff were at this meeting and any decision to disband the team was not made until 2023. At the time of this meeting we were already being supported in another team."

Despite the representations of the claimant's representative the tribunal found that there was nothing in this from which any inference of discrimination could be drawn. Mr Ross has simply reported the facts of the matter. He has stated that not everyone was invited to the meeting because that is factually the case and contradicts what the claimant herself had said in her grievance. Mr Ross was extensively cross examined on this point and maintained his position which was that the claimant had not been invited to the meeting because she would not be affected by anything within it. The tribunal found that this was his honest position. A claim of victimisation in respect of the grievance outcome is not well-founded.

71. With regard to the grievance appeal the position is that Mr Berry was looking only at item 1 and item 2. Item 1 was the risk assessment which had already been partially upheld by Mr Ross. With regard to item 1 Mr Berry did not disturb Mr Ross's finding. He noted that the risk assessment had been carried out albeit he agreed it might have been better had this been carried out earlier. With regard to item 2, Mr Berry's decision was more nuanced than Mr Ross's and he partially upheld this. He decided that what was considered to be a single point in the stage 2 grievance was actually two related points namely (a) no invite to the meeting to discuss dispersal of locality team 2 on 16 September and (b) communication about future redeployment. The position regarding the invitation to the meeting stated:-

> "I understand that the nature of the meeting was to discuss the temporary dispersal of staff in the team for the short term due to the lack of appropriate team supervision following unsuccessful attempts to recruit to the team manager post. At that meeting, those currently working in the team were advised that this temporary position was likely to continue to until around January 2023.
>
> The reasons given for you not being invited to the meeting were that you were not currently in the team at the time given you were redeployed to the MASH team and that Lynne McBean thought you were already on your maternity leave which I understand was due

> to start shortly after that meeting. While I do not believe there was any deliberate intent to exclude you from the meeting, I would consider it best practice that all members of the team, whether still working in the team or not at the time, should have been advised of the situation and that an invite should have been extended to all. I therefore uphold that element of the grievance."

72. It is perhaps as well to note at this point that Mr Berry's summary of the position regarding the claimant's invite to the meeting was entirely in keeping with the tribunal's own findings in the matter albeit the tribunal were divided as to whether this failure was an act of pregnancy discrimination or not. It would certainly have been best practice to invite the claimant to the meeting. It may not have been discrimination even if one of the reason's was Ms McBean's mistaken belief the claimant was already on maternity leave. It is not necessarily a detriment to fail to invite some-one to a work meeting when they are on maternity leave if they are not affected by the matters to be discussed at the meeting. With regard to the second point, Mr Berry did not uphold this. He noted that the claimant had been advised of the reason for the meeting and the correct position in the email exchange with Ms McBean which had taken place very soon after the meeting. He went on to state:-

> "I conclude that at the time of the meeting and subsequent email exchange between you and Lynne that it was not management's long-term intention to permanently disband the team and given you were already in a redeployed post at the time, would not be affected by the change. I therefore do not uphold that element of your grievance.
>
> Subsequent communication and planning support for your return to work has already been upheld at the Stage 2 grievance."

Once again it was the tribunal's view that there was nothing in this which could prima facie be seen as victimisation. It was not the respondent's intention to call Mr Berry but once the evidence was concluded the tribunal had adjourned for a day with a view to hearing submissions the following day. The following morning the claimant asked permission to lodge an email which the claimant had recently obtained through her Freedom of

Information request. This was the email at page 198 referred to above. The tribunal decided that it would be appropriate to allow the claimant to lodge this document late but at the same time allow the respondent to lodge certain further emails around it and also to call Mr Berry as a witness. Essentially Mr Berry in the email indicated to his HR representative that he intended to divide the grievance at point 2 into two parts and asked if she had any objection to this. In his email he does go on to state:-

"Also conscious of the legal aspect of this too"

This was on the basis that by December 14 he was aware that the claimant had submitted her ACAS early conciliation form. Mr Berry was perfectly clear in his evidence that the reason he made the findings he did was entirely as stated in his grievance appeal letter. He had not in any way been influenced by any desire to downplay the claimant's discrimination claim. The tribunal entirely accepted his evidence. The tribunal's view having considered all the evidence was that there was absolutely nothing which would cause the burden of proof to shift to the respondent in respect of the appeal either. In short the tribunal's view was that the two victimisation claims were not well-founded and it was therefore not open to the claimant to argue that the earlier ostensibly time barred claims were part of a course of conduct which included the victimisation claims and therefore extended into the three month period prior to early conciliation starting.

73. Although the claimant's representative had not led any evidence from the claimant in relation to any difficulties in making the claim or indeed obtained any evidence from her as to why she had not raised a claim at the point where she first contacted her union representative in July the claimant's representative did in his final submissions make a motion that if the tribunal were not with him on his primary point then it would still be just and equitable to extend time. He referred to the case of ***Kumari v Greater Manchester Mental Health NHS Foundation Trust*** EA220-000833-VP where it was noted that the merits of the case were a particular factor and at the end of the day it was a matter for the tribunal to decide taking into account all of the matters which were potentially relevant. He

referred to the case of ***Robertson v Bexley Community Centre (trading as Leisure Link)*** [2003] IRLR 434 as well as the seminal case of ***British Coal Corporation v Keeble*** [1997] IRLR 336 EAT.

74. It is a truism that time limits are of importance in employment cases. The jurisdiction has been set up so as to allow a speedy way of resolving workplace disputes. The normal position is that tribunals will enforce these time limits unless there is some good reason why it is just and equitable not to. The claimant's position in this case was that the claimant's treatment had been particularly egregious. The tribunal did not consider that this would necessarily of itself be a good reason for extending time but in any event we were not at all convinced that this was the case. The claimant's representative in his own submissions accepted that there had been no intention to discriminate in this case. At the end of the day, the claimant felt that she had been ignored during her pregnancy but the evidence was that she had been in constant contact with her line manager albeit she saw her line manager's contact as being with a friend rather than anything else. The tribunal were in no doubt that it would have been good practice for the respondent to have been much more organised in the way they maintained contact with the claimant but the problem does appear to have been that if the claimant was expressing concerns to Alison Hughes about not having information or not being consulted these were not being passed up the line of command. The tribunal were struck in this case by the almost complete absence of the usual type of HR letters which you would expect any employer, particularly a large public sector employer, to send to employees on maternity leave. The view of the managers appear to have been that matters would sort themselves out once the claimant returned from leave and indeed this is essentially what happened. The claimant was originally allocated to the adolescent team. She did not want to work there and an alternative team was found for her. In submissions the claimant's representative was keen to point out that the claimant had absolutely no dispute with Mr McClure and felt that he had dealt with matters appropriately. The claimant does appear to have had other things going on in her life and although the medical evidence was minimal it is clear that the claimant's perceived issues with her employer have at least contributed to a flare up of a pre-existing mental

predisposition. At the end of the day however this is a case where the respondent has sought to deal with matters as soon as it was brought to their attention. When the claimant's union rep wrote to Ms McBean she immediately contacted Ms Hughes to ask why nothing had apparently been done about arranging a meeting with Ms Spence. Matters were not seen as urgent because the union representative herself suggested the meeting should not take place until just before the claimant was due to return in August. The claimant then submitted her grievance which was dealt with in an appropriate timescale given the fact it was summer holidays. At the grievance meeting the issue of her redeployment following her return is discussed and the claimant is provided with a new suggested team almost immediately albeit the claimant herself takes a period of around five weeks to confirm she will accept it. The claimant was represented by her union throughout. There was absolutely nothing to stop her or her union representative raising a claim in April/May if she considered at that point that she had been discriminated against.

75. The claimant's representative said that there had been no prejudice to the respondent as the evidence had been heard and the claim dealt with. Whilst relevant this does not mean that in every case where the tribunal agrees to deal with the issue of time bar at the final hearing it is automatically just and equitable to extend time. In cases where there is an allegation that there has been a course of conduct extending into the three month period the tribunal will almost always say that the matter will be dealt with at the final hearing as otherwise there is a risk of evidence being heard twice. The tribunal's view in this case was that whilst the respondent's witnesses were all able to give evidence there was no doubt that the delay in this case had caused some deterioration in their recall. This was particularly the case in relation to Lynne McBean's recollection of what had happened in January 2023 regarding the decision to disband locality team 2. The tribunal's view was that there was really nothing in this case which would make it just and equitable to extend the time limit. The claimant was able to seek advice from her union and pursue her internal grievance. The default position is that the time limit applies. There was nothing in this case which distinguished it from any other case where

a claim is raised out of time. As a result, the claimant's claims fall to be dismissed.

76. The respondent however may wish to reflect on their HR practices and ensure that their policies are complied with by individual managers particularly where an employee is absent on pregnancy/maternity leave. It is well known that individuals in this situation often feel out of touch and vulnerable and it is prudent for employers to adopt policies which ensure that they are kept in touch with the workplace and in particular where changes are taking place that they are kept informed so that they do not feel isolated. The respondent themselves have policies which state that this will happen. The problem in this case is that they have not followed them and that is why they have found themselves in this position albeit that at the end of the day the tribunal has found the claims to be time barred.

I McFatridge
Employment Judge

1 October 2024
Date of judgment

Date sent to parties **4 October 2024**