



# EMPLOYMENT TRIBUNALS

**Claimant:** X

**Respondent 1:** Y

**Respondent 2:** Z

**HELD AT:** Leeds

**ON:** 7 and 8 November 2018

6 and 8 February 2019

(Reserved) 14 February 2019

**BEFORE:** Employment Judge Trayler  
Ms N H Downey  
Ms G M Fleming

## REPRESENTATION:

**Claimant:** Mr J Heard, Counsel

**Respondent:** Miss R Mellor, Counsel

# RESERVED JUDGMENT

1. The claim fails and is dismissed.

# REASONS

## The Issues

1. The claimant is X born 18 September 1985.
2. The claim is against Mr X's former employer Y and Z. The hearing took place on 7 and 8 November 2018 and was adjourned part heard to 6 and 8 February 2019. On 8 February 2019 there was again insufficient time to conclude the

hearing and judgment was reserved to 14 February 2019. The parties were also ordered to provide further written submissions and comments on the other party's submissions in advance of that hearing.

3. At a preliminary hearing on 2 July 2018 the issues for the tribunal were determined. These were confirmed as the issues to be determined at the outset of the hearing. However, on the fourth day of the hearing issues were added for which submissions were sought. The issues to be determined are set out below.
4. The first issue to be determined is whether the respondents or either of them subjected the claimant to a detriment because of a protected act. The protected acts relied upon by the claimant are a written grievance dated 24 October 2016 and a claim to the Employment Tribunal (case number 1800523/2017) both of which include complaints of sex discrimination. It is not disputed by the respondents that these are "protected acts" for the purposes of this claim.
5. The detriments relied upon by the claimant are alleged comments by Z on 19 January 2018 namely "I don't talk to men who abuse women" and, "You lost, I got you sacked and I hope that hell continues" and a separate detriment of referring the claimant to the Disclosure and Barring Service (DBS). The comments and context of them are denied by the respondents as is the motivation for the comments and referral to the DBS.
6. We sought the party's submissions as to whether there is properly a separate complaint that the delay in making a referral is a "detriment" for these purposes. We consider that the issue of delay is complained of as a detriment as it is complained of in the claim form. It is clear that the timing of the referral is part of the claimant's complaint to the Tribunal and therefore we will determine whether there is any victimisation by that.
7. We sought the parties' submissions as to whether the "protected act" of bringing a claim in the tribunal includes the settlement of such claim. We will also address this issue in the reasons below.
8. We also sought submissions as to whether the respondent has absolute privilege in making its referral to the Disclosure and Barring Service and whether this extends to the delay in making the referral. This was the principal cause of the adjournment on 8 February 2019. We therefore determine the additional issue as to whether the claimant can complain of a DBS referral or the delay in making it because such referral is the subject of absolute privilege.

### **Relevant Law**

9. By section 27 Equality Act 2010 (the 2010 Act) a person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act or A believes B has done a protected act. "Protected act" includes bringing

proceedings under Equality Act 2010 and doing any other thing for the purposes of or in connection with the 2010 Act.

10. Section 136 of the Act applies to section 27. By section 136(2) if there are facts from which a tribunal could conclude that a person (A) contravened section 27 the tribunal must hold that the contravention occurred. However, subsection (2) does not apply if A shows that A did not contravene section 27, section 136(3).
11. A, for the purposes of section 136(3), has to prove on the balance of probabilities that the treatment was in no sense whatsoever on the grounds of sex as “no discrimination whatsoever” is compatible with the Burden of Proof Directive, **Igen Limited v Wong [2005] IRLR 258 CA**. In a complaint of victimisation, A needs to prove that the detriment is in no sense whatsoever because of the protected act.
12. We referred the parties to the decisions in **White v Southampton University Hospitals NHS Trust and Another [2011] EWHC 825 QB** and **Vishwanath and Vishwanath v County Durham and Darlington NHS Foundation Trust ET 2501195/2016 and 2501196/2016** which are decisions on privilege attaching to referrals to statutory regulatory bodies. From **White** it can be seen that absolute privilege attaches to referrals to some statutory bodies and therefore potentially to a referral to Disclosure and Barring Service. By **Vishwanath** this privilege can be seen to attach to any delay in making a referral. We return to this in our conclusions below.

### Facts Found

13. The Tribunal heard evidence from the respondent Z, A, A's husband; B, Trustee of Mencap; C, Trustee and the claimant. We read documents from a bundle agreed by the parties and make findings of fact on the balance of probabilities.
14. The respondent provides services to vulnerable adults in the Kirklees area. It is subject to regulation and in certain circumstances has a duty to report matters to the Disclosure and Barring Service (DBS). This is a body established by statute. The conditions for referral are set out below. The process for dealing with barring a person from working with children or vulnerable adults is (save where there is an automatic bar) that initially a referral is made to DBS. The DBS can then require information from certain bodies. Thereafter the DBS alerts the person subject of the referral to the fact of that referral. If it is minded to bar a person the DBS sends to that person a notification in which it states why it is so minded. The person referred has the right to make representations which are usually written. There is no “hearing” at this stage. No investigation of the facts is made by the DBS, only an assessment of the information received. If a decision is made to debar the person subject of the referral from working with vulnerable adults or children the person barred is notified and has an opportunity to challenge the decision by appeal to the Upper Tribunal.

15. The claimant (X) started work for the first respondent (Y) as a Community Support Worker on 22 May 2015.
16. On 25 August 2016 the claimant was promoted to Community Support Co-ordinator, see page 76 -7.
17. The claimant says that on 27 August 2016 he made the respondent aware of a relationship between himself and a fellow employee, D. This is disputed by the respondents but we need make no finding in respect of that.
18. On 19 September 2016 Y sent X a letter setting out disciplinary allegations against him. This is at pages 97/8 of the bundle and includes failing to report a relationship with another member of staff, failure to disclose information relevant to the investigation and discussing his own personal life with a member of the public whilst supporting a service user. It is pointed out that Y is to consider his future suitability for employment at a meeting on 22 September 2016.
19. By letter of 6 October 2016 Y confirms to X that the result of the disciplinary hearing which in fact took place on 30 September 2016 is that no further action will be taken, X's explanations of the allegations having been accepted, see pages 106/7.
20. By letter of 18 October 2016 Y confirmed to Mr X that his suspension continues. In fact X's suspension had continued from 6 October. The allegation against him is explained that at 8.45 on 5 September 2016 it had been reported to E of Y by D that X had sexually harassed a work colleague, made inappropriate remarks to a service user and neglected his duties by discussing his personal life with a service user, see page 108.
21. On 24 October 2016 X raised a grievance see page 134/5. This is relied upon by X as a protected act. In the grievance X refers back to a letter of 21 September 2016 in which he states that he had "pointed out that D (who had not been suspended or subject to any investigation) was being treated differently to me by reason of the fact that she is female and I am male, and that this amounted to unfair sex discrimination". In the remainder of the letter X complains of his suspension continuing, of the lack of a letter confirming his suspension and about the way the respondent is dealing with the allegations against him.
22. On 3 November 2016 a letter is sent to X requiring him to attend a disciplinary hearing. In the letter Z identifies five points leading to disciplinary action, page 146/7. These are as follows:

"False Imprisonment- locking the doors of a service users house leaving them unable to leave.  
Tickling service users in your care. This is deemed at least inappropriate and potentially of a sexualised nature.

Holding service users' hands which is a breach of professional boundaries.  
Allowing service users to sit on your knee. This is deemed at least inappropriate and potentially of a sexualised nature.  
Failure to follow a reasonable management request of discussing the issues that led to your suspension with other members of staff".

23. On 10 November 2016 a disciplinary hearing takes place conducted by F. The notes from this are at pages 159/166.
24. On 17 November 2016 a letter is sent to X by F notifying him of his dismissal, see pages 154/5. The grounds for dismissal are those set out within the letter of 3 November 2016.
25. On 24 November 2016 X appeals against dismissal, pages 167/171.
26. On 13 January 2017 an appeal outcome letter is sent to X, see pages 188/9. X told the respondent that he was unable to attend his appeal which was conducted in his absence. The dismissal is upheld and written reasons given.
27. By 25 January 2017 X made a reference to ACAS for early conciliation of a potential claim as on that date ACAS contacted the respondent about that claim. The claimant subsequently presented his claim to the tribunal. In it he complains of sex discrimination.
28. On 14 August 2017 the parties attended a hearing at Leeds Employment Tribunal with a view to judicial mediation of the claim. It is alleged that during this the respondent accepted that X was not an abuser.
29. Our finding on this is that at the Mediation no specific mention was made of any issue concerning referral of X to the Disclosure and Barring Service by Y or Z. During a session at the outset of the Mediation Counsel for X asked one of Y's Officers (G) at the hearing whether he regarded X as an abuser and he replied in the negative. We do not consider that X nor the Tribunal can take this as a signal that Y were withdrawing allegations against X which it had found in a disciplinary investigation and hearing to be well founded and had declined X's appeal. We find that it was an attempt to defuse confrontation as Z said. We find that there was no specific mention of DBS. X was aware at this stage that a referral had been made to H Safeguarding team in about October 2016, which had concluded not long after as Y were investigating. He had asked if all safeguarding issues had been concluded but nothing was said about the DBS. We find that there was no assurance that **all** external safeguarding bodies had been sent a referral and therefore X could not take that as an assurance concerning DBS. Referral is not optional so far as DBS is concerned. If this was critical for X in settling the claim we would expect it to have been specifically referred to in discussions and the settlement. Although there is a clause that neither party would engage in disparaging comments about the other we do not believe this was either intended to include a statutory referral nor, in our finding, does it do so.

30. The claim was settled and the judgment and agreement are at pages 42, 43 and 44. By it the respondent, on the basis of “without admission of liability” agreed to pay the claimant £25,000 in full and final settlement of the claim. There is an agreement that both sides will keep the terms of the settlement confidential and that neither party will communicate any disparaging or derogatory statements about the other. The respondent agreed to circulate a memorandum amongst its staff making it clear that allegations of harassment by D had been found not to be proven, that the parties had resolved their differences and advising staff not to get involved in further discussion on the matter or the circumstances of X’s “employment or departure from Y in Kirklees”. A form of the memo is agreed together with a form of reference to be given by the respondent. The reference is limited to identifying the posts held, dates of employment, salary paid and a statement that the respondent has a policy only to provide prospective employers with factual references. Importantly, Y never withdrew the allegations which caused it to dismiss X. X sought to challenge the dismissal by his Tribunal claim, that having been settled and dismissed we cannot reopen it. There is no evidence before us therefore to suggest that there was any dishonesty on Y’s part in bringing those disciplinary proceedings neither do we have any doubts as to the honestly held belief in the allegations on the part of Z, B or C.
31. The respondent, as a “Regulated activity provider” is subject to a legal duty to report to the Disclosure and Barring Service if both of two conditions are met. The requirements are in the bundle at pages 45 and 46. The first condition is where the respondent withdraws permission for a person to engage in regulated activity with children and/or vulnerable adults or the person is moved to an area of work which is not regulated. The second condition is where the respondent “think[s] that” the person “has carried out 1 of the following:
- “Engaged in relevant conduct in relation to children and/or adults. An action or inaction has harmed a child or vulnerable adult or put them at risk of harm or;  
Satisfied the harm test in relation to children and / or vulnerable adults. E.G. there has been no relevant conduct but a risk of harm to a child or vulnerable [adult] still exists or;
- Been cautioned or convicted of a relevant (automatic barring either with or without the right to make representations) offence”
32. There are other provisions as to “Relevant conduct in relation to adults” at page 46/7. This conduct includes where it endangers a vulnerable adult or where, if it was repeated, it would, or would be likely to endanger the vulnerable adult. A person’s conduct is explained as endangering a vulnerable adult if it puts a vulnerable adult at risk of harm as well as causes a vulnerable adult to be harmed or harms such an adult. The harm test is satisfied if a person harms, causes a vulnerable adult to be harmed, puts a vulnerable adult at risk of harm or attempts to harm or alternatively incites another to harm a vulnerable adult.

33. It is made clear in the guidance that there is a legal duty to refer where the conditions are met even if the matter has already been referred to another body such as a local authority safeguarding team. It is also pointed out that a person who fails to refer without reasonable justification is committing an offence and if convicted may be subject to a fine of up to £5,000, see page 48.
34. There is a flow chart within the guidance which is at page 49A of the bundle. In this the question is asked "Have you carried out an investigation to establish facts and gather evidence". If the answer to this is "No" the next box is "You must follow your own safeguarding and disciplinary procedures to establish facts and gather evidence. Re-consider whether the person should be referred after this process".
35. After referral the DBS decides whether to bar a person from working with children or vulnerable adults as explained above.
36. In relation to the issue of whether the respondent has immunity from this process because of privilege we decide unanimously that the referral to the DBS and the timing of it is the subject of privilege and any complaint concerning that must therefore fail.
37. The privilege is absolute as explained in **White** (above). We agree with the submissions of both parties that we need to see if the conditions in **Heath v Metropolitan Police Commissioner** [2004] EWCA Civ 493 are present. Firstly, we need to see whether the DBS is recognised in law. The DBS is a creature of statute having been established by Safeguarding and Vulnerable Groups Act 2006. It has a legal existence. Secondly, are its processes akin to those of a court. We find that they are taking into account the fact that notice of the referral is given and once a view is taken that they are minded to bar an opportunity is given to make representations orally or in writing. Although there is no "hearing" or other factual enquiry save for considering the referral and representations once a decision is made to bar there is a right to appeal to a tribunal. The only way into this process leading to a Tribunal decision is by a referral. If we were wrong in considering the initial stage of the process as akin to a court then the end of it is undoubtedly in that category.
38. In any event, as explained in **Heath** there needs to be flexibility in considering which of these conditions is present. We note also that there can by virtue of the 2006 Act be no claim for compensation as consequence of inclusion by the DBS on a barred list or the provision of information. Our finding is that the privilege does attach to the referral and is unaffected by delay as it is absolute privilege. As explained in **Darker v Chief Constable of the West Midlands Police** [2000] UKHL 44 the rationale for immunity is so that those with a duty to refer are not deterred from doing so by concern over potential litigation.
39. As submitted by the respondents in order to lose that privilege we would need to find that the original information which was the reason for the referral was untrue and known by the referrer to be untrue. As the respondent submits, we can make no such finding. This Tribunal has no jurisdiction to reconsider a claim

which has been concluded by dismissal even on the basis of settlement. In any event we do not believe that there was any lack of belief in the original allegations as set out in the referral form when the referral was made. As explained below the majority view. Had we jurisdiction to consider the complaint relating to the referral and delay is that the respondents have not shown that the referral was in no way related to the settlement of the claim or the original claim. We do not find any dishonesty or knowledge that the allegations were untrue. We make the alternative findings below as the parties have engaged in a lengthy hearing and we believe that it is proper to record our alternative findings. However, for the reasons stated the complaints as to the referral and delay fail.

40. The situation here is different from that in **Hassan v Commissioner of Police for the Metropolis** UKEAT/0437/06/DM. The situation is different as there the tribunal was concerned with an internal dismissal process found not to be sufficiently akin to that of a Court. For the reasons above we find that is not the case here.
41. The DBS, also as in **Heath** does lead to a binding determination of civil rights of a party as there is, if barred, a restriction on the type of work that person can carry out. The nature of the issue, a decision whether a person should be so barred, is also closely akin to a civil issue in the Courts. It is the exercise of a judgment as to whether a person can continue working in a particular field by a body outside the employment relationship and a judgment is reached after the process of evaluating information received as above which we also consider closely akin to court processes.
42. There is no dispute in this case that Y as a provider of regulated services had a legal duty to refer the issues it had with X to the DBS.
43. At a Board Meeting on 23 November 2017 Y decided to refer X to the DBS concerning the issues for which it had dismissed him, see page 54. In the Minutes is recorded that "Discussion took place regarding breach of confidentiality agreement". This is a reference to the agreement with X. The Decision is recorded "Report our concern with a view to registering X on POVA (Protection of Vulnerable Adults) list". This is a reference to making a DBS referral.
44. The referral form is dated 8 December 2017 and is at page 54.
45. In it Z sets out the circumstances which resulted in X being removed from regulated activity. It is explained that the investigation had started following unfounded allegations of sexual harassment. Z includes a concise and accurate statement of the five disciplinary accusations and that they had resulted in dismissal for gross misconduct after a period of suspension. Z explains that a further allegation which had not been pursued due to lack of evidence namely that a service user had unexplained bruising on the inner thighs and an allegation that X had supported her in the shower, which X claimed not to



remember. It is further stated that the service user had in October 2017 made a further disclosure that a male worker, where X had worked and who wore glasses, had touched her breasts in the shower. Included with the form were the documents in relation to the disciplinary investigation.

46. Z refers to X's appeal being dismissed by Y Trustees and then refers to his claim to the tribunal and the mediation. Z says that a settlement had been agreed "that upheld the dismissal for gross misconduct" and also refers to there having been a financial settlement and agreement as to the terms of any future reference and a memo to be sent to staff. At this stage we point out that the agreed settlement payment had been made to X and also a memo sent to all staff and volunteers as agreed.
47. It is undoubtedly the case that the claimant could have been referred to DBS sooner than he was. As above the DBS referral must be made if the service provider thinks that the grounds are made out. Arguably the referral should have been made after completion of the dismissal hearing but certainly after the appeal, as by then all "investigations" by Mencap had been concluded.
48. Neither Z nor Y had made any DBS referrals previously and were therefore unfamiliar with the process. Z completed the referral form with the guidance in front of her to help proper completion of the form.
49. Z was aware of the need to refer but did not address her mind to this until after the judicial mediation was completed. The reason given for this was that Z wanted to have the disciplinary and appeal concluded before making a referral to DBS. Z did this because she wanted to allow the process to conclude so that X had the chance to defend the allegations fully before a referral was made. Z saw this as completing an investigation before referring. This at least seems to accord with what is anticipated by the Guidance provided by DBS as is referred to above.
50. The majority of the tribunal (the Employment Judge in the minority) find that no proper explanation has been given for the delay and did not believe in full the explanation given by the respondents: - Z says she was aware of the legal duty to refer and the majority find the explanation for not doing so not credible when the purpose of a referral is safeguarding vulnerable adults against a risk of harm and no further investigations could take place after the appeal outcome.
51. The Minority finds that the appeal having been concluded by the result letter of 13 January 2017 the notification of a tribunal claim by ACAS is received on 25 January. The focus of Z and Y shifted to the claim. By the claim to the tribunal X complains of a wrongful and discriminatory dismissal. By it therefore X disputes that there was any reason to dismiss him. The dismissal is therefore a disputed issue. The Minority finds that this was the reason Z did not pursue a referral at this stage and that this continued to the time of the judicial mediation.

52. However, no referral is made after the judicial mediation on 14 August 2017 until 8 December 2017. The minority finding in relation to this is that no referral was made because of a number of factors which the respondents (specifically Z) allowed to confuse them as to whether a DBS referral should be made and caused a delay in referral. The minority finds that Z and the respondent's trustees from whom we heard evidence B and C, had a limited understanding of the nature of tribunal claims, how they are heard and judicial mediation. They did not for example understand the effects of the mediation on the status of X at work
53. The minority finding is that Z approached the Board members at the meeting on 23 November 2017 when there were discussions whether a referral should then be made. Z took responsibility for the referral and obtained the Board authority for this on 23 November 2017. The Minority finds there were earlier informal discussions about referral, a process in which Y and Z were inexperienced.
54. The referral could have been made at any time after the appeal had been concluded or indeed before. After the mediation on 14 August 2017 there was no Board Meeting until October 2017. There was an AGM in September 2017 at which X attended. His reported comments that day to the effect that he had been "exonerated" and this raised doubts in the mind of the respondent as to what had transpired at the Judicial Mediation. The minority finding is that these doubts led to Z wrongly stating in the referral form that the dismissal had been "upheld" in the DBS referral form.
55. The respondent made enquiries of its advisers as to the position which was clarified by 21 November 2017. In the meantime the respondents understood from D that the claimant had told her that he had received a specific sum in settlement of his claim and the respondent felt that X had broken the terms of the settlement as to confidentiality. The respondents sought advice on that too.
56. Although there had been a Board meeting in October 2017 at which such a decision could have been taken or the respondent could have convened a special meeting to discuss it or indeed could have decided by Z making the decision herself, the Minority finding is that the respondent made the decision in the way stated. We unanimously believed the evidence of Z, B and C. There was no meeting in August and there was an AGM in September rather than a Board Meeting.
57. The Majority decision on this is that the respondent has not shown a credible reason for the delay and therefore the reason for the delay has no adequate explanation. The reasons for delay do not convince the majority. The factors put forward by the respondents do not explain their failure to make the referral when there is a legal duty to do so and which arose much earlier. There is however as above a unanimous finding of an honest belief in the grounds for the referral being made out.

58. The Majority find that the evidence of the Trustees was that they had little or no knowledge of the need to refer until the November meeting and the issue only arose following the comments by X about the settlement in the mediation. In the Minutes of 23 November this is confirmed by the issue on the Agenda as a perceived breach of confidentiality. This supports the finding of the majority that the referral comes about because of the claim and more specifically the settlement of it. It is more likely than not to be for reason of the claim having been settled and taking into account the amount of settlement which exceeded what the Trustees anticipated beforehand.
59. The proper analysis is to ask if the claimant has shown grounds from which it could be concluded in the absence of an explanation that there has been discrimination. Our unanimous finding on that is that the claimant has shown such facts. All X can be expected to show is that he has been referred to DBS. That is a detriment. He was not referred at the outset nor was he referred after his dismissal had been concluded and his appeal against dismissal failed but instead approximately 11 months after his dismissal and after a comment at a Judicial mediation that he was not viewed as an abuser. These are facts from which it could be concluded that the referral was made, or made when it was, because of the claim to the tribunal and the settlement of that claim. We view these as protected acts either as being one item, the claim or as something done for the purpose or in connection with the 2010 Act, the settlement of the claim.
60. The burden therefore is shifted onto the respondent to show the reason. The unanimous finding is that the respondent has shown the reason for making a referral. That is the statutory duty to do so. There is no evidence that the respondent took the view that the dismissal was wrong. The Minority finding is that the delay has been explained by the respondent and is the true reason for the delay. It has shown on the balance of probabilities that the referral is not in any way due to the protected acts. The Majority finding is that the Respondent has not shown the reason for making the referral in December 2017 and that therefore it is concluded that it is for reason of the protected act of bringing the claim and settlement of it. It is a unanimous finding that it is unlikely that the referral or the delay was because of his grievance given the issues raised in it.
61. Z met X in a car park outside a supermarket. Our finding is that there were there two such meetings, on or around 9 January and on 19 January 2018.
62. In the first one, on or around 9 January Z had been with one of her grandchildren and X in our finding followed Z around the supermarket insisting on discussing his employment and the ending of it. We find it is likely that there were two meetings because Z told a colleague of the first meeting around 9 January 2018 and also referred to it in a letter to the DBS on 22 February 2018 concerning two approaches to her by X.
63. On the 19 January 2018 we find that Z saw X as she was leaving a supermarket in Huddersfield at around 7 pm. Z was pushing a shopping trolley. We find that

X again followed Z putting his hand on the trolley and again trying to discuss with her the dismissal and the injustice he felt. We find as Z accepts that she said to X that she did not speak to men who abuse women. Our finding is that she was referring to his attitude in the car park that night against the background of what had occurred earlier on or around 9 January. Z denies saying that she had won, he had lost and she hopes the hell of the dismissal continues. We do not believe she said that. However whatever was said we find was caused by X's attitude displayed that day in following Z to her car, holding her trolley and raising his voice. Z did, as she said, find it frightening and intimidating. We find that the comment about not speaking to men who abuse women was in response to X's actions which Z viewed as abuse of her as a woman. By the time she reached the car, some hundred metres or so from the supermarket door, Z's husband sitting in the car heard a raised voice from the boot area of his hatch back car and saw Z returning the trolley to the trolley park. We believed the version of events given by Z on balance and think it is more likely that she responded to an unpleasant situation on the night rather than what had happened between October 2016 and November 2017.

64. Our finding is that the comments made had no reference whatsoever to X's Grievance, his claim to the tribunal or any aspect of it. In finding against X we consider the demeanour of Z and X in the tribunal and based on the respondent's understanding, that on at least two occasions X had tried to discuss this issue in public places, namely with D and at the AGM. On balance of probability we find therefore that X sought to do this again on 9 and 19 January. We also take into account that X in his witness statement did not deny a meeting on 9 January although it will have been clear to him by that stage that Z said that there had been one.
65. We believe Z made an honest mistake as to whether one or two grandchildren were with her on 9 January and it does not lead us to doubt her evidence. Also, Z was at least willing to accept that she had spoken to X partly in the way alleged. We find Z was a woman apparently alone in a dark car park who tried her best to deflect X by refusing to discuss matters with him in the light of his perceived abuse of her. That is all it was and it is not victimisation because of his protected acts. We accept that the comment made could be viewed as subjecting him to a detriment because the response could be seen as rejecting X as a person with whom Z would hold a discussion and accusing him of being a man who abuses women but no further.

### **Summary Conclusions**

66. In summary our decision is that there can be no action in relation to the referral to DBS because it is a privileged act in respect of which the respondent has immunity from process. The same applies to the delay in referral.
67. The DBS is a statutory body. There is a process by which the rights of the individual are determined. This a process which resembles the process of a court or tribunal in that barring can only occur after the person referred has a

right to respond. In addition there is a right to have an appeal against a barring decision to a Tribunal. The only way the matter can be determined in full, that is, after challenge on appeal, is if a referral is made. The referral is therefore the subject of absolute privilege. The same applies to any delay. There is no specified date by which a referral is to be made. The referral is the subject of absolute privilege even if made in bad faith as long as it is not known to be untrue. It is hard to see how it would cease to enjoy privilege due to delay.

68. Privilege is accorded to referrals to statutory bodies for public policy reasons namely that where a body such as DBS has a duty to safeguard children and vulnerable adults those making referrals should be able to do so without fear of legal sanction.
69. The safeguard against abuse of the process is that persons in appropriate circumstances would not be barred because of the opportunity to make representations at the 'minded' to bar stage and to appeal thereafter.
70. We find that there can be no action by X in relation to the DBS referral and the timing of it and for that reason those complaints fail.
71. Had we not made such a finding we would by a majority (the Employment Judge in a minority) have found that complaint proved as explained above.
72. We would have unanimously found that there are facts proved from which we could have concluded that there had been victimisation. This is the fact of the claim and the settlement of it and, after a delay, the referral made afterwards. The delay from the conclusion of the appeal in January 2017 to referral is some 11 months. Unanimously we found those are facts from which pursuant to section 136 we could have concluded there is victimisation. The minority finds that on balance the respondent has shown the non-discriminatory reason. The majority find it has not.
73. We include settlement of the claim as a detriment as it would be artificial to exclude it from that. In any event it is within section 27 as any other act in connection with the 2010 Act. We included the delay as a detriment because it would be artificial to exclude this from the Referral as a "detriment". It is in the claim form and so in any event we would have allowed any necessary amendment as we had evidence of the reasons for delay in referral in the hearing and submissions of the parties. Referral is a detriment because it subjects a person to a barring process. Delay is a detriment because it prolongs the time a person has that hanging over them. The Majority would have found that the respondent has not shown that the settlement had no influence on the referral.
74. We unanimously decide that the complaint of victimisation by the incident on 19 January 2018 fails as explained above.

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Employment Judge Trayler  
Date 21 March 2019

JUDGMENT SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE

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