EMPLOYMENT TRIBUNALS

Claimant: Mrs Eileen Jones

Respondent: North Lincolnshire & Goole Hospitals NHS Trust

HELD AT: Manchester **ON:** 30 and 31 January 2017
1 February 2017
2 February 2017
(in Chambers)

BEFORE: Employment Judge Jones
Mr Q Shah
Mr K Lannaman

REPRESENTATION:

Claimant: In person
Respondent: Mr B Williams, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The complaints that the claimant was discriminated against in respect of her protected characteristic of disability, by of way of direct discrimination, discrimination arising from disability, breach of a duty to make reasonable adjustments and victimisation are not well-founded and are dismissed.

2. The complaints that the claimant was subjected to detriment and unfairly dismissed on the grounds of having made protected disclosures are not well-founded and are dismissed.

REASONS

Introduction

1. On 19 December 2013 Eileen Jones, the claimant, presented complaints of discrimination and unfair dismissal against her former employers, the North Lincolnshire & Goole Hospitals NHS Trust, the respondent. At a preliminary hearing before Employment Judge Davies on 20 November 2014 the claimant was given permission to amend the claim to add a complaint of automatically unfair dismissal

contrary to section 103A of the Employment Rights Act 1996 ("ERA") and that she was subjected to detriments contrary to section 47B of the ERA. At that hearing the issues in the case were identified. Subject to an addition to the list of protected disclosures submitted by the claimant's former legal representatives on 21 May 2015, and a concession by the respondent that the claimant was a disabled person at the material times, the issues remain as identified by Employment Judge Davies.

Evidence

2. The Tribunal heard evidence from the claimant; from Mrs Clare Hughes, Operation Lead for Speech and Language Therapy/Nutrition & Dietetics; and from Mr Alan Bell, former non executive director of the respondent.

3. The claimant submitted some further documentation which had not previously been disclosed until a few days before the commencement of the hearing or at the hearing in the form of a medical report from Mr James Walsh, Consultant Orthopaedic Surgeon, dated 20 January 2017 and a letter from HM Principal Inspector of Health and Safety at the Health and Safety Executive to the claimant dated 9 April 2015. The respondent did not object to the admission of these documents to the bundle. On the second day of the hearing the Employment Judge queried why notes had not been taken at the meeting convened to determine whether the claimant's employment should be terminated. Mrs Hughes informed the Tribunal that a Human Resources officer had made notes of the meeting but, for some reason, these were never disclosed.

4. The claimant had included in the bundle some of her notes relating to the meeting but they were a summary of the points she had advanced without any reference to the comments of discussions which took place about them. On the third day of the hearing the claimant produced typewritten notes which she had taken at that meeting. Mr Williams objected to their admission. The Tribunal ruled against the claimant in her application to admit these documents. Very clear directions had been given by Employment Judge Davies about disclosure of relevant documents. Further Case Management Orders were made by other Judges at preliminary hearings, including an order by Employment Judge Keevash that a bundle of documents was to be supplied to the claimant by 4 December 2015. Having regard to the overriding objective the Tribunal was satisfied it was not in the interests of justice to admit the claimant's notes of this meeting. To do so would have jeopardised the conclusion of this hearing in timely fashion. There would have to be a delay for the respondent to take instructions upon the claimant's notes with the potential for it seeking to adduce further evidence not already addressed in the witness statements and other documents. It is more than three years since this claim has been issued and it is well outside the targets for determining such cases.

Findings of Fact

5. The claimant is a Speech and Language Therapist. She was employed in that capacity by the respondent on 8 October 2012. That employment was terminated by a letter of 18 December 2013 with notice to expire on 7 January 2014. Mrs Hughes and Mr Bell say that the reason the claimant's employment was terminated was because of lack of capability due to the claimant's ill health. The claimant says that the decision was discriminatory and was because she had made a number of

protected disclosures relating to criminal offences, legal obligations and health and safety matters.

6. On 4 December 2012 the claimant had an accident outside the Accident and Emergency Department of the Scunthorpe General Hospital. She was crossing a path in the vicinity of the car park and fell. She believes she tripped over a wire. She managed to make her way to the Occupational Health Department where she spoke to some staff. The claimant was advised to attend at the Accident and Emergency Department which she did. She was seen by the casualty doctor at 17:55. He recorded that she was walking through an alleyway, it was dark and something caught her right leg causing her to fall with both hands outstretched. She was noted to have injuries to the left hand and right knee and was discharged at 18:10 with the prescription of painkillers.

7. On 5 December 2012 the claimant attended at work and compiled an incident report online with the assistance of a manager. The report recorded that the claimant had slipped and fallen forwards in the car park in front of the A & E. It stated that it had been raining very heavily and there was a lot of surface water. It recorded that the doctor had examined wrists, knees and the right ankle and informed the claimant that nothing was broken. On 5 December 2012 the claimant emailed Mrs Hughes and informed her that she had filled in the incident report form. She said that she had slipped in the car park and had suffered a few bruises. The claimant had also telephoned Mrs Hughes to leave her a message to similar effect.

8. Mrs Hughes replied to the email within half an hour. She said she hoped the claimant was ok and asked if she had been checked out at A & E. The claimant replied on 7 December 2012 by email. She said that the doctor had given her painkillers and provided some work related information.

9. On 10 December 2012 the claimant emailed Mrs Hughes again. She informed her that she had problems driving because of pain in her right ankle and that she believed her foot was sprained. She informed Mrs Hughes she would not be able to work that week. She had been due back on that day.

10. By this stage the claimant was in Ireland. She had travelled, in accordance with pre-arranged plans, on 5 December 2012 to stay near to her daughters. On 14 December 2012 she had x-rays taken at a hospital in Ireland. They revealed a scaphoid fracture in the right hand. There was bruising and pain around the thumb and in the wrist. In addition the claimant had pain and soreness in the knees and hip. Both wrists were supported by splint and plaster casts. There remained similar support until May 2013. A TENS machine was provided. The right foot was injured. On examination a Morton's Neuroma between the third and fourth metatarsal was discovered. There were legions on the second, third and fourth metatarsal heads. They were painful. Later in 2013, in September, the claimant's surgeon recommended a metatarsal dome.

11. On 17 December 2012 the claimant submitted sick notes. They were to last until 24 December 2012. She spoke to the Office Manager, Jenny Brown. She informed her that the x-rays had revealed a fracture to a bone in the wrist and a sick note signed by her GP referred to a fracture to the right hand.

12. Further sick notes were submitted. In a letter to Mrs Hughes of 19 February 2013 the claimant advised she was having physiotherapy and had pain using a computer, mouse and driving distances. She said that she understood that Mrs Hughes was contacting the Occupational Health Department ("OH") to see if she could return to work with amended activities. She said it took three to four months for the facture to settle down. The sick notes submitted from the claimant's GP referred to a fracture to the scaphoid in the right thumb. He said the claimant was "in rehab, possibly returning to work from 2 April 2013 – reduced hours for six weeks".

13. The claimant had a telephone conversation with Mrs Hughes in February 2013. She informed Mrs Hughes that after the accident she had gone to the Occupational Health offices and spoken to two members of staff there. The claimant is adamant that she had informed Mrs Hughes about a wire which she believed caused the accident. Having regard to the contemporaneous documentation, including that which came from the claimant, we are not satisfied, on a balance of probability, that there was reference to a wire before April 2013. However, we are satisfied that Mrs Hughes visited the Occupational Health department in about February 2013 to see if she could find the staff to whom the claimant had said she had spoken. The staff Mrs Hughes spoke to did not know anything about the accident.

14. On 2 April 2013 the claimant sent two texts to Mrs Hughes. She raised a question about whether the accident had been reported in accordance with the Reporting Injuries Diseases and Dangerous Occurrences Regulations 2013 ("RIDDOR"). She also mentioned a wire. We are satisfied that this is the first reference that had been made to the wire to Mrs Hughes. Mrs Hughes telephoned Sarah Davy, a Datix Systems Manager, to ask if an incident had been reported under the regulations. Ms Davy made enquiries and emailed Mrs Hughes to say an incident report had been submitted and a reference number was given. She was informed that a copy was to be sent to Bill Parkinson, he being the person responsible for reporting matters under RIDDOR.

15. On 30 April 2013 Mr Parkinson submitted a report to the Health and Safety Executive ("HSE") in respect of the incident. He described it as a slip/fall which occurred when the staff member was leaving site. He referred to adverse weather conditions. The account of the incident has plainly been taken directly from the incident report which the claimant had compiled on 5 December 2012 with the assistance of another manager.

16. On 10 April 2013 Mrs Hughes rang the claimant. She could not get through. She left a message on her mobile phone. She asked her to call back.

17. On 25 April 2013 Mrs Hughes rang the claimant again. She said she could not get through and left another message. The claimant submitted further sick notes referring to a wrist injury. They stated that the claimant was unable to attend work until 29 April 2013. In the accompanying letter the claimant asked if Mrs Hughes had managed to check out the RIDDOR number and the OH staff who she had spoken to. She said that she went to them just before 5 o'clock when she had been badly injured and that they had said they would find the wire and write out the incident form.

18. Mrs Hughes emailed Ms Davy to ask if she could access the system. She was attempting to sort out the claimant's temporary industrial injury pay with the Payroll Department. She took advice. The claimant's sick pay had expired and she was entitled, under the contractual terms of employment, to be paid 85% of her salary if she was absent as a consequence of an industrial injury. The Payroll Department arranged for the claimant to receive this pay. The claimant had worked 22.5 hours and there were errors initially by paying her as a full-time worker.

19. In a telephone call of 29 April 2013 the claimant informed Mrs Hughes of her condition. She was to await further tests from a specialist and was continuing to suffer pain in the wrist. She informed Mrs Hughes she was getting back into driving. She said her grip had gone and she had difficulty with a computer mouse, the telephone and emails. The claimant informed Mrs Hughes that photos had been taken of the site and that the wire was still there. She restated that she had gone to the Occupational Health Department and then the Accident and Emergency Department.

20. Having taken advice Mrs Hughes wrote to the claimant on 9 May 2013 to invite her to a meeting on 16 May 2013 to discuss her state of health. The sick note had expired on 29 April 2013. She enclosed the Trust's policies on sickness absence. Mrs Hughes asked the claimant to telephone her if her ill health or location prevented her from attending.

21. That meeting was postponed. The claimant had contacted Mr Julian Corlett, the Unison Branch Secretary, to assist her. He contacted Mrs Hughes on 22 May 2013 to inform her of his involvement and that he would attend the meeting on her behalf. The claimant was to remain in Ireland, a situation Mr Corlett described as not ideal.

22. The meeting took place on 4 June 2013. The claimant attended on the telephone and Mr Corlett in person. The claimant was advised of the respondent's counselling services. The claimant said she was continuing to have problems of pain and reduced grip strength and that she was undertaking regular physiotherapy. She was awaiting a further appointment with a specialist. She was signed off for a further month to the end of June by her GP. The claimant was informed that it would be beneficial for her to be seen by the Occupational Health advisers as soon as possible. The claimant expressed concerns about flying or driving at that stage. It was agreed, therefore, that she should send copies of her consultant's reports. The claimant submitted a report from Mr McGoldrick, Consultant Orthopaedic Surgeon, of 3 May 2013, and Mr Seamus Morris, Consultant Orthopaedic Surgeon, of 9 April 2013. Both reports confirmed the conditions in the wrist and lower limbs. A letter from the claimant's GP confirmed the facture.

23. On 24 June 2013 Mrs Hughes contacted Mr Parkinson for an update in respect of the accident and it being reported. She said that there was a possibility that the respondent may have to terminate the claimant's contract. She wanted to know if there would be a possible claim and said she would appreciate details in respect of any investigation. Mr Parkinson said that the HSE and Payroll had been notified but nothing had been highlighted with regards to any defects in the car park and lighting surveys had been carried out in the past which had not highlighted any issues. He said they should await the notification of any personal injury claim.

24. On 1 July 2013 Mrs Hughes telephoned the claimant and left a message. She thanked her for sending the medical reports. She said the Occupational Health Department would contact her directly.

25. On 27 June 2013 the claimant sent a letter to Liz Brown, an employee working in the Payroll Department. The letter is headed "Re: our conversation this morning regarding pay". The claimant explained that there had been an error in the calculation of her pay and was concerned that they may seek to recoup what amounted to an overpayment in the first month. In her evidence the claimant explained that this was because she had accidentally been categorised as being a full-time worker and not working 22.5 hours. In the letter she explained how she had fallen on a wire on 4 December 2012 and that it was at the bottom of a wire fence that had been left in. She described the injuries and how she could not use a phone or computer for four months because of her reduced grip. She said she did not know if the matter had been reported, had no RIDDOR number and she had had a severely reduced rate of pay for a period. She said that had caused financial difficulties, in particular in respect of her having to pay her doctors and physiotherapist. She said she thought it was the fault of the Trust that she had been overpaid for the first month.

26. On 3 July 2013 the claimant sent an email to Mrs Hughes. She expressed concerns about the medical report she had sent being read by the Occupational Health Department because of the fact that two staff members there had not taken her to casualty after the accident or arranged for a wheelchair notwithstanding she was badly injured. She said that the health and safety training at the NHS was about keeping colleagues safe and what to do if one was injured, but these guidelines had not been adhered to by those staff. She said the matter had not been addressed and that there should really be a complaint raised. She asked if her GP could attend at the forthcoming meeting to discuss her sickness absence.

27. On the same day, 3 July 2013, Mrs Hughes sent an email to Human Resources advisers in which she referred to the claimant's receipt of temporary injury allowance and her suspicion that the Trust may receive a claim. She said that the claimant had expressed concerns all along at the way she had presented at the Occupational Health Department following the fall and that she had spoken informally to office staff there who had no record of the incident. Mrs Hughes asked if she needed to take the matter further and whether this was a formal complaint. Mrs Hughes was advised by Julia Rimington of Human Resources in respect of these matters on 5 July 2013. She said that the claimant's concerns needed to be acknowledged but that it was up to the claimant if she wanted to take the matter further. Mrs Hughes never relayed this to the claimant.

28. The next sickness absence meeting took place on 17 July 2013. It had been arranged for the convenience of the attendance of Mr Corlett and for the telephone attendance of both the claimant and her GP. It was scheduled to commence at 3.30pm. Unfortunately the claimant's GP was overrunning. Mr Corlett and the HR representative decided to leave after 25 minutes of waiting. Mr Corlett had other business to attend to. By 4.15pm the claimant had managed to telephone with her General Practitioner. She had a discussion with Mrs Hughes. The medical position was that the wrist and knees were being treated by an orthopaedic specialist and the foot and neck were being treated with physiotherapy for rehabilitation. The General Practitioner expressed the opinion that the claimant was recovering in line with

expectation given the nature of her injuries. He felt she would recover sufficiently to be able to return to work within nine months to one year of the accident, or three to six months from that time. He said the claimant would be likely to need a phased return initially, for example for half days. Mrs Hughes advised the claimant that the Occupational Health physiotherapist would ring her the following morning to arrange a phone consultation. The same day Mrs Hughes emailed Mr Corlett to summarise the position. She added that she had spoken to the claimant afterwards. She wrote, "*I think she may email you as she seemed unsure whether she needed/wanted you there*".

29. On 3 August 2013 the claimant emailed Mrs Hughes to inform her that she had spoken to Tony from the Occupational Health Department but the telephone signal was bad and they were cut off. She said she had left a message and had rung back several times but he was engaged. She asked if the telephone could be put on roaming as it was very expensive for her to ring on her mobile phone. She asked if anything had happened about reclaiming her medical expenses. The Human Resources Department would not authorise payment of a roaming telephone facility.

30. There was a period of leave after which Mrs Hughes contacted the Occupational Health Department to enquire whether they had progressed and she was informed that there had been problems with communications over the telephone. It was suggested that an independent company in Ireland should prepare a report given these difficulties.

31. On 13 September 2013 Mrs Hughes emailed the claimant. She said she hoped she was making a good recovery. She said she had attempted to contact her on 2 September by leaving a voicemail on her mobile phone but there had been no reply. She said there had been no direct contact for 6-7 weeks despite a number of attempts to call her. She drew the claimant's attention to the fact that under the sickness policy she was expected to maintain regular contact with her manager and that she could not provide regular support unless there was such contact. She asked her to telephone to update her on medical appointments and progress. She said that she recognised distance made keeping in contact more difficult, but as an employee of the Trust and one of her team regular contact was essential. The claimant did not reply.

32. On 27 September 2013 Mrs Hughes wrote to the claimant in respect of her sickness absence. She stated that she had been trying to contact her by phone and email for a number of weeks but was unable to reach her. She recorded she had left messages on the claimant's voicemail asking her to contact her. She said the latest was 2 September. She also said that she had emailed the claimant, the last time being on 13 September 2013. She said she had not heard from the claimant for 9-10 weeks, the last time being on 19 July 2013 when she spoke directly to her GP. [Mrs Hughes acknowledged in evidence that this was an error as the claimant had attempted to contact her by her email of 3 August 2013 and Mrs Hughes had overlooked this]. She added that the Occupational Health Department had been attempting to contact her to arrange an assessment by an organisation in Ireland known as Medmark to report on her health and ability to work given her long-term absence. They had not been able to contact the claimant either. She reminded the claimant that she was expected to maintain in regular contact with her manager during her absence pursuant to the Trust's management of absence policy. She left her telephone number and said that the lack of contact was a growing concern.

33. The claimant wrote back immediately. She pointed out that she had emailed on 3 August. She also pointed out that she had asked for a roaming facility to be added to her mobile phone. She said Mrs Hughes' letter was completely untrue and she was not accepting it, and that Mrs Hughes had invoked the sickness policy and accused her of not complying with it when it was the managers who had failed to keep in touch, and that if they had provided the roaming facility it would have made matters easier.

34. On 30 September 2013 the claimant emailed Mrs Hughes to update her as to her medical condition. The consultant had recommended putting splints back on to the wrist and was recommending nerve conduction studies. This is because the claimant was dropping objects. She said she was having enormous problems using computers and answering the phone. She said she had not had any missed calls. She asked Mrs Hughes to contact her. She said it had taken over 30 Euros of credit when she phoned on 17 July. There were further emails sent by the claimant and a telephone conversation was arranged on 9 October 2013. The claimant raised concerns about the RIDDOR report not having been completed following the accident and that it had affected her pay. She said it had affected her professional registration due to a lack of funds. An arrangement was made for the claimant to drive to Dublin, some 20 miles away, for the Occupational Health assessment by Medmark.

35. On 11 October 2013 Karen Fanthorpe of the Human Resources Department contacted Mr Corlett because Mrs Hughes had informed her that he had assisted the claimant previously. She asked for his help and advice in trying better to manage the case given the problems that had cropped up. She asked if the claimant had maintained contact with him since she returned to Ireland, and asked if there was an alternative possibility of Unison support being arranged for her in Ireland. She wrote, "*I think it would be helpful to Eileen and to Clare and me as managers if we could make sure she was properly supported*".

36. On 25 October 2013 Mrs Hughes sent a request for an assessment to Medmark. She asked whether the claimant would be fit to travel by the end of November, whether she was ready to return to work on a phased basis with reduced hours, and whether any restrictions were advised or adjustments needed. She asked if the claimant was not able to work what the likely recovery pattern was, including overall prognosis and timescale.

37. On 31 October 2013 Mrs Hughes wrote to the claimant to invite her to a long-term sickness absence meeting to discuss her continued ill health. She informed her she could attend with a representative and said that if her ill health prevented her from attending she should contact her. She informed her that there was the Occupational Health appointment on 4 November in Dublin. She asked her to confirm her attendance for the meeting on 23 November.

38. In response to Mrs Franthorpe's email Mr Corlett wrote on 16 October 2013 to say he could not assist further in the claimant's matters. He said that he had received a courteous email from Clare Hughes in which she had informed him that the claimant had told her she did not require him at that or any further meeting, and that this was the claimant's prerogative, and so he had been dismissed from providing the union's services.

39. On 11 November 2013 the claimant sent an email to Mr Corlett to ask him if he could assist her at the forthcoming sickness absence meeting. He replied and wrote that her manager had contacted him to say that the claimant had expressed surprise that he was in attendance on 17 July and that she had stated that she did not want his involvement in any further meetings or copying into correspondence. He said she reserved the right to dispense with the union's services and having done so he was unable to assist her. The claimant responded the next day to say she was flabbergasted and disputed that she had said any such thing. She said she still wanted him to be involved and she said she did not think a manager could cancel a union representation involvement. Subsequently the claimant challenged this decision with the union but was not able to obtain representation.

40. On 5 November 2013 the claimant attended the Occupational Health meeting in Dublin. The adviser prepared a report and under the heading "recommendations" stated:

> "*Although she continues to have difficulties in her day-to-day activities and is resistant to travel for HR meeting, I have explained there is no medical reason that if she could here that she should [not] be able to travel for the meeting. However she is some way off even being fit for a phased return to work.*"

41. Under the heading "work restrictions" he stated:

> "*Based on the nature of her injuries and the very slow progress she has made to date her prognosis of returning to work in the next six months would be poor*."

42. On 14 November 2013 the claimant emailed Gemma Downs of Human Resources. She complained of having been bullied. She referred to the letter of 27 September 2013 which had inaccurately said there had been lack of contact for several weeks notwithstanding her email of 3 August. She also complained of Mrs Hughes cancelling her representation by Unison. She said she could not travel alone due to her injuries and that she had emailed Mrs Hughes to that effect but had received no response. She said she felt she was being discriminated against because of her injuries and subsequent disability issues. She asked Mrs Downs to get back to her and to rearrange the meeting. Mrs Downs acknowledged the email the following day and said she would respond as soon as possible.

43. The claimant wrote to Mrs Hughes by email of 15 November 2013, again pointing out mistakes in her earlier letter and complaining that she had not responded to her emails. She said she had difficulty travelling to the airport and felt she was being bullied. She said she had discovered that Mrs Hughes had cancelled her union representation and objected to this. She said she was raising it as a complaint.

44. The claimant submitted a medical certificate stating she was unable to attend work until 18 December 2013. It was dated 13 November 2013. The sick note stated that there were multiple injuries and that there was to be a review with the consultant in December when an updated report would be issued.

45. On 18 November 2013 Mrs Hughes wrote to the claimant and then informed her that she had received the Occupational Health report and a likely outcome at the

forthcoming meeting would be termination of her contract due to ill health. She said the meeting would be in accordance with the Trust's sickness absence policy.

46. The claimant emailed Mrs Downs again on 21 November 2013 repeating her concerns about the meeting and requested it to be rescheduled to 11 or 13 December. She said if that was not done it would be in defiance of legislation. She also informed her she had not received the Occupational Health assessment.

47. The Human Resources Department and Mrs Hughes agreed to postponing the meeting to 11 December and provided the claimant with the Medmark report.

48. On 9 December 2013 the claimant emailed Karen Fanthorpe. She relayed the circumstances of the accident as she recalled them. She said she believed she was being discriminated against due to her disability problems and referred to a grievance she had submitted. She said her trade union representation had been removed by her manager. She informed Mrs Fanthorpe that the HSE were investigating the report of the incident. She said the reportable incident included a fracture and that the HSE had to inspect the site before any evidence was removed. She said they had a photograph of the metal wire in situ where a temporary fence had been erected. She said no-one had reported the incident. She asked for a response.

49. An investigation had been undertaken by the Trust by 8 September 2014 into the accident. It was summarised in power point presentation form, wrongly dated 4 December 2013 rather than 2012. It had examined various pathways in and about the car park where there was no evidence of any wire. In his evidence Mr Bell said that it had only become apparent subsequently that the path the claimant had crossed was a grassed area which had been used as a shortcut. There was a wire present to assist the growth of a privet hedge. At the time of the investigation this had not been recorded because he said it was not a recognised path. Shortly after the accident a wooden fence had been erected at the end of the grassed area where people had taken a shortcut. A wire remained adjacent to the fence, still supporting the growing privet.

50. On 9 December 2013 the claimant emailed Gemma Downs and asked her to read her grievance letter first. She enclosed a number of documents she said were relevant to the forthcoming meeting. She informed her she had reported her concerns to the Health and Safety Executive and they had ordered a full investigation into the accident and the failure to report it. She said it was mandatory to report an accident that involved a fracture or attendance at hospital. She said they had the photographs of the wire in situ and a fence which was erected afterwards. She said she had received no response to her grievance against Mrs Hughes. She again complained about the removal of the union representation.

51. On 11 December 2013 the claimant attended at the arranged meeting and was accompany by Mr Wright, a friend. The claimant raised her belief that the respondent should make adjustments in the workplace. She pointed out that the Occupational Health report did not address workplace adjustments and that if that were not possible redeployment had to be considered. She referred to the wire which she fell over at the time of her injury and the failure to comply with legislation. She complained that the A & E Department did not carry out an x-ray and there had been no attempt to identify the two staff she had spoken to at the Occupational

Health Department. She said there had been a failure to report the matter to the HSE, which was mandatory, and her trade union representative had been removed by Mrs Hughes. She requested that any decision be deferred until she had seen her consultant on 18 December.

52. On 18 December 2013 Mrs Hughes wrote to the claimant and terminated her employment. She addressed a number of these issues, saying that she had not removed the trade union representative and it had been left to the claimant to contact him. She said the matter had been reported to the HSE. As to the request for a postponement she said that the most recent medical advice in the Occupational Health report was that the claimant's prognosis for returning within six months was poor and therefore the service could not continue to sustain that level of absence so it was necessary to terminate her engagement. She wrongly referred to an appointment with the consultant six weeks hence, rather than six days. She informed the claimant her employment would terminate on 7 January 2014.

53. The claimant submitted an appeal in which she pointed out that she had submitted a grievance and it had not been investigated; that union representation had been removed and that the accident was not investigated by the HSE and there were outstanding criminal charges against the Trust for not following correct procedures or investigating the accident.

54. At the appeal meeting Mr Bell addressed these issues. He concluded there were no criminal charges, having made enquiries of the HSE. He did not accept that Mrs Hughes had removed the claimant's trade union representative. In the meeting the claimant was asked when she would be able to come back to work, she knowing her job. The claimant said she would have to ask her GP. It was pointed out that she could not say even at that stage when she would return. The claimant said that if they had asked her before the meeting she could have checked with her consultant. She said driving would possibly be difficult and driving a lot would kill her. The claimant was notified that the appeal was dismissed by a letter of 10 March 2014. Mr Bell wrote that the panel felt the claimant had aspirations to return to work but there was no plan provided by her to consider a return either on a phased basis or with adjustments and that the Occupational Health advisor had provided no clear prognosis for a return.

The Law

55. The relevant statutory provisions are contained within Part IVA of the ERA particularly sections 43B, 43C, 47B and 48, and section 103A.

56. In respect of the disability discrimination complaint the relevant statutory provisions are contained within section 6, section 13, section 15, section 20, section 21, section 23, section 39, section 123, section 136 of the Equality Act 2010 (EqA) and schedule 8, paragraph 20.

Submissions

57. Both parties made oral submissions to the Tribunal.

Discussion and Conclusions

Disability

58. It is conceded that the claimant had a physical impairment which had a substantial and long-term adverse effect upon the claimant's ability to undertake normal day-to-day activities. However, the respondent disputes that the managers had the requisite knowledge for part of the period to which this claim relates. That is relevant to the breach of the duty to make adjustments claim and the discrimination arising from disability claim whereby in neither instance is the duty breached if the employer did not know or could not reasonably have been expected to know that the claimant was disabled.

59. It cannot be suggested that from late December 2012 the respondent's managers did not know that the claimant's normal day-to-day activities were not substantially adversely affected. The issue is whether they knew or could reasonably have been expected to know that they were long-term by which it is meant there was a risk they would last for longer than one year.

60. Upon the medical information which was submitted to the respondent's managers it would have become apparent on 17 July 2013 that there was a risk her symptoms would last longer than 12 months. Although the GP thought the return to work would be within 9-12 months, by then there was evidently a risk that symptoms may last longer even though a phased workplace return might have been achievable. We are therefore satisfied that from that point in time the respondent had the requisite knowledge that the claimant was a disabled person. Prior to that point both the claimant and her GP had been intimating that the position would have improved within three to four months of the injury being sustained.

The four detriments and dismissal

61. In respect of both the direct discrimination and discrimination arising from disability claims there are four alleged detriments and an act of dismissal. We address each detriment in turn, and then consider it, if established, as against the respective legal complaint. A detriment will arise if a reasonable employee would or might take the view that they had been disadvantaged, see **Shamoon v Chief Constable of the Royal Ulster Constabulary (Northern Ireland) [2003] UKHL 11*, [2003] 2 All ER 26, [2003] ICR 337*** and **Ministry of Defence v Jeremiah *[1980] QB 87, [1979] 3 All ER 83***

Removing the trade union representation

62. Neither party called Mr Corlett to give evidence. The claimant believed that Mrs Hughes had removed Mr Corlett as her representative because of the contents of his email of 11 November 2013. Mr Corlett had said in that email that Mrs Hughes had said "*she [the claimant] did not want Mr Corlett's involvement in any further meetings or copying into correspondence*". The claimant's surprise at this comment is perfectly understandable. The claimant wrote to the union subsequently to obtain representation. It is surprising that was not provided given the claimant said that she had not given any instructions to remove the union representation.

63. Mrs Hughes was clear in her evidence that she had given no such instruction. In addressing the questions posed to her, her answers were clear and consistent. Mrs Hughes was a reliable witness who conceded that she had made mistakes in respect of a number of matters in this case, such as not being aware that there was an obligation to report an accident of this type to the HSE until she learned of that having made enquiries following the claimant's concerns of early 2013. Similarly Mrs Hughes conceded that she had overlooked the claimant's email of 3 August 2013. This frankness put Mrs Hughes in a good light because it reflected well upon her honesty. The email she had sent to Mr Corlett on 17 July 2013 did not say what he later alleged. In his email to Mrs Fanthorpe of 16 October 2013 he had said Mrs Hughes had told him that the claimant did not require him at any further meeting. The actual content of her email had expressed doubt as to whether the claimant needed or wanted Mr Corlett, but left an expectation that the claimant would contact Mr Corlett.

64. While criticisms may well arise in respect of the fact that the union were not prepared to pick up the claimant's case and continue to represent her, we can find no justification for laying this at the door of Mrs Hughes. The claimant criticised her for emailing Mr Corlett to summarise the contents of the 17 July meeting without also sending a copy to her. Mrs Hughes said that the claimant was present at the meeting and knew what had been said in contrast to her union representative. That was a logical explanation for why Mrs Hughes had written to Mr Corlett but not the claimant. It was the claimant who had not contacted Mr Corlett for many months between 17 July and 11 November. This is perhaps a little surprising given the concerns the claimant had expressed between those periods as to the lack of communication and her reservations about Mrs Hughes.

65. Any suspicion that Mrs Hughes had been at the forefront of the removal of her union representation should have been dispelled when the claimant saw the email correspondence disclosed for the purpose of this litigation, summarised at paragraph 35 above. Far from the managers of the Trust not wishing for the claimant to have union representation, they were instrumental in seeking to obtain such support, as expressly stated in the email of 11 October 2013. This even envisaged representation from a source in Ireland. It was the union and not the employer which was resistant to providing support.

66. We reject the allegation that Mrs Hughes removed the claimant's trade union representation. That detriment not been established. It must fail as an allegation of direct discrimination or discrimination arising from her disability.

Writing to the claimant on 27 September 2013 stating she had not kept in touch with her

67. The letter of 27 September 2013 contained an error. It stated that there had been no direct contact for 9-10 weeks. Mrs Hughes had overlooked the email from the claimant of 3 August 2013. This error aside, Mrs Hughes had attempted to contact the claimant by telephone on 2 September 2013 and had sent her an email on 13 September 2013. To neither had she received a reply. It was perfectly reasonable of Mrs Hughes to express concern about the lack of response to these two communications, given her obligations as a manager seeking to comply with the management of absence policy. We do not consider that this letter could be construed as a detriment by any reasonable employee, by reference to the definition

set out in paragraph 61 above. The claimant's angry response was disproportionate in its criticism. Doubtless the claimant had become frustrated when she had left phone messages which had not been responded to and had, herself, sent an email to which she had not received a reply. It did not follow that the actions of Mrs Hughes in seeking to pick up contact in September amounted to a detriment. Had she not done so she could well have been criticised by both the claimant and her employers.

Direct discrimination

68. Even were this a detriment for the purposes of the direct discrimination complaint we are not satisfied there are facts from which we could decide, in the absence of any other explanation, that stating in a letter that the claimant had not kept in touch was less favourable treatment because of the claimant's disability. An appropriate comparator who had been absent from work for this period of time but who did not have a disability would have been likely to have received a similar letter from Mrs Hughes. The error in overlooking the email of 3 August 2013 would have arisen in a similar hypothetical scenario. It was not the disability which caused Mrs Hughes to write the letter in the terms she had. This complaint of direct discrimination therefore fails.

Discrimination arising from disability

69. Were we to be satisfied this was unfavourable treatment for the purpose of section 15 of the EqA (which we are not, for the same reason we are not satisfied it was a detriment) we would have found it was because of something, the claimant's absence through ill health, which was in consequence of her disability.

70. Sending a letter which stated that the claimant had not kept in touch and should contact Mrs Hughes was a proportionate means of achieving a legitimate aim. The legitimate aim was to provide healthcare to the public and manage the claimant's absence. It was a proportionate means of achieving that aim to send the letter. That was part of the absence management policy. It was to ensure that communication between the claimant and her managers was effective, so as to attempt to achieve the claimant's return to work or, if that was not achievable within an adequate timeframe, to replace her services. Only by the provision of staff who could discharge their duties could the legitimate aim, of providing healthcare to the public, be achieved.

71. This part of the claim under section 15 of the EqA fails, both because the letter could not be considered as unfavourable treatment and it would, in any event, have been justified.

Failing to deal with the claimant's grievance

72. The claimant's grievance contained in the letter of 14 November 2013 and repeated in the letter of 9 December 2013 was not handled in accordance with the respondent's grievance procedure. The complaints the claimant raised were addressed at the hearing of 11 December 2013 and the appeal hearing of 7 March 2014 and did not follow a separate consideration by way of a grievance meeting, determination and right of appeal. The failure to deal with an employee's grievance in the normal manner could reasonably be construed as a disadvantage and

therefore a detriment for the purpose of Section 39(2)(d) of the EqA and unfavourable treatment under Section 15 of the EqA.

Direct discrimination

73. The question in respect of the direct disability discrimination complaint is: was that failure less favourable treatment because of the claimant's protected characteristic, she being a disabled person?

74. There is no comparable factual situation of a person who was not disabled who had submitted a grievance in similar circumstances which might throw some light upon whether the approach the managers of the respondent adopted was attributable to the claimant's disability. Upon the assumption that procedures are followed in the normal course of events, we are satisfied that there are facts from which we could decide, in the absence of an adequate explanation, that the failure to deal with the claimant's grievance separately and in accordance with the standard procedure was because she was disabled.

75. We therefore consider, the burden of proof having transferred to the respondent, whether it has established that the failure to deal with this matter was not because of the protected characteristic. In so doing we recognise that discrimination may be for conscious or subconscious reasons. Moreover if a discriminatory reason played a significant part in the impugned act, the act will be unlawful. The discriminatory reason need not be the sole or even principal reason provided it was not trivial.

76. Having regard to the explanations advanced by Mrs Hughes and Mr Bell we are satisfied that the failure to deal with the grievance under the grievance procedure had nothing at all to do with the fact the claimant was a disabled person. Had a non disabled person raised a similar grievance we are satisfied the respondent would have managed it in a similar way by addressing it at the hearing relating to the dismissal and the appeal hearing. The complaints were concerned with the events which led to the claimant's absence and how the respondent's managers had handled both the incident and her absence. The claimant herself raised the very same complaints at the commencement of the long term absence meeting. Mrs Hughes decided to answer those complaints. For her to have failed to do so would have been to ignore points advanced by the claimant. Having done so a separate grievance procedure was no longer required as the managers had answered the complaints.

77. We have had regard to the substance of the complaints, with a view to considering whether they throw any light upon whether Mrs Hughes or Mr Bell might have had discriminatory factors influencing them, consciously or subconsciously, in dealing with them as they did.

78. As to the complaint about Mrs Hughes having dismissed the trade union representative, she was in the best position to know if it had substance. It is true that one would not ordinarily expect the manager against whom the complaint had been made to address it. Were this a challenge to the reasonableness of the employers' actions or whether they fell within a reasonable band of responses, the claimant's complaint might have merit. That is not the question. Rather it is why the employers acted in the way they did. We are satisfied Mrs Hughes addressed this in the

termination meeting because the claimant had squarely levelled the criticism in the hearing itself and to have avoided it would have been evasive.

79. As to the criticisms concerning failures in communication, Mrs Hughes was, once again, in the best position to answer them and took the opportunity to do so. As to the complaint relating to the Health and Safety Executive, Mrs Hughes and Mr Bell had to confront the complaint raised before them. The Trust had reported the matter in accordance with its obligation to do so under the law, albeit late, by 30 April 2013. The HSE had not regarded this delay as a significant transgression. The claimant's criticism of the contents of the report is not helped by reason of it being taken directly from her own incident report.

80. The criticisms in respect of the subsequent enquiry undertaken by Mr Parkinson overlook the marked absence of particularity as to the site of the fall in the earlier reports. In the Accident and Emergency report she is recorded as "walking in an alley". The incident report refers to falling in the car park. The grassed area upon which she says the accident occurred would not, in ordinary language, be described as a car park. Nowhere was the incident described as being at the edge of a grassed area, from the car park to the highway, depicted by a worn path of trodden grass. We accept Mr Bell's evidence that the investigation as depicted in the powerpoint presentation made no reference to the wire, because the claimant had not adequately explained where the accident took place. The investigators were examining pathways.

81. Mrs Hughes had not ignored the claimant's concerns. She immediately responded. She made attempts to discover who had spoken to the claimant in February 2013, but nobody in the Occupational Health Department was able to assist. As is apparent from the emails, Mrs Hughes continued to take advice from the Human Resources Department and ask others about the investigation.

82. The presence of a wire and a 1½ metre high fence which had been erected subsequently, quite possibly to prevent use of the shortcut over the grass, was recognised later as is apparent from the letter of the Principal Inspector at the HSE to the claimant, dated 9 April 2015. The attitude of the HSE was that it was not necessary to investigate the incident or to issue an enforcement notice let alone institute proceedings for prosecution against the respondent. The allegation the claimant made in her grounds of appeal that the respondent was being prosecuted was simply incorrect.

83. In these circumstances, although the claimant feels there have been profound failures to acknowledge the circumstances which led to her fall and to respond in accordance with legal requirements, these views are not supported by the evidence presented to this Tribunal. The explanation given that the claimant's disability played no part whatsoever in the decision to handle the grievance in the context of the meetings the claimant had with Mrs Hughes and Mr Bell is credible and accepted. In the circumstances the complaint for direct discrimination fails.

<u>Discrimination arising from disability</u>

84. Although the allegation of a failure to handle the grievance under the respondent's policies could be unfavourable treatment, we are not satisfied it arises in consequence of her disability. The causal connection is not met. The claimant

cannot connect such a failure to something which arose in consequence of her disability. In the circumstances the section 15 EqA fails.

Instigating dismissal proceedings

85. The claimant identified the instigation as being the point at which Mrs Hughes sent a letter on 18 November 2013 in which she informed the claimant that the outcome of the meeting might be the termination of her contract of employment due to ill health. The earlier letter of 31 October 2013 had not made such a reference. Instigating dismissal proceedings would amount to unfavourable treatment, disadvantage and detriment.

Direct discrimination

86. We must consider whether there are facts from which we could decide in the absence of any other explanation that the instigation of the procedure was less favourable treatment because of the claimant's protected characteristic. We are not satisfied that there are. Had the respondent received advice that an employee who was not disabled was unlikely to be able to return to the workplace within a comparable period of time we are satisfied that they would have instigated similar proceedings under their long-term absence policy. It was the inability of the claimant to attend work to discharge her duties in the past and foreseeable future which caused Mrs Hughes to instigate the dismissal proceedings. It was not because the claimant was a disabled person. The complaint of direct discrimination fails.

Discrimination arising from disability

87. Not only would notifying the claimant that her employment may be terminated be unfavourable treatment for the purpose of Section 15 of the EqA it was because of something, the claimant's absence from work, which arose in consequence of her disability.

88. The respondent contends that initiating the dismissal procedure was a proportionate means of achieving a legitimate aim. The legitimate aim is said to be "the needs of the efficiency of the service and the health, welfare and safety of the claimant and the staff in the service". We accept that this would be a legitimate aim.

89. The department in which the claimant worked comprised eight Speech and Language Therapists, albeit in the Trust as a whole there were a further 16 in Children's Services. The claimant had been absent from work for a period of over 12 months at the time her employment was terminated. According to the Occupational Health advice she was not likely to return within the next six months. Instigating dismissal proceedings was appropriate to the legitimate aim of running the service efficiently and ensuring the health and welfare of the claimant and other staff in the service were met. If the claimant could not discharge her duties the service was not being provided to the public efficiently. Others were taking the strain in covering their own duties and those of the claimant. That extra work would impact upon their welfare. Planning and proper delivery of the service required a supply of a sufficient number of Speech and Language Therapists to meet demand. Determining whether the claimant could contribute to the delivery of the service in the foreseeable future was necessary, in order to meet the aim.

90. Initiating that stage of the long term absence policy, in the light of the up to date medical advice was responsible and reasonably necessary as well as being appropriate to the aim. No alternative measure could reasonably have been adopted. A situation whereby the claimant remained absent and employed was inconsistent with meeting the needs of the service both to patients and other staff. That was the outlook for at least the following 6 months, according to the occupational health opinion. The initiating of the dismissal proceedings was, in the circumstances justified.

Dismissal

Direct discrimination

91. For the purpose of the direct discrimination claim we are not satisfied that there are facts from which we could decide in the absence of an adequate explanation that the claimant was treated less favourably than someone who did not share her protected characteristic. Such a comparator must share the claimant's abilities. That includes consideration of someone who, for a reason other than their disability, was unable to work. We consider the respondent would have terminated the employment of a person who did not have a disability if they had been absent from work for in excess of a year and were not expected to be able to return in any capacity for a further six months. That is because this was inconsistent with meeting the needs of the service to the public and putting additional strain on other staff who covered for the absent employee. In the circumstances the complaint of direct discrimination fails.

Discrimination arising from disability

92. We are satisfied that the dismissal of the claimant was unfavourable treatment and that it arose as a result of something, her previous absence and expected absence from work, which was in consequence of her disability.

93. The legitimate aim is as described above. We are satisfied that the termination of the claimant's employment was appropriate to that aim. By dismissing the claimant the funds were freed to appoint a replacement and to provide the additional resource for the public and to assist the claimant’s colleagues.

94. Was dismissal proportionate? That involves considering what reasonable alternatives were available to the respondent. The claimant points to the fact that the respondent had not followed its procedure. She expected a number of meetings to be held with her, with letters setting out a series of successive steps which had to be followed before any decision to terminate the employment was arrived at. This was not a good argument. It is clear from the policies set out in the bundle that the claimant is referring to the short-term sickness absence policy. That was not the policy the respondent was following, nor should have been following. Mrs Hughes applied the long-term absence procedure, correctly.

95. Occupational Health advisers specialise in addressing health and the workplace. The advice before the respondent, from an independent Occupational Health adviser, was that the claimant was unlikely to be fit for work within six months. If that advice was correct we are satisfied that the termination of the claimant’s employment in December 2013 was a proportionate means of achieving the

legitimate aim. For the reasons we have set out above, there was a need for the respondent to be able to run its department efficiently. It had not had the benefit of the claimant's services for 12 months. She had been in receipt of industrial injury pay. The other members of the department were having to shoulder the burden of her absence. No adjustments were possible to accommodate the claimant's return in the near future or in the medium term without significant disruption and damage to the delivery of the service. Termination of the claimant's employment was, in these circumstances, proportionate, or reasonably necessary.

96. The claimant contends that she was fit to work from January 2014 with adjustments. She said that would be in a desk based post at Brigg which did not involve driving. If there was any medical opinion that the claimant could have returned to work in January 2014 the claimant would have a good case that the dismissal was precipitate and inappropriate. There was not. This part of the claimant's case lacked all credibility. She said that a report had been prepared by her consultant to that effect on 18 December 2013. When asked why it had not been produced she was unable to give any satisfactory answer. She firstly said it was in the possession of her General Practitioner and that she had asked for it to be produced but he had failed to produce it. She said she had asked her consultant, Mr Walsh, to produce a copy and yet he had provided the report of 20 January 2017 which did not contain any opinion that she had been fit to work from January 2014. Mr Walsh made an observation about workplace adjustments the claimant needed after he reviewed her in September 2013. He did not say when the claimant would have been able to return to the workplace with these adjustments. It could not conceivably have been in September 2013 because her General Practitioner had issued a sick note and explained that the claimant was still in considerable pain and unfit to work from mid November to Christmas. The claimant then suggested that her former solicitors were to blame in not producing the medical opinion of 18 December 2013, as she said they had a copy of the report and had failed to disclose it.

97. Not only did the claimant present no such report to the Tribunal she did not present it to Mr Bell at the appeal hearing. She did not inform him she had been fit to work from January 2014 and could have produced an opinion to that effect from her consultant. When asked when she could work she said simply that she would have to take the advice of her GP and consultant. We reached the conclusion there had been no consultant report of 18 December 2012.

98. The claimant alleged that the Occupational Health adviser at the Medmark assessment had told her that a decision had been made by her employer that she was to leave her employment in any event. Moreover, she suggested that the Medmark report was deficient because it should have made a number of recommendations as to adjustments as could be seen in the Peritas Health Management report she had provided dated 4 April 2016.

99. We did not accept that the Occupational Health adviser had spoken to the claimant as she alleged. If he had it is inconceivable she would not have raised it as a complaint at the termination meeting or the appeal, or in one of her grievances. It would be a flagrant contravention of proper and fair procedure which the claimant would have picked up on. It first appeared in her witness statement.

100. The criticism of the failure of the author to include adjustments, fails to appreciate that such specialists can only make suitable and well-tailored

recommendations for adjustments to the workplace when the definitive medical condition is known. The claimant was still undergoing a period of recovery and so it would have been premature and inappropriate to recommend what adjustments would be needed some six months or further down the line. All that could sensibly be said at that stage was that the claimant was not fit to return to work.

101. Similarly, the claimant's suggestion that there had been a failure to hold meetings to discuss a planned return overlooked the fact that the situation had not arisen where any meaningful plans could be made. The claimant was still in a state of recovery, the end stage of which was unknown.

102. There were no adjustments which could reasonably have been made to facilitate the claimant's return to work at that time. Termination of the claimant's employment was reasonably necessary to meet the legitimate aim.

103. In the circumstances the respondent has discharged the defence under section 15(2) of the EqA.

Breach of the duty to make reasonable adjustments

104. The first provision, criterion or practice (PCP) relied upon is the application of the respondent's managing staff attendance policy. The claimant says that placed her at a substantial disadvantage because it prevented her from relying on her own consultant's report.

105. We are not satisfied that this policy precluded an employee from relying upon medical evidence other than that of the Occupational Health Department. It was not a provision or criterion of that policy. Nor was there any evidence that it was a practice, which presupposes it arose more than once.

106. It is true that Mrs Hughes mistakenly stated that the claimant had requested a further delay of six weeks for the obtaining of such a report, when in fact it was only six days. Nevertheless, we are not satisfied that the claimant was put to any substantial disadvantage in the proceedings because she had every opportunity to produce her own medical report at the appeal hearing. The procedure did not prohibit that and nor did the appeal panel. In her grounds of appeal the claimant made no reference whatsoever to any independent medical report or her wish to adduce her own medical evidence. For the reasons we have given we do not believe any such opinion existed.

107. The second PCP is said to be not seeking advice from Occupational Health on possible reasonable adjustments. We are not satisfied that there was any such PCP. The letter of instruction from Mrs Hughes to Medmark, summarised at paragraph 36 above, requested advice on what adjustments could be made. In the absence of such a PCP this claim is not made out.

Victimisation

108. It is accepted that the grievance constituted a protected act. We address these claims by analysing the reason why Mrs Hughes and Mr Bell acted as they did, upon the assumption that the burden of proof had shifted.

The instigation of the dismissal

109. We accept the explanation of Mrs Hughes this was solely because of the need to deliver the service efficiently and have regard to the welfare of the claimant and the other members of staff. The long-term absence of the claimant and anticipated further absence was going to impact negatively on service delivery. She had recently received the occupational health report which was highly significant in the context of the potential for the claimant to discharge her duties. Whilst Mrs Hughes was aware of the contents of the grievance, we are satisfied they did not influence her in any way. She had taken steps to assist the claimant such as arranging for an occupational health report to be commissioned in Ireland and not initiating early meetings under the long term absence management procedure as early as 28 days after the claimant's absence. Given the history there were simply no facts from which we could infer that the complaint about discrimination had anything to do with the initiating of the dismissal proceedings.

Dismissal

110. Similarly, we entirely accept the reason advanced by the respondent for the dismissal of the claimant. It was because on the medical advice they had there was no reasonable prospect of the claimant being able to discharge her duties with any adjustment for a significant period of time.

Protected Disclosures

Telephone communications to Mrs Hughes in (February), March and April

111. We do not accept that, in February 2013, the claimant had made a reference to the wire in her telephone discussion with Mrs Hughes. We accept Mrs Hughes' evidence that the claimant had spoken about attending at the Occupational Health Department where two staff had not supported her but sent her to the Accident and Emergency Department. Whilst this would be the disclosure of information which in the reasonable belief of the worker tended to show that the health and safety an individual might have been endangered, we are not satisfied it was in the public interest. It was clearly the claimant's concern about how she personally had been treated.

112. As to the subsequent text of April 2013, the claimant referred to RIDDOR and to a wire. We are satisfied that this information did tend to show that a legal obligation may not have been complied with because the claimant expressly referred to regulations. We therefore accept that this was a protected disclosure because there is a public interest in complying with health and safety regulations.

Letter to Liz Brown in Payroll

113. This letter, of 27 June 2013, was principally about the fact the claimant had been overpaid and she was concerned there should be no recoupment of that overpayment. None of that amounted to disclosure of information within the meaning of section 47B, let alone it being in the public interest. Her reference to the fact that she fell over a wire left in the car park was a disclosure of information which in the reasonable belief of the claimant tended to show that the health and safety of an individual, the claimant, had been endangered. However, we are not satisfied

that was in the public interest. That is because the claimant did not suggest that there was any continuing risk to others. In the circumstances this was not a public interest protected disclosure.

Email to Clare Hughes of 3 July 2013

114. This email concerned the failure of members of staff in the Occupational Health Department to arrange for a wheelchair to be provided to her or to accompany the claimant to casualty. [It is noteworthy it does not refer to the Occupation Health staff witnessing the site of the accident and the wire, something the claimant heavily criticised the respondent for in her witness statement]. She said that these failings were in contravention of the training given by the NHS. We are satisfied that this was information which tended to show in the reasonable belief of the claimant and in the public interest that the health and safety of individuals might be endangered, because it includes the potential for future shortcomings and risks due to a lack of training. In the circumstances we are satisfied this was a public interest protected disclosure.

Email to Clare Hughes of 3 August 2013

115. The claimant recognised in evidence that there was nothing within this email in the nature of the disclosure of information which tended to show wrongdoing within section 43B of the ERA. It was a complaint about the inability to keep in touch over the telephone. This was not a protected disclosure.

Email to Gemma Downs of 14 November 2013 [the grievance]

116. The grievance concerning bullying, the dismissal of her union representative and discrimination because of her injuries was information which might have disclosed the breach of a legal obligation, but it was not in the public interest. It was a complaint about the treatment of the claimant. Accordingly it was not a public interest protected disclosure.

Email to Karen Fanthorpe of 9 December 2013

117. In this email the claimant refers to the failure to report in time the incident to the HSE. This is in addition to the other complaints about discrimination of her. We are satisfied in relation to the complaint concerning the HSE that that was information which was disclosed which tended to show in the reasonable belief of the claimant and in the public interest the failure to comply with a legal obligation. It was broader than a private interest because the requirement to report to a supervising regulatory body is designed to protect the public. Accordingly this email was a protected disclosure.

Email to Gemma Downs of 9 December 2013

118. This email similarly raises issues about failure to comply with HSE legislation and why that is the case; that is a failure to investigate and report. It is a public interest protected disclosure.

Termination Meeting

119. The claimant raised the breach of the obligations as she understood them under the Health and Safety legislation concerning the HSE. For the same reasons we have set out above these communications were public interest protected disclosures.

Was the dismissal of the claimant for the reason, or if more than one the principal reason, that she had made such protected disclosures?

120. We have no doubt that the dismissal of the claimant was solely related to her inability to work in the foreseeable future and the fact that she had been unable to provide any service to the respondent over the last year. We entirely accepted the evidence of Mrs Hughes and Mr Bell that it had nothing whatsoever to do with any of the protected disclosures. The circumstances concerning the accident had been investigated and reported. There was no major failing and shortcoming which was likely to embarrass either Mr Bell of Mrs Hughes or the respondent itself. This was borne out by the subsequent letter from the HSE which does not criticise the handling of the matter by the respondent's staff.

121. Even were we wrong in not categorising each alleged disclosure as being qualified and protected, none of these communications influenced Mrs Hughes or Mr Bell in respect of the decision to terminate the claimant's employment. Those complaints which touched upon the claimant's own health and the accident but did not engage the public interest requirement were not factors which influenced the decision makers. The case for termination of employment on the grounds of ill health capability reasons was compelling.

Detriments: was the claimant subjected to detriments for having made the protected disclosures?

Instigation of the dismissal procedures

122. In respect of the instigation of the dismissal procedures we have set out above the reasons this took place. We are satisfied it had nothing whatsoever to do with either the protected interest disclosures or any of the complaints the claimant made which are said to fall within that category of complaint.

Failing to investigate the grievance

123. We are satisfied that the failure to investigate the grievance under the respondent's grievance policy had nothing whatsoever to do with the fact that the claimant had made protected public interest disclosures. We have set out above in paragraphs 76 to 83 the subject matter of the grievance complaints and why Mrs Hughes and Mr Bell acted as they did.

124. In the circumstances the complaints under section 47B of the ERA are dismissed.

Employment Judge Jones

Sent on: 20 February 2017

[AF]