EMPLOYMENT TRIBUNALS

Claimant: Mrs J Brind

Respondent: Pennine Care NHS Foundation Trust

HELD AT: Manchester **ON:** 22-25 May 2017 and in chambers on 26 May 2017

BEFORE: Employment Judge Franey
Miss F Crane
Dr H Vahramian

REPRESENTATION:

Claimant: In person
Respondent: Ms R Eeley, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The complaint of breach of contract is dismissed because the Tribunal does not have jurisdiction to determine it.

2. The complaint that the claimant was victimised by reason of having assisted a colleague in 2012 is dismissed upon withdrawal.

3. The complaint of direct disability discrimination fails and is dismissed.

4. The complaint of indirect disability discrimination fails and is dismissed

5. The complaint of a breach of the duty to make reasonable adjustments fails and is dismissed.

6. The complaint of harassment related to disability fails and is dismissed.

7. The complaint of victimisation as a consequence of the grievance of 5 April 2016 fails and is dismissed.

8. The complaint of detriment in employment by reason of a protected disclosure fails and is dismissed.

Employment Judge Franey

20 June 2017

JUDGMENT AND REASONS SENT TO THE PARTIES ON

28 June 2017

FOR THE TRIBUNAL OFFICE

REASONS

Introduction

1. Following a period of early conciliation through ACAS resulting in the issue of a certificate on 10 May 2016, the claimant began these proceedings by presenting her claim form in case number 2401716/2016 on 6 June 2016. She asserted that she was a disabled person by reason of depression, and brought complaints of disability discrimination arising out of her employment as a mental health practitioner within the respondent's Child and Adolescent Mental Health Services ("CAMHS"), together with complaints of detriment on the ground of a protected disclosure. The complaints concerned the period since she had returned to work in April 2014 following a period of absence on secondment and four months of sickness absence. The claim form recorded that the claimant had been off sick since 22 January 2016 and that a grievance was pending.

2. A second claim form was presented on 11 July 2016 in case number 2401985/2016. Further complaints of disability discrimination, victimisation and protected disclosure detriment were raised in relation to the period since the first claim form. The claimant did not undergo a fresh period of early conciliation via ACAS before lodging this claim but instead relied on the early conciliation certificate issued on 10 May 2016. Her claim form also included a number of complaints of breach of contract.

3. By response forms filed on 27 July and 19 August 2016 respectively the respondent resisted all the complaints on their merits. The respondent denied that the claimant was a disabled person but in any event denied any unlawful treatment. It did not admit that any protected disclosures had been made or that any detriments had been imposed as a consequence of the alleged disclosures.

4. The legal complaints were identified and recorded by Employment Judge Sherratt at a preliminary hearing on 1 September 2016. He ordered the claimant to serve a disability witness statement. That was done, and on 22 November 2016 the respondent conceded that the claimant was a disabled person by reason of a mental impairment (depression and anxiety) at the relevant time.

5. Employment Judge Sherratt also ordered the claimant to file a schedule of complaints to identify those matters in her two claim forms for which she sought a remedy, as opposed to those matters which were part of the background narrative. The claimant served her schedule of complaints on 29 September 2016. The respondent provided comments in response on 21 October 2016.

Issues

6. At the start of the hearing we sought to identify the issues to be determined by the Tribunal based on the schedule of complaints and the reply. It became apparent that the complaint of victimisation contrary to section 27 Equality Act 2010 based on the claimant having assisted a colleague with a complaint of bullying in 2012 was

unsustainable because there was no evidence that the complaint made by the colleague raised any issues within the scope of the Equality Act 2010. Sensibly, therefore, the claimant withdrew that complaint and the 15 allegations of victimisation which formed part of it (although a number of those matters remained relevant to other heads of claim).

7. The claimant also made allegations of victimisation and of protected disclosure detriment in relation to her grievance and appeal. The outcome of the grievance was not received until after the second claim form was lodged, although it had been received by the time of the schedule of complaints. The outcome of the appeal was not received until December 2016. The schedule of complaints referred to "flaws" in the grievance process and that it had been unfair, but did not give any particulars save for an allegation relating to delay. During cross examination the claimant indicated that by these brief phrases in the schedule of complaints she had intended to cover the matters in her grievance appeal letter of 16 August 2016, and four specific alleged failings in the grievance process were identified. Ms Eeley objected to the inclusion of these matters without permission to amend, and said that if permission to amend was granted the respondent would have to seek an adjournment to the hearing to enable it to call Ms Hodson, who determined the grievance, to give evidence. The claimant indicated that she would not prefer not to pursue those matters and therefore did not seek permission to amend her claim form and schedule of complaint so as to introduce those further particulars.

8. Finally, the claimant withdrew two complaints (relating to the desk plan circulated in May 2016) during submissions.

9. The consequence was that the List of Issues affecting liability to be determined by the Tribunal was agreed to be as follows:

A: ***Direct disability discrimination – section 13 Equality Act 2010***

1. Can the claimant prove facts from which the Tribunal could conclude that because of her disability of depression and anxiety the respondent subjected her to less favourable treatment in any or all of the following respects:

(a) In failing to provide specialist service CBT supervision by a BABCP accredited supervisor between March 2015 and June 2015? The claimant compares herself with her colleagues, Mrs McElroy, and with other IAPT employees of the respondent.

(b) In implementing a three month Performance Improvement Plan (PIP) between July 2016 and October 2016? The claimant compares herself with a hypothetical comparator.

2. If so, can the respondent nevertheless show that it did not contravene section 13?

B: ***Indirect disability discrimination – section 19 Equality Act 2010***

3. Can the claimant prove facts from which the Tribunal could conclude that:

(a) The respondent applied a provision, criterion or practice ("PCP") of undertaking file audits, that PCP being applied to the claimant in June 2015;

(b) That PCP applied or would apply to persons who were not disabled;

(c) That PCP puts or would put disabled persons at a particular disadvantage when compared with persons who were not disabled; and

(d) That PCP put or would put the claimant at that disadvantage?

4. Can the claimant prove facts from which the Tribunal could conclude that:

(a) The respondent applied a PCP in the form of its PIP, that PCP being applied to the claimant between July and October 2016;

(b) That PCP applied or would apply to persons who were not disabled;

(c) That PCP put or would put persons who are disabled at a particular disadvantage when compared with persons who were not disabled; and

(d) That PCP put or would put the claimant at that disadvantage?

5. Can the claimant prove facts from which the Tribunal could conclude that:

(a) The respondent applied a PCP of conducting an investigation into work based concerns, and that PCP was applied to the claimant in April 2016;

(b) That PCP applied or would apply to persons who were not disabled;

(c) That PCP put or would put persons who are disabled at a particular disadvantage when compared with persons who were not disabled; and

(d) That PCP put or would put the claimant at that disadvantage?

6. If so, can the respondent nevertheless show that it did not contravene section 19, whether because the application of any of the above PCPs was a proportionate means of achieving a legitimate aim, or otherwise? The legitimate aims on which the respondent relies were

(a) to reduce workforce sickness absence by supporting employees in their return to work, and

(b) to ensure that employees were performing to the requisite standards, which in turn promotes safe standards of patient care and business efficiency.

C: Breach of the duty to make reasonable adjustments – sections 20 and 21 Equality Act 2010

PIP

7. Can the claimant prove facts from which the Tribunal could conclude that:

(a) The respondent applied a PCP to her in the form of its PIP?

(b) That PCP put the claimant at a substantial disadvantage in comparison with persons who were not disabled because that PCP had a detrimental impact on her mental health?

8. If so, can the respondent show that it did not know, and could not reasonably have been expected to have known, that the claimant had a disability and was likely to be placed at that disadvantage?

9. If not, can the claimant prove facts from which the Tribunal could conclude that the respondent failed in its duty to take such steps as it would have been reasonable to

have taken to avoid that disadvantage? The adjustment for which the claimant contends was not subjecting her to a PIP.

10. If so, can the respondent nevertheless show that it did not contravene sections 20 and 21?

Investigating Work Based Concerns

11. Can the claimant prove facts from which the Tribunal could conclude that

(a) The respondent applied a PCP of investigating work based concerns;

(b) That PCP put the claimant at a substantial disadvantage in comparison with a person who was not disabled because it had a detrimental impact on her mental health?

12. If so, can the respondent show that it did not know, and could not reasonably have been expected to have known, that the claimant had a disability and was likely to be placed at that disadvantage?

13. If not, can the claimant prove facts from which the Tribunal could conclude that the respondent failed in its duty to take such steps as it would have been reasonable to have taken to avoid that disadvantage? The adjustment for which the claimant contends was to comply with the respondent's policies and protocols for supervision instead of investigating such concerns.

14. If so, can the respondent nevertheless show that it did not contravene sections 20 and 21?

D: Harassment related to disability – section 26 Equality Act 2010

File Audit June 2015

15. Can the claimant prove facts from which the Tribunal could conclude that in undertaking a file audit in June 2015:

(a) The respondent engaged in unwanted conduct;

(b) Which was related to disability; and

(c) Had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

Supervision meeting 17 July 2015

16. Can the claimant prove facts from which the Tribunal could conclude that in the conduct of the supervision meeting of 17 July 2015:

(a) The respondent engaged in unwanted conduct;

(b) Which was related to disability; and

(c) Had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

Brown/Clark Meeting 6 August 2015

17. Can the claimant prove facts from which the Tribunal could conclude that in the arrangements for a meeting with Ms Brown and Miss Clark on 6 August 2015:

(a) The respondent engaged in unwanted conduct;

(b) Which was related to disability; and

(c) Had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

Desk Plan May 2016

18. Can the claimant prove facts from which the Tribunal could conclude that in the circulation of a new seating/desk plan excluding the claimant in May 2016:

(a) The respondent engaged in unwanted conduct;

(b) Which was related to disability; and

(c) Which had the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

All

19. If so, can the respondent nevertheless prove that it did not contravene section 26?

E: Victimisation – section 27 Equality Act 2010

20. It being accepted that the grievance of 5 April 2016 was a protected act, can the claimant prove facts from which the Tribunal could conclude that because of her protected act the respondent subjected her a detriment in the following respects:

(a) [withdrawn]**;**

(b) The investigation into work based concerns by Ms Brown;

(c) The PIP imposed by Ms Brown;

(d) Breaches of the claimant's confidentiality by Ms Brown in relation to letters being incorrectly addressed, and the claimant's fit note; and

(e) Flaws in the grievance process and it being unnecessarily protracted, including the lack of any prompt acknowledgement of the appeal?

21. If so, can the respondent nevertheless show that it did not contravene section 27?

F: Equality Act time limits Case Number 2401716/2016

22. In so far as any of the matters for which the claimant seeks a remedy in case number 2401716/2016 occurred prior to 27 December 2015, does the Tribunal have jurisdiction to consider them because:

(a) They formed part of conduct extending over a period ending after that date; or

(b) The claimant can establish that it would be just and equitable to allow a longer time period for bringing her complaint?

G: Detriment in employment on the ground of protected disclosures – section 47B Employment Rights Act 1996

Protected disclosures

23. In her grievance of 5 April 2016 did the claimant:

(a) Disclose information;

(b) Which she reasonably believed was in the public interest; and

(c) Which she reasonably believed tended to show that the respondent had failed to comply with its legal obligations relating to health and safety at work, and/or that the health or safety of the claimant had been endangered?

24. In presenting her complaint to the Employment Tribunal on 6 June 2016, did the claimant:

(a) Disclose information;

(b) Which she reasonably believed was in the public interest; and

(c) Which she reasonably believed tended to show that the respondent had failed to comply with its legal obligations relating to health and safety at work, and/or that the health or safety of the claimant had been endangered?

25. If so, was that disclosure made within any of the provisions of section 43C-43G of the Act?

Detriments

26. If so, can the claimant prove that she was subjected to a detriment by or deliberate failure to act by the respondent in any or all of the following respects:

(a) Victimisation and continued harassment as alleged in the claim form in case number 2401985/2016, namely

(1) [withdrawn]**;**

(2) Failing to respond to the claimant's email of 25 June 2016;

(3) Ms Brown's email of 27 June 2016 and accompanying letter about work-based concerns;

(4) The conduct of the meeting of 1 July 2016, and

(5) The failure of Ms Brown to respond to the claimant's email of 5 July 2016 expressing concern at the loss of her sick note.

(b) Failure to conduct a fair grievance process, and

(c) The PIP?

27. If so, can the respondent show that the ground on which any act or deliberate failure to act was done was not any protected disclosure?

H: ***Early Conciliation Case Number 2401985/2016***

28. Does the Tribunal have jurisdiction to consider complaints raised in case number 2401985/2016 (i.e. arising out of events after 6 June 2016) in the absence of a fresh early conciliation certificate prior to the presentation of that claim?

Evidence

10. The Tribunal heard from four witnesses, each of whom gave evidence in person pursuant to a written witness statement. The claimant was the only witness on her side. The respondent called Renee Clark, the Clinical Lead of the Transition service in which the claimant worked and the claimant's line manager between 2014 and 2016; Vicky Brown, the Operational Manager of Oldham CAMHS who was Miss Clark's line manager; and Ruth Parton, the Acting Senior Human Resources Business Partner who dealt with the claimant's grievance appeal.

11. The parties had agreed a bundle of documents in two lever arch files running to over 600 pages. Some documents were added to that bundle by agreement during the course of the hearing and allocated page numbers. Any reference in these reasons to a page number is a reference to that bundle unless otherwise indicated.

Relevant Legal Principles – Equality Act 2010

Jurisdiction

12. The complaints of disability discrimination were brought under the Equality Act 2010. Section 39(2)(d) prohibits discrimination against an employee by subjecting her to a detriment. Section 39(3) prohibits victimisation. Section 39(5) applies to an employer the duty to make reasonable adjustments.

13. Section 40(1)(a) prohibits harassment of an employee.

14. By section 109(1) an employer is liable for the actions of its employees in the course of employment.

Burden of Proof

15. The Equality Act 2010 provides for a shifting burden of proof. Section 136 so far as material provides as follows:

> **"(2) If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision."**

The section goes on to make it clear that a reference to the Court includes an Employment Tribunal.

16. Consequently it is for a claimant to establish facts from which the Tribunal can reasonable conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has

been no contravention by, for example, identifying a different reason for the treatment.

17. In **Hewage v Grampian Health Board [2012] IRLR 870** the Supreme Court approved guidance previously given by the Court of Appeal on how the burden or proof provision should apply. That guidance appears in **Igen Limited v Wong [2005] ICR 931** and was supplemented in **Madarassy v Nomura International PLC [2007] ICR 867**. Although the concept of the shifting burden of proof involves a two stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

Time limits

18. The time limit for Equality Act claims appears in section 123 as follows:

> **"(1) Proceedings on a complaint within section 120 may not be brought after the end of –**
>
> **(a) the period of three months starting with the date of the act to which the complaint relates, or**
>
> **(b) such other period as the Employment Tribunal thinks just and equitable.**
>
> **(2) …**
>
> **(3) For the purposes of this section –**
>
> **(a) conduct extending over a period is to be treated as done at the end of the period;**
>
> **(b) failure to do something is to be treated as occurring when the person in question decided on it".**

19. A continuing course of conduct might amount to an act extending over a period, in which case time runs from the last act in question. The case law on time limits to which we had regard included **Hendricks –v- Commissioner of Police of the Metropolis [2003] IRLR 96** which deals with circumstances in which there will be an act extending over a period. In dealing with a case of alleged race and sex discrimination over a period, Mummery LJ said this at paragraph 52:

> **"The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of "an act extending over a period." I agree with the observation made by Sedley LJ, in his decision on the paper application for permission to appeal, that the Appeal Tribunal allowed itself to be side-tracked by focusing on whether a "policy" could be discerned. Instead, the focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed."**

Direct Disability Discrimination

20. Direct discrimination is defined in section 13(1) as follows:

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

21. The concept of treatment being less favourable inherently suggests some form of comparison and in such cases section 23(1) applies:

> **"On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case."**

22. Section 23(2) goes on to provide that if the protected characteristic is disability, the circumstances relating to a case include the person's abilities. The effect of section 23 as a whole is to ensure that any comparison made must be between situations which are genuinely comparable. The case law, however, makes it clear that it is not necessary for a claimant to have an actual comparator to succeed. The comparison can be with a hypothetical person without a disability. Further, as the Employment Appeal Tribunal and appellate courts have emphasised in a number of cases, including **Amnesty International v Ahmed [2009] IRLR 884**, in most cases where the conduct in question is not overtly related to disability, the real question is the "reason why" the decision maker acted as he or she did. Answering that question involves consideration of the mental processes (whether conscious or subconscious) of the alleged discriminator, and it may be possible for the Tribunal to make a finding as to the reason why a person acted as he or she did without the need to concern itself with constructing a hypothetical comparator.

Indirect Discrimination

23. Indirect discrimination is prohibited by section 19 which reads as follows:

> **"(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.**
>
> **(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –**
>
> **(a) A applies, or would apply, it to persons with whom B does not share the characteristic,**
>
> **(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,**
>
> **(c) it puts, or would put, B at that disadvantage, and**
>
> **(d) A cannot show it to be a proportionate means of achieving a legitimate aim."**

24. The concept of what is sometimes called "group disadvantage" under section 19(2)(b) was considered by the Supreme Court in **Essop and ors v Home Office; Naeem v Secretary of State for Justice [2017] 1 WLR 1343**. The focus of the

appeal was on whether a claimant had to establish a causal link between the PCP and the particular disadvantage experienced by persons with the protected characteristic when the PCP was or would be applied to them. There was, however, no requirement that the PCP put every member of the group sharing the particular protected characteristic at a disadvantage (paragraph 27). As to the composition of the group for comparison, all the workers affected by the PCP in question should be considered. Then the comparison can be made between the impact of the PCP on those in the group with the relevant protected characteristic and its impact upon those in the group without it (paragraph 41).

25. Turning to justification under section 19(2)(d), in paragraph 4.27 the Equality and Human Rights Commssion's Code of Practice in Employment (2011) considers the phrase "a proportionate means of achieving a legitimate aim" and suggests that the question should be approached in two stages. Firstly, is the aim legal and non discriminatory, and one that represents a real, objective consideration? If so, secondly is the means of achieving it proportionate – that is, appropriate and necessary in all the circumstances? The Code goes on in paragraphs 4.30 – 4.32 to explain that the second question involves a balancing exercise between the discriminatory effect of the decision as against the reasons for applying it, taking into account all relevant facts. It goes on to say the following at paragraph 4.31:-

> **"although not defined by the Act, the term "proportionate" is taken from EU directives and its meaning has been clarified by decisions of the CJEU (formerly the ECJ). EU law views treatment as proportionate if it is an "appropriate and necessary" means of achieving a legitimate aim. But "necessary" does not mean that the [unfavourable treatment] is the only possible way of achieving a legitimate aim; it is sufficient that the same aim could not be achieved by less discriminatory means."**

Reasonable Adjustments

26. Section 39(5) of the Equality Act 2010 provides that a duty to make reasonable adjustments applies to an employer. Further provisions about that duty appear in Section 20, Section 21 and Schedule 8.

27. The duty does not apply if the employer did not know, and could not reasonably be expected to know that the employee had a disability and was likely to be placed at the disadvantage in question by the PCP (Schedule 8 paragraph 20).

28. That duty appears in Section 20 as having three requirements, and the requirement of relevance in this case is the first requirement in Section 20(3):-

> **"the first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage".**

The importance of a Tribunal going through each of the constituent parts of that provision was emphasised by the EAT in **Environment Agency –v- Rowan [2008] ICR 218** and reinforced in **The Royal Bank of Scotland –v- Ashton [2011] ICR 632.**

29. As to whether a "provision, criterion or practice" ("PCP") can be identified, the Commission Code of practice paragraph 6.10 says the phrase is not defined by the Act but "should be construed widely so as to include for example any formal or informal policy, rules, practices, arrangements or qualifications including one off decisions and actions". The question of what will amount to a PCP was considered by the Employment Appeal Tribunal in October 2012 in **Nottingham City Transport Limited –v- Harvey UKEAT/0032/12** in which the President Mr Justice Langstaff (dealing with a case under the Disability Discrimination Act 1995 and the Disability Rights Commission's Code of Practice from 2004, both now superseded by the provisions summarised above) said of the phrase "provision, criterion or practice" in paragraph 18:

> **"Although those words are to be construed liberally, bearing in mind that the purpose of the statute is to eliminate discrimination against those who suffer from a disability, absent provision or criterion there still has to be something that can qualify as a practice. "Practice" has something of the element of repetition about it. It is, if it relates to a procedure, something that is applicable to others than the person suffering the disability. Indeed, if that were not the case, it would be difficult to see where the disadvantage comes in, because disadvantage has to be by reference to a comparator, and the comparator must be someone to whom either in reality or in theory the alleged practice would also apply. These points are to be emphasised by the wording of the 1995 Act itself in its original form, where certain steps had been identified as falling within the scope to make reasonable adjustment, all of which, so far as practice might be concerned, would relate to matters of more general application than simply to the individual person concerned."**

30. As to whether a disadvantage resulting from a provision, criterion or practice is substantial, Section 212(1) defines substantial as being "more than minor or trivial".

31. The obligation to take such steps as it is reasonable to have to take to avoid the disadvantage is one in respect of which the Code provides considerable assistance, not least the passages beginning at paragraph 6.23 onwards. A list of factors which might be taken into account appears at paragraph 6.28 and includes the practicability of the step, the financial and other costs of making the adjustment and the extent of any disruption caused, the extent of the employer's financial or other resources and the type and size of the employer. Paragraph 6.29 makes clear that ultimately the test of the reasonableness of any step is an objective one depending on the circumstances of the case.

<u>Harassment</u>

32. The definition of harassment appears in section 26, for which disability is a relevant protected characteristic, and so far as material reads as follows:

> **"(1) A person (A) harasses another (B) if -**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
>
> **(b) the conduct has the purpose or effect of**
>
> **(i) violating B's dignity, or**

> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B…**
>
> **(4) In deciding whether conduct has the effect referred to sub-section (1)(b), each of the following must be taken into account -**
>
> **(a) the perception of B;**
>
> **(b) the other circumstances of the case;**
>
> **(c) whether it is reasonable for the conduct to have that effect.**

33. Chapter 7 of the EHRC Code deals with harassment. We also had regard to what was said by the Court of Appeal in **Land Registry v Grant [2011] ICR 1390** about the need to avoid cheapening the significance of the words in section 26(1)(b) since they are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. The perception of the person responsible for the action in question is not decisive on the question of whether the unwanted conduct is related to disability; it is simply one factor to be taken into account (**Hartley v Foreign and Commonwealth Office UKEAT/0033/15/LA**).

Victimisation

34. Victimisation in this context has a specific legal meaning defined by section 27:

> **(1) A person (A) victimises another person (B) if A subjects B to a detriment because--**
>
> **(a) B does a protected act, or**
>
> **(b) A believes that B has done, or may do, a protected act.**
>
> **(2) Each of the following is a protected act--**
>
> **(a) bringing proceedings under this Act;**
>
> **(b) giving evidence or information in connection with proceedings under this Act;**
>
> **(c) doing any other thing for the purposes of or in connection with this Act;**
>
> **(d) making an allegation (whether or not express) that A or another person has contravened this Act.**
>
> **(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.**

35. This provision does not require any form of comparison. If it is shown that a protected act has taken place and the claimant has been subjected to a detriment, it is essentially a question of the "reason why".

36. Something amounts to a detriment if the treatment is of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to her detriment – see paragraphs 31-37 of the speech of Lord Hope in **Shamoon v Chief Constable of the RUC [2013] ICR 337.**

Relevant Legal Principles – Protected Disclosure Detriment – Employment Rights Act 1996

Protected Disclosure?

37. Whether an employee made a protected disclosure is governed by Part IVA of the Act of which the relevant sections are as follows:-

> **"s43A:** **in this Act a "protected disclosure" means a qualifying disclosure (as defined by Section 43(B) which is made by a worker in accordance with any of Sections 43C to 43H.**
>
> **s43B(1):** **in this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the following:**
>
> **(a)** **…**
>
> **(b)** **that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,**
>
> **(c)** **…**
>
> **(d)** **that the health or safety of any individual has been, is being, or is likely to be endangered.**
>
> **(e)** **…**
>
> **(f)** **……..**

38. Sections 43C – 43H deal with the identity of the person to whom the disclosure is made. Qualifying disclosures are protected if they are made to the employer or other responsible person (s43C), to a body or person prescribed by regulations (s43F), or to any other person if the requirements of s43G are met.

39. In **Chesterton Global Ltd v Nurmohamed [2015] IRLR 614** the Employment Appeal Tribunal upheld a decision of an Employment Tribunal that there had been a protected disclosure where a director of a firm of Estate Agents made representations about illegality in relation to commission earnings which affected about 100 other senior managers. That limited group of other people was sufficient to satisfy the public interest test. The Employment Appeal Tribunal said that it was clear that the sole purpose of the amendment to section 43B(1) of the 1996 Act implemented in 2013 was to reverse the effect of **Parkins v Sodexho Limited [2002] IRLR 109**. The EAT said:

> **"The words 'in the public interest' were introduced to do no more than prevent a worker from relying upon a breach of his own contract of employment where the breach is of a personal nature and there are no wider public interest implications."**

Detriment

40. If a protected disclosure has been made the right not to be subjected to a detriment appears in Section 47B(1) which reads as follows:

> **"A worker has the right not to be subjected to any detriment by any act or any deliberate failure to act by his employer done on the ground that the worker has made a protected disclosure."**

41. The right to go to a Tribunal appears in Section 48 and is subject to Section 48(2), which says this:

> **"On such a complaint it is for the employer to show the ground on which any act or deliberate failure to act was done".**

42. The question of what will amount to a detriment was considered in the discrimination context by the House of Lords in **Shamoon v The Royal Ulster Constabulary [2003] ICR 337**: the test is whether a reasonable employee would or might take the view that he had been disadvantaged in circumstances in which he had to work.

43. As to the causation provision in Section 48(2), **NHS Manchester v Fecitt [2012] ICR 372** concerned a case where whistleblowers had been moved due to a dysfunctional working atmosphere. Their claim failed in the Employment Tribunal. The appeal was allowed by the EAT but the Court of Appeal restored the Tribunal decision and in doing so confirmed that the correct test to be applied is the discrimination test under the Equality Act 2010. There will be a breach of section 47B if the protected disclosure had any material influence on the mental processes of the decision maker. Consequently the Tribunal can proceed by way of an inference as to the real reason for the decision as per the guidance given by the Court of Appeal in **Igen Limited v Wong [2005] ICR 931**.

Relevant Legal Principles – Early Conciliation

44. The requirement to contact ACAS before instituting "relevant proceedings" is found within section 18A of the Employment Tribunals Act 1996. The complaints in these proceedings were relevant proceedings as defined in section 18(1) of that Act, and none of the exemptions in regulation 3 applied. Accordingly the claimant was bound by section 18A(1) as follows:

> **"Before a person ("the prospective claimant") presents an application to institute relevant proceedings related to any matter, the prospective claimant must provide to ACAS prescribed information, in the prescribed manner, about that matter."**

45. In **Compass Group UK & Ireland Ltd v Morgan [2016] IRLR 924** the EAT considered a case in which an early conciliation certificate was issued in January 2015, the claimant resigned in March 2015 and then lodged a claim form alleging constructive unfair dismissal. It was argued that because the alleged dismissal occurred after the early conciliation certificate, it could not have been a matter in respect of which the claimant had undergone early conciliation. The EAT rejected this argument. It noted that there was no express requirement in section 18A that the matters complained of must predate any relevant early conciliation certificate; nor was there any temporal or other limitation on the use of an early conciliation

certificate, and ultimately it is a question of fact in degree in every case whether a claimant has provided to ACAS the prescribed information about the "matter" to which the relevant Tribunal proceedings relate.

Relevant Findings of Fact

46. The purpose of this section of our reasons is to set out the broad chronology of events in order to put our decision into context. Any disputes of fact of particular significance to our conclusions will be addressed in the discussion and conclusions section. It is not appropriate to record all the matters about which the tribunal heard factual evidence, not least because some of it related to withdrawn claims, but in reaching our conclusions we had regard to all the relevant evidence placed before us.

Background

47. The respondent is an NHS Trust with approximately 7000 employees which supplies a wide range of health services across a number of boroughs around Manchester, including Oldham, Stockport and Rochdale. This case was primarily concerned with the CAMHS service in Oldham. That service was divided into two teams. The majority of staff were employed in the Core team, which dealt with children ages 5-16. There was a smaller Transition team which dealt with children between 16 and 18 years old.

The Claimant

48. Having worked for the Trust since 2007, the claimant was appointed to a two year position in the Transition team in April 2011 (pages 126-127).

49. For the calendar year 2013 she was seconded out of the team to work towards a Post Graduate Diploma on Improving Access to Psychological Therapies ("IAPT"). A key part of that diploma involved undertaking sessions with patients, and the claimant would return to the Transitions office in Oldham for that purpose about one day a week. Otherwise she was not part of the team.

50. As her diploma course came to an end in December 2013 the claimant was certified for work due to an acute stress reaction. She was unable to return to work until 1 April 2014. An Occupational Health ("OH") report of 25 March 2014 (pages 132-133) addressed to Miss Clark's predecessor, Lisa Slater, contained the following:

> **"Janet has been absent since end of November 2014, suffering with symptoms of anxiety and low mood secondary to perceived work related stress. She detailed the recent changes to her job, alongside study for a course. I understand that she has some outstanding assignments that she is working on and I advise that appropriate time should be allocated for this…She would benefit from a phased return to work and I advise that a stress risk assessment should be undertaken on her return and be subject to regular ongoing review to ensure that implemented controls remain effective."**

Return to Work April 2014

51. Upon the claimant's return to work her line manager as the Clinical Lead of the Transition team was Miss Clark, with whom she had previously worked, and the Operational Manager of Oldham CAMHS was Ms Brown. In May or June 2014 another member of staff, David Capper, joined the team. Together with the Consultant Psychiatrist, Dr Ramkisson, there were four clinicians in the team. They worked a variety of working patterns. The claimant worked three days a week between Wednesday and Friday; Mr Capper worked Monday and Tuesday but was in the department as part of the Core team on Wednesdays as well. Accordingly Wednesday was identified as the day for the weekly meeting at which new patients would be allocated to the appropriate member of the team

52. Despite the OH recommendation, no stress risk assessment was undertaken. The claimant did not think to ask for one because she did not understand what it was. Miss Clark did not arrange one because she did not see the report. There was no handover briefing from Lisa Slater which alerted her to the issue.

53. However, the claimant was given a phased return to work and allowed to build up her caseload; and she had no criticisms of the respondent in that respect.

Supervision

54. Miss Clark was the claimant's supervisor. There were two sorts of supervision. Clinical supervision concerned clinical actions in relation to individual patients. Managerial supervision concerned the way in which the cases were being progressed, record keeping and other managerial matters. Supervision sessions were intended to alternate between clinical and managerial. The bundle contained records of regular supervision meetings between the claimant and Miss Clark during May and June 2014.

55. There were separate supervision arrangements for the IAPT coursework. Although the claimant had completed the 12 month course she would not gain the qualification until she had completed some follow up work and had successfully submitted three video tapes of consultations with young people. She was working towards these in the months that followed. Her deadline for submission of those tapes was extended on more than one occasion. The claimant was allocated time in her weekly job plan for her to see IAPT patients, and she was supervised in relation to her IAPT work by Lisa Smart. Lisa Smart was herself supervised by Ms Brown. On 29 April 2014 in a supervision session between Ms Brown and Lisa Smart it was recorded that there were some time management concerns about the claimant (page136(a)), but these concerns were not relayed to the claimant at that time. She was unaware of them.

56. There were no particular problems during the rest of 2014.

Early 2015

57. At the start of 2015, however, the claimant encountered a number of difficulties.

58. Firstly, there was a change in the IAPT supervision arrangements. Lisa Smart was replaced as supervisor by Ms Boshoff, who was based at Prestwich, for a ten week intensive supervision period. The respondent funded this even though it was not required to do so. This worked very well for the claimant and she benefitted significantly from that supervision, but it only covered two of the three patients in respect of whom she was planning to submit her tapes. At the end of it, however, she was allocated a IAPT supervisor based in Rochdale, Mr Knowles, who was very busy with his own work commitments and a number of supervision meetings did not take place. This caused the claimant significant concern, not least because her final deadline for submission of the tapes was in June 2015..

59. Secondly, the claimant had some sad episodes in her personal life. A friend of hers died in early January, and her father-in-law died on 26 February 2015.

IAPT Supervision March – June 2015

60. The first allegation of direct disability discrimination related to the absence of adequate supervision arrangements for the claimant's IAPT work between March and June 2015 when she finally submitted her tapes. There were a number of emails in the bundle where the claimant chased Mr Knowles for supervision dates. She notified Ms Brown and Miss Clark on 9 April (page 167) that the supervision with Mr Knowles was not happening. On 29 April 2015 the claimant emailed Sara Barnes, the Directorate Manager for CAMHS, drawing her attention to the problem. She also emailed Dr Deborah McNally, the Consultant Clinical Psychologist who led the CBT training which was part of the IAPT course. Dr McNally responded on 29 April 2015 (page 178) to say:

> **"I think it is better if you do not copy me into emails to Sara and others as I am not part of your management team and this is a service issue. Your service are not obliged to provide supervision during extended supervision, but it is to their advantage if they do. It is very important that you are in contact with service managers and keep them informed of any issues so they can support you."**

61. Following that claimant emailed Sara Barnes again on 8 May 2015 (pages 177-178) providing a chronology of her difficulties in getting supervision, and Ms Barnes replied on 11 May (page 177). She suggested that the claimant stick with Gordon Knowles as her supervisor to July, and that she would look at ways of providing some capacity for him. She also offered to consider alternatives.

62. Despite these difficulties with supervision the claimant did successful submit her three tapes by 19 June 2015 and was then waiting to hear whether she passed the course or not. The next stage would be for her to move towards accreditation by the British Association for Behavioural and Cognitive Psychotherapy ("BABCP"). In order to make such progress she would need to have a supervisor accredited by the BABCP.

Return to Work Meeting 20 May 2015

63. Between 13 and 15 May 2015 the claimant was off work for three days. This was self certified absence, although she did see her GP. It led to a return to work meeting with Miss Clark on 20 May 2015. The signed form appeared at page 180. The form recorded that the claimant was suffering from low mood and anxiety, had

seen her GP and her medication had been increased. She was due to see her GP again on 27 May 2015. However, it also recorded that the claimant felt fit to return to work and no extra support was required.

File Reviews May – June 2015

64. In the autumn of 2015 there was going to be a Trust wide audit of files. Miss Clark decided that it would be appropriate to get the Transition team files into order in advance of that formal audit. She devised a questionnaire to be completed for each file held by the team (pages 173-175) and circulated it to the team by email of 8 May 2015 at page 172. Each file would be audited by a person other than the caseworker, and any actions required would be noted and would have to be implemented. Miss Clark and Dr Ramkisson reviewed each other's files, but Miss Clark did the claimant's and Mr Capper's files.

65. The file reviews were done in late May and early June 2015. The review of the claimant's files resulted in a significant number of action points for her. Some of the files had GP letters missing, or no Trust Approved Risk Assessments ("TARAs"), and it appeared to Miss Clark that on some files there had been no action for eight or nine months. The claimant said she had some material at home, and this also was a concern to Miss Clark and Ms Brown (page 197), although it turned out to be CBT notes for IAPT training purposes, not clinical notes.

66. The outcome of the review was discussed at a supervision meeting on 4 June 2015 between Miss Clark and the claimant at pages 199-200. Each patient file was discussed individually. There were a handful of files still to be reviewed.

67. Miss Clark recognised that completing the action points resulting from the file review would cause further work for the claimant. The daily records at pages 188-189 showed that the claimant was allocated patient free days on 11 and 12 June to undertake that administration work, and had further time on 17, 18 and 19 June. She was also entitled to use the time if a patient did not attend for an appointment.

68. Miss Clark also proposed that she and the claimant meet fortnightly for supervision from 17 July (page 203).

69. This was a stressful time for the claimant. She had the extended deadline for submission of her IAPT tapes fast approaching. She also had the additional work generated by the file reviews. On 17 June she emailed Miss Clark (page 212) to say that she was "total[ly] overwhelmed" by the quantity of the work generated by the file review.

70. The claimant alleged that the conduct of the file review amounted to disability related harassment and we will return to that in our conclusions.

Emails re CBT Supervision

71. The same day the claimant sent an email to Ms Brown which was copied to Sara Barnes and Miss Clark. It appeared at page 216. It was primarily about IAPT supervision and the arrangements for submission of her tapes. She said that she had had no supervision at all since Lisa Smart left. She ended her email with the following paragraph:

> **"As far as I am aware, Renee** [Clark] **is unable to provide CBT supervision for me as I understand she is not accredited with the BABCP for CBT and has not obtained the necessary supervisory qualification, which the course requires in order to supervise IAPT trainees."**

72. Miss Clark responded the same day to clarify that it was not her intention to supervise the claimant as an IAPT trainee, but as a Transition practitioner. Although her email did not betray it, Miss Clark was in fact very upset by the claimant's email, believing that the claimant was calling into question her professional competence. In fact the claimant had been talking about the supervision required for her to progress towards BABCP accreditation, not about supervision of her CBT work as a Transition practitioner. This misunderstanding soured the relationship between the claimant and Miss Clark considerably over the weeks that followed.

73. The claimant had further difficulties at the end of June. Her son was admitted to hospital for two days in late June with a potentially serious heart condition. It was a very upsetting time for her.

Supervision 17 July 2015

74. A supervision meeting between Miss Clark and the claimant took place on 17 July 2015. The notes appeared at pages 232-237. The claimant alleged that the conduct of this meeting by Miss Clark amounted to disability related harassment. We will return to that in our conclusions.

75. Immediately after the meeting the claimant became upset and a colleague alerted Ms Brown to the position. The claimant and Ms Brown spoke that same day. The note of their discussion appeared at pages 240-241. The claimant told Ms Brown that she was finding the scrutiny and supervision oppressive. The note recorded that the claimant was tearful and felt micromanaged. She felt she was being treated differently to others. In a written note she made on 24 July 2015 on page 241 the claimant explained that she thought the repetitive written action plans were concealing the real concerns about performance and more open dialogue from Miss Clark was needed. Her notes said:

> **"This is harassment and bullying I feel, and it has become humiliating and demoralising."**

"Clear the Air" Meeting 6 August 2015

76. One of the action points from the meeting with Ms Brown was to consider a three way meeting, and this was eventually arranged for 6 August 2015. It was intended to be an opportunity to clear the air between the claimant and Miss Clark. The claimant wanted Ms Brown to attend as well. The situation was affecting the claimant badly, and she was concerned that the meeting was not taking place until 6 August. In an email of 29 July 2015 at page 249 she said she was finding it difficult to focus on work with this hanging over her head.

77. The notes of the meeting on 6 August 2015 appeared at pages 257-258. The claimant alleged that the conduct of this meeting was disability related harassment, and we will return to that in our conclusions. The meeting discussed the action plan resulting from the file reviews, and the email from the claimant about CBT supervision arrangements. Miss Clark said that the emails had been undermining her

competence, and she had found them hurtful and personal. The claimant made clear that she felt she had been managed differently to other staff members, but Miss Clark articulated that concerns regarding file governance and record keeping had been uncovered in the file review. However, there was now a clear job plan in place to support capacity, and time had been allocated in the diary to catch up. The notes recorded that there would be efforts to maintain a professional relationship going forward, and that supervision for BABCP accreditation would be arranged by the service once the claimant had passed the course.

78. The notes were not signed by the claimant. They were not sent to her until some six months later and she could not say whether the notes were accurate. She gave her account of the meeting in May 2016 as part of the grievance process (page 391) and we will return to that matter in our conclusions.

September – December 2015

79. In the months that followed there were a number of issues which caused the claimant concern. She felt she was not being supervised properly by Miss Clark and meetings for the purpose of "caseload cleansing" were cancelled. These formed part of the withdrawn victimisation complaint and it is not necessary for us to record the details in these reasons. It was clear that the working relationship was deteriorating despite the attempt to "clear the air" on 6 August 2015.

Supervision 22 January 2016

80. Matters came to a head, however, at a supervision meeting on 22 January 2016. There were no notes of this supervision meeting kept. Miss Clark and the claimant could not agree on whether Miss Clark had given the claimant a copy of her handwritten notes at the end of the meeting. Miss Clark's normal practice of typing up the notes on the supervision form after the meeting and then circulating the typed form could not happen because the computer was not working in the office where the meeting took place.

81. When interviewed about six weeks later by Ms Brown (page 320) the claimant described how she brought four of her files for discussion but Miss Clark asked her to get four different files. She said that Miss Clark had asked her who her clinical supervisor was and the claimant replied that it was Miss Clark. She described Miss Clark as having behaved in a way which was very erratic and unpredictable. In her written grievance document of 5 April 2016 she described that meeting as the "final straw" in the campaign of harassment conducted by Miss Clark.

82. Miss Clark's account was given in her witness statement at paragraph 101. She suggested that the claimant exaggerated the claim that her caseload had doubled since Christmas. There had been an increase but the caseload was still lower than expected. She was also concerned that the four files the claimant brought with her were recent files which did not give her a chance to check whether there had been a lack of documentation or drift in patient management. She therefore asked the claimant to bring a more representative mix of files. She was not aware at the time that the claimant had any issue with the way the supervision was conducted.

Sick Leave January – July 2016

83. The claimant went off sick immediately following this meeting. She was to remain on sick leave until early July 2016. Her fit notes over the period recorded a "moderate depressive episode". The initial fit note of 26 January was effective to 13 February (page 296). It was not apparent that the claimant would not be back at work for almost six months.

Work Based Concerns

84. Whilst the claimant was on sick leave, management began to act on some work based concerns, which fed into a performance improvement plan ("PIP") which took effect when the claimant returned to work in July. This formed the basis of an allegation of direct discrimination, indirect discrimination, breach of the duty to make reasonable adjustments, victimisation and whistle-blowing detriment. We will return to these matters in our conclusions. For the purpose of this chronology, however, the following points should be noted.

85. The first mention of performance concerns appeared in an email of 1 February 2016 from Ms Brown to Ms Prasad of HR. The claimant was not identified in the email but it sought help with the performance issue for a staff member. The email said:

> **"She has gone off work with moderate depression but on looking through her files it is evident that work is not being recorded properly and there are lots** [of] **concerns.**
>
> **This has been a problem before and on her return to work last time she found it very difficult to tolerate the exposure and consequent action plan. I'll be very honest and think we backed off in response and I'm keen to address and be clear about what to expect on this occasion.**
>
> **I strongly feel that we need to be really clear with her about expectations and how to support her, especially as she has gone off with her mental health, with a clear plan and documented goals to work toward…**
>
> **I am keen to address this as her line manager addressed this last time which has taken its toll on their relationship and in terms of their relationship it may be that if I intervene with your support this may allow me to be the bad guy rather than her line manager which is what [I] felt happened last time a bit."**

86. These concerns were not passed on to the claimant at this time. Ms Brown's contact with the claimant was in supportive terms.

87. On 10 February 2016, however, Dr Ramkisson emailed Ms Brown to draw attention to some issues on the claimant's files that had arisen in the two weeks since the claimant had been off. The email at pages 301-302 gave some specific details. It suggested that there could be a serious incident and that service practice was not defensible. It referred to the team being overloaded and there having been an increase in referrals. One of the issues which Dr Ramkisson's identified in the claimant's files was missing documentation.

88. Ms Brown updated Sara Barnes and Ms Prasad on 17 February 2016 about the position on the files of the claimant. Her email appeared at pages 306-307. She said that the governance was very poor indeed with a lot of missing information. She

had tried to triangulate the contacts activity with the online diary but entries from July 2015 to January 2016 had been deleted, with a note saying they had been deleted in error. There was a suspicion that these might have been deleted by the claimant. Cross referencing this with contacts recorded on the computerised system showed that there had been a large number of contacts entered without a corresponding record in clinical notes of the activity in question. She was not sure whether the claim that there had been contact was false or whether it had simply not been written up properly. She summarised her view as follows:

> **"There is nothing malicious or seriously worrying found so far in her written notes to comment upon rather, lots of drift, missing paperwork as identified and general disorganisation, lots of cancelled appointments and rescheduling of appointments which it is not always clear who is cancelling and whether it's the staff member or the patient (probably a mix but a lot)… I will continue going through all of her caseload to continue this investigation of concerns so as to decide how to proceed and support the staff member."**

OH Report February 2016 and Sickness Review 9 March 2016

89. An Occupational Health referral in February resulted in a report of 26 February at pages 313-314. It recorded that the claimant reported a longstanding history of depression but said her symptoms were usually well controlled. She was also suffering from physical symptoms relating to her joints, blood pressure and cholesterol. Her medication was being reviewed. The opinion was that the claimant would not be fit to return to work until the workplace issues had been addressed. A referral for counselling was recommended.

90. The report was discussed at a sickness review meeting on 9 March 2016 conducted by Ms Brown and Ms Prasad. The claimant was accompanied by her colleague, Tracey McElroy. The notes at pages 320-322 recorded the claimant saying she was not feeling well with depression and anxiety and that she had physical problems as well. She said it was all stress related. She described how she had been undermined and isolated by Miss Clark over a long period. She said her caseload had doubled and she had been taking on all the new patients. Ms Brown said that the claimant's concerns needed to be investigated and she felt she would do that. The possibility of a return to Oldham CAMHS was discussed.

91. On 24 March 2016 at page 324 the claimant emailed Ms Brown to say that she had actually felt worse since that meeting and had been to hospital two days later due to palpitations. She was now extremely anxious about going back to work at Oldham. She was about to submit a formal grievance letter and was concerned about whether she could reintegrate back into work. The response the same day at page 326 was in supportive terms and reassured the claimant that once she was physically and mentally ready to think about options for a return they would be discussed.

92. On 26 March 2016 the claimant contacted ACAS to initiate early conciliation.

Grievance 5 April 2016

93. The claimant submitted her grievance by email on 5 April 2016. It appeared at pages 333-346. The grievance began by explaining how the claimant's health had been affected by her treatment at work. She referred to the absence of a stress risk

assessment, the increasing workload and the lack of adequate supervision. She then alleged that she had been harassed by Miss Clark's behaviour over a lengthy period. She requested that she and Miss Clark be separated with immediate effect. She said the final straw was the supervision meeting on 22 January 2016. She went on to make further allegations of disability discrimination. The respondent accepted that this grievance was a protected act under the Equality Act 2010, as it made a number of allegations of disability discrimination. However, it was not accepted that it amounted to a protected disclosure and we will return to that issue in our conclusions.

94. On 19 April 2016 the claimant emailed Ms Prasad to say that she did not agree with the notes of the meeting on 9 March. Her email appeared at pages 348-349.

95. The grievance was acknowledged by email from Ms Heaton of HR on 20 April 2016 (page 350). It was to be investigated by the Operational Manager, Gaynor Hodson. The claimant was invited to a meeting on 4 May.

Invitation to Meeting about Work Based Concerns

96. About two hours later on 20 April Ms Brown emailed the claimant (page 352) inviting her to a meeting on 28 April. The email said:

> **"This meeting will be in two parts. The first part will be related to your sickness; the second will be to raise/discuss some work based concerns. You are entitled to bring along union representation or a colleague to this meeting for support if you wish."**

97. This was the first indication to the claimant that there were "work based concerns". Her immediate response was to say that she could not attend the meeting that day. It was rearranged to 3 May. However, on 27 April the claimant sent an email in the following terms (page 355):

> **"I am not entirely sure what the purpose of this meeting is i.e. formal/informal, however I have now been invited to attend a grievance meeting the following day, 04/05/2015, and so would prefer not to attend any other work related meetings until after I have information regarding the outcome of this meeting.**
>
> **Perhaps you would be kind enough to clarify your paragraph about the structure of the meeting in the meantime: 'the first part will be related to your sickness; the second will be to raise/discuss some work based concerns'. I am curious as to your meaning re 'some work based concerns' and have lost confidence since the last meeting when information became misconstrued and misrepresented over the five weeks I was waiting to receive the minutes.**
>
> **I am able to attend any sickness absence meeting as per Trust policy I might add."**

98. The reply from Ms Brown of 28 April 2016 appeared at page 358. It said that:

> **"The meeting called is a formal meeting and it is a contractual obligation that you are required to attend any meetings in relation to work based concerns. We will be able to provide you with more information at our meeting.**
>
> **You have the right to be accompanied for this meeting by a Union representative or colleague.**

> **The grievance is being managed separately and under the Trust grievance policy and if you have any questions in relation to this then please direct them to the investigation officer or HR Support (Justine Heaton).**
>
> **In terms of the structure of the meeting…first part – will be to discuss your sickness absence [and] any support that we can offer to you. Second part – to discuss some work based concerns which will be highlighted to you in the meeting."**

99. In cross examination Ms Brown said that the reference to a "formal meeting" was a reference to the sickness part of the meeting, but we rejected that. The email said there was a contractual obligation to attend the work based concerns meeting too. We accepted, however, that Ms Brown's intention, on advice from HR, was to hold the sickness part of the meeting first of all to assess whether the claimant was well enough to go on and discuss the work based concerns.

100. Ms Brown said that the decision to proceed to discuss the work based concerns with the claimant at this stage was because the detailed grievance which the claimant had submitted suggested that she might be well enough now to engage with such matters. We will return to that issue in our conclusions.

101. The claimant was concerned that she still did not know what the work based concerns were. She also wanted to deal with the grievance meeting first.

102. On 2 May 2016 the claimant submitted a statement of evidence for her grievance. It ran to approximately 30 pages and appeared between pages 365-397. Essentially it was the factual component of her grievance and it set out in some detail the chronology of events on which she relied. In an appendix at pages 395-396 she set out 12 questions and suggested that an adverse inference could be drawn in Employment Tribunal proceedings if the respondent did not reply, or if replies were evasive or equivocal.

103. On 3 May 2016 Ms Brown expected the claimant to attend the meeting but that did not happen. She sent an email to the claimant after the meeting at pages 412-413. She said she had not received any contact indicating the claimant would not be attending, and said that:

> **"It is a contractual obligation to attend such meetings and failure to attend may be viewed as refusing to obey a reasonable request and may result in disciplinary action."**

104. The email invited the claimant to a rescheduled meeting on 11 May 2016.

105. The grievance meeting took place on 4 May. The investigation officer, Ms Hodson, interviewed the claimant accompanied by Justine Heaton of HR. Ms Heaton's notes appeared at pages 400-407, and a note prepared by the claimant appeared at pages 408-411. There was a discussion about which witnesses needed to be interviewed for the grievance and about a number of the factual issues which the claimant had raised about how she had been treated by Miss Clark. The claimant was to send relevant emails to Ms Hodson. She said she did not want to work with Miss Clark again but would consider working at Tameside or Stockport which were nearer to her home.

106. On 5 May (page 412) the claimant replied to Ms Brown's email of 3 May. She said she had not been well enough to read her work emails over the past days and

was not aware of any contractual obligation because the email of 28 April at page 358 had not been read. She was shocked at the mention of disciplinary action and said the last two emails had been intimidating and threatening. She was not refusing to attend the meeting but felt that there was discriminatory treatment.

107. On 6 May Ms Brown issued two letters to the claimant inviting her to the two meetings on 11 May. Those letters appeared at pages 414 and 415. The letters were sent to the claimant at her correct address at Alder Close. The claimant acknowledged receipt ion 10 May.

108. That same day ACAS issued its early conciliation certificate.

Meetings 11 May 2016

109. The first meeting of the day concerned sickness. The notes appeared at pages 423-426. The claimant said there had been no change and she was probably worse than last time. The grievance had not helped. Her health was discussed. The claimant said returning to Oldham CAMHS was not an option but she would consider Tameside, Stockport or Rochdale. She said she would be able to return to work if she was moved to another area. It was agreed that the possibility of a return would be reviewed once there had been a further Occupational Health report and a report from the cardiologist to whom the claimant had been referred.

110. The meeting then moved on to discuss the work based concerns. There were typed notes which appeared at pages 421-422. The notes were not provided to the claimant at the time and she did not accept that they were accurate. In broad terms, however, it was common ground that Ms Brown said that the discussion was just an exploration of the concerns. The meeting was not part of any disciplinary process. Ms Brown said she had discovered the concerns when the claimant went off sick and the files were being collated. The claimant said she was not feeling well enough to attend any appointments to discuss these work based concerns, and this was accepted by Ms Brown. The claimant said that when she had gone off sick she had some clinical records at home (not just CBT notes) because she had gone home intending to complete some work that weekend, but had forgotten about them. Arrangements were made for them to be returned as a matter of urgency.

111. A letter was issued after the meeting confirming the position in relation to sickness absence management. Initially it was sent to the wrong address, Bank Street. That letter appeared at page 426k. This error was discovered and the letter reissued to the correct address at Alder Close. The circumstances of this error formed part of the allegation of breach of confidentiality by way of victimisation, and we will return to it in our conclusions.

112. On 13 May 2016 Ms Brown emailed Ms Prasad in HR to say that she had been speaking to managers about options for a return to work. Her counterpart in Stockport was exploring temporary options. The clinical records had been returned.

113. On 16 May 2016 the claimant was certified unfit by her GP for a further month with a continuation of her moderate depressive episode (page 430).

114. On 17 May 2016 the claimant emailed Ms Brown about the minutes and said that she had not received any minutes of the work based concerns meeting. Her email said:

> **"I know there wasn't a lot written down, but I felt at a distinct disadvantage not knowing the agenda before I arrived and not now having anything specific in writing relating to the concerns you raised about my work. I feel the facts need to be incorporated within my grievance documentation and are entirely relevant. My current mood state makes it difficult for me to recall and process information as effectively as I would under normal circumstances, and as I explained in my last email, I felt anxious and apprehensive during the meetings."**

115. On 23 May Ms Brown emailed Ms Prasad to check that the work based concerns minutes had been sent to the claimant (page 441) but it appeared there was some confusion about whether these had been sent (page 440). Ms Prasad went on leave and the matter was still outstanding when Mr Ruddy took over from her at the end of June (page 440).

Desk Plan May – June 2016

116. On 18 May 2016 Miss Clark sent an email to a large number of staff (including the claimant) updating them on a desk move scheduled for 13 July. She provided an updated version of the desk map and said that two members of the team had been forgotten but she had apologised. The desk plan attached had names on it but the claimant's name did not appear.

117. The claimant was upset by the fact that her name did not appear on the plan. On 7 June at page 463 she emailed Ms Heaton to that effect.

118. Ms Heaton told Ms Brown. Ms Brown looked into it. She said in an email to Ms Heaton on 7 June at page 466 that the claimant's name had been left off the plan as someone from the agency was sat in that desk and the managers did not want to cause further distress to the claimant when she was off work. There would be space for the claimant when she was ready to return. The gist of that explanation was conveyed to the claimant by Ms Heaton on 9 June at page 469.

119. This was an allegation of harassment related to disability to which we will return in our conclusions.

Occupational Health Report – 24 May 2016

120. The Occupational Health report of 24 May 2016 appeared at pages 442-443. It recorded that the claimant was unaware how her grievance was proceeding despite meetings with her manager and HR. It recorded that she had heightened anxiety and low mood symptoms, and "scored very highly for depression and high for anxiety". The opinion was that if she was made aware of the position on her grievance she could return to work in a different location. If she could not be offered a different location she would be off sick until the grievance concluded. A phased return to work over four weeks with regular one-to-one meetings with her manager was recommended upon her return.

121. In late May there was contact between Ms Hodson and Miss Clark about the claimant's grievance. Arrangements were made for Miss Clark to be interviewed on 2 June. She was not provided with a copy of the grievance document itself (page 445).

122. On 31 May 2016 the Consultant Cardiologist, Dr Scott, reported on the claimant following her recent admission for palpitations. He said that issues relating to stress at work could have been a contributory factor. Statin treatment was recommended but she was discharged from care.

123. That same day Ms Brown had a meeting with Dr Ramkisson to discuss things which had emerged on the claimant's file since she had been off. The handwritten notes of the meeting appeared at pages 449a-449g. These notes were never provided to the claimant and she was unaware of this meeting. There was a discussion about a number of specific patient files, with the names appearing in the notes (albeit redacted for this hearing). The claimant saw this document for the first time during our hearing (as she had been unable to access the version emailed to her a few days earlier) and emphasised that it was the sort of detail about the concerns which she would have wanted at the time in order to respond properly. The notes recorded a summary of the concerns on the final page which included issues with patient drift, missing documentation and care planning.

124. On 1 June 2016 Ms Heaton emailed the claimant to say that the grievance investigator was meeting Miss Clark the following day.

125. On 6 June 2016 the claimant lodged her first Employment Tribunal complaint.

126. On 14 June 2016 Ms Hodson carried out some more interviews for the grievance. She interviewed Mr Capper (pages 475-476), Ms McElroy (pages 477-479) and Ms Brown (pages 480-483). On 20 June 2016 Ms Heaton responded to a query from the claimant about progress on the grievance in an email at page 488. Her email said that there was one more person to be interviewed before the report could be written up. That was the interview of Dr Ramkisson which took place on 27 June at pages 497-500.

Reduction in Pay

127. On 20 June 2016 the respondent's payroll provider, Capita, issued a letter to the claimant indicating that she would move to half pay on 24 June because of her sickness (page 486). Understandably this caused the claimant great concern. She thought that the reason she was not back at work by now was because matters were taking too long. She sent an email on 21 June at page 487 saying she was not sure what to do, and this was forwarded to Ms Brown. Ms Brown said in an internal email of 21 June at age 487 that she would "push the Stockport plan". There were further emails about the sick pay position on 23 June, and on 25 June the claimant sent an email to Ms Brown (page 495a) in which she referred to the previous emails and said:

> **"…I was wondering if you could please intervene in the worrying situation regarding my salary reduction from 24 June 2016? I only received notification of this by a letter from Capita on Wednesday 22 June so it came as a shock. I was hoping that a suitable workplace would have been identified for me before this happened, which you have now informed me you are still trying to secure. The letter advises me to discuss the**

> **contents with my manager or 'Trust Human Resource adviser'. Justine [Heaton] has explained that she cannot be involved in this matter due to the grievance process, and Priya [Prasad] is on [annual leave] until 5 July I understand. I am not sure, therefore, who else to approach? I would be most grateful for your advice/assistance in this matter."**

128. The allegation that this email was ignored formed one of the allegations of detriment due to a protected disclosure and we will return to it in our conclusions. It is convenient to record here, however, that Ms Brown did not reply to that email, but by letter of 27 June 2016 at page 496 (addressed to the wrong address but sent by email only) the claimant was invited to further meetings about return to work and work based concerns on 1 July. In an internal email to Ms Heaton at page 506 Ms Brown made clear her intention to discuss the sick pay issue, following a further detailed email from the claimant about that matter on 28 June at pages 506-508.

Meetings 1 July 2016

129. The claimant attended the two meetings with Ms Brown regarding sickness and work based concerns on 1 July. No formal notes were kept but the contents were summarised in a lengthy letter from Ms Brown of 4 July at pages 517-527. The text of the letter in our bundle had the claimant's comments interpolated. There were a number of additions and corrections which the claimant made. Broadly, however, there was discussion about a sick note which had been sent in by the claimant but not received (page 517) which was part of one of the allegations of breach of confidentiality by way of a whistle-blowing detriment, and discussion about the current health position. The sick pay issue was discussed and after the meeting it was resolved by a full retrospective restoration to full pay.

130. The claimant confirmed that she was able to carry on with the work based concerns meeting and those matters were then discussed. Ms Brown said that it would not have been helpful to have told the claimant about these concerns when they first arose because she had gone off sick at that time. The claimant responded by saying the delay had made her mental health worse. There was discussion about the problems which Ms Brown believed there were on the files. There was no detailed discussion of specific patients. According to page 521 Ms Brown said the following:

> **"I informed you that in your temporary role in Stockport, we will need to ensure that you achieve and maintain satisfactory standards in relation to output (avoiding drift) recordkeeping and file management."**

131. At the top of page 522 the following appeared in the text of the letter as issued by Ms Brown:

> **"I am required to ensure that the serious concerns that had come to my attention in relation to your performance prior to January 2016 are addressed, [and they] must be the focus of our attention now in addition to supporting you to achieve the required standards in a helpful and timely way. I said that if you did not wish to engage with the process to achieve and maintain satisfactory standards in the areas I had identified as of concern, I would be required to follow a formal investigatory process under the disciplinary procedure. I am emphasised that this is your choice but that I have to address the concerns in one way or another, and that I would much prefer to follow an informal supportive process to enable you to achieve satisfactory standards rather than a disciplinary one."**

132. This was a reference to the performance improvement plan or "PIP". The claimant alleged that the decision to put her under a PIP upon her return to work in July 2016 amounted to direct disability discrimination, indirect disability discrimination, a breach of the duty to make reasonable adjustments, victimisation because of her grievance, and a protected disclosure detriment because of her grievance and Tribunal claim form. We will return to those matters in our conclusions.

133. The procedure envisaged formed part of the respondent's capability policy under the heading "Informal Assistance" on pages 630 and 631. That policy referred to "an action plan" with provision for review timescales and the keeping of proper records. It envisaged a total review period of three months following which there should be escalation to the formal procedure if there had been no substantial improvement. The formal procedure itself had three stages and could result in dismissal if there was no sufficient improvement.

134. The claimant was treated as having returned to work on 1 July 2016 but in fact did not resume work until the middle of that month at her new location of Stockport CAMHS. She was part of a different team with no contact with Miss Clark. Arrangements were discussed at a meeting with her new line manager on 8 July at page 539, and the action plan or PIP to which she was subjected appeared at page 541. In cross examination the claimant accepted that the plan did not ask her to do any more than meet the required standards, but her concern was that it came on top of what was already a difficult situation because she was returning to work after six months off to a new team with new ways of working. She found it quite humiliating to be on the action plan for three months, being unable to explain to her new colleagues why she was having additional supervision meetings with her new manager. We will return to this issue in our conclusions.

Grievance conclusion and appeal

135. The remaining outstanding matter for our purposes was the grievance. On 2 July Ms Brown said that the claimant had specifically requested an update at their meeting on 1 July. She sent that email to Ms Hodson (page 516). The claimant sent her own email enquiring about progress on 6 July at page 536. It was over six weeks since the meeting on 4 May.

136. On 11 July 2016 the claimant lodged her second Employment Tribunal complaint.

137. The grievance outcome letter was issued on 29 July by Ms Hodson. It appeared at pages 558-573. It found that the supervision sessions between the claimant and Miss Clark had been cancelled by both of them for different reasons at different times, but that there had been adequate IAPT supervision. There were some recommendations to be made about having a more robust supervision framework. Recommendations were to be made about rebuilding the working relationship with Miss Clark, on the basis that the return to work at Stockport might be a temporary measure. The job plan was found to have been proportionate and appropriate, and the account given by Miss Clark of the various supervision meetings appeared to be accepted in place of the claimant's account. The file review was something which applied to all members of staff and the conclusion was that

Miss Clark had treated staff including the claimant fairly and consistently. There was insufficient evidence to justify referring Miss Clark for a disciplinary hearing for bullying and harassment.

138. The claimant was given the right of appeal. She lodged her appeal by a letter of 16 August 2016 at pages 584-596. Her letter was sent by email to Mrs Parton as directed. On 2 September Mrs Parton read that email but did not reply to the claimant (page 597). She then went on a period of annual leave between 5 and 19 September, and on her return was engaged in some training away from her office. She had further examinations and training for a couple of days in early October. There was no contact at all with the claimant during this period. She was left in the dark as to what was happening with her grievance appeal.

139. The claimant chased matters up via Ms Heaton on 22 October at page 618. The reply of 24 October at page 618a said that Ms Heaton could not be involved as she had supported Ms Hodson, but the email had been passed on to Mrs Parton. There was still no reply from Mrs Parton or any contact with the claimant. The claimant contacted the respondent's solicitors in these proceedings in late November. Eventually the appeal outcome letter was issued on 20 December. It appeared at pages 620-625. Mrs Parton responded to each of the 62 points which the claimant had made in her grievance appeal. She rejected the appeal. She concluded the grievance process had been followed correctly, that key information provided by the claimant had been taken into account even though the grievance had not been upheld on many matters, and overall the appeal was rejected.

140. In her role as Acting Senior HR Business Partner Mrs Parton also had involvement for the respondent in relation to the Employment Tribunal proceedings which had been underway since 6 June. The allegation made by the claimant was that the delay in dealing with her grievance and the appeal amounted to victimisation because of her grievance, and/or protected disclosure detriment because of her grievance and first claim form. We will return to those matters in our conclusions.

Submissions

141. The witness evidence finished shortly before lunchtime on Thursday 25 May 2017. Ms Eeley had prepared a written submission accompanied by copies of some authorities, and the Tribunal read that submission over lunch before hearing oral submissions. Understandably the claimant had not prepared any written submission and her case was summarised orally only.

<u>Respondent's Submission</u>

142. For full details of the respondent's submission reference should be made to the written document. What follows is an overview of the position taken by the respondent incorporating any additional points made orally.

143. Although it was conceded that the claimant had been a disabled person, the respondent denied actual or constructive knowledge of that. Ms Eeley submitted that even by the time of the grievance of 5 April 2016 the respondent could not reasonably have known that the claimant was a disabled person even though the claimant made that assertion. That therefore meant that the reasonable adjustments

complaints should fail, and that there could not have been any direct disability discrimination.

144. Dealing with the direct discrimination complaint, Ms Eeley submitted that there were reasons for the IAPT supervision arrangements and for the PIP in July 2016 which had nothing to do with disability. There was simply no causal link. Further, there had been no detrimental treatment in relation to the IAPT supervision and the comparison with Ms McElroy was misconceived.

145. The indirect discrimination complaint was also resisted. It was not accepted that any PCPs had been applied, but even if they had there was simply no evidence on which the Tribunal could conclude that there was any group disadvantage for disabled employees.

146. In relation to reasonable adjustments, again it was denied there was any PCP applied or any substantial disadvantage. The disadvantages that the claimant suffered were not due to her disability but to other factors. In any event the adjustments which the claimant sought (not investigating work based concerns and not pursuing the PIP) could not reasonably be made by the respondent because there was a responsibility to ensure proper governance and handling of files. Management could not reasonably take no action once those concerns arose.

147. In relation to harassment, the four matters on which the claimant based her claim were said not to be related to disability in any way. In any event they did not create the proscribed environment and there were some disputes of fact as to how particular meetings were conducted which ought to be resolved in favour of the respondent.

148. In relation to victimisation, the respondent accepted that the grievance was a protected act but it was denied that there had been any detriments imposed on her because of the protected act. It was not accepted that it was a protected disclosure because the claimant could not reasonably have believed that her disclosures were made in the public interest. They only affected her personally. The first Employment Tribunal complaint was not a protected disclosure either because it was not in the public interest and in any event had not been made to her employer or an appropriate person.

149. Ms Eeley submitted that the second complaint was one over which the Tribunal had no jurisdiction because of a failure to undergo early conciliation. She distinguished **Compass Group v Morgan** on the basis that in that case the only event after early conciliation was the resignation which simply crystallised the cause of action arising out of events prior to early conciliation. In the present case, she submitted, the second claim form related to factual events occurring after early conciliation and therefore was not the same.

150. Ms Eeley also submitted that those complaints which were out of time should be rejected because there had been no continuing act and no evidence from the claimant to support an extension of time on the basis it was just and equitable to do so.

Claimant's Submission

151. The claimant began her submission by making clear that she felt her disability had influenced her treatment by Miss Clark. They had got on fine before she returned to work in April 2014. The absence of any stress risk assessment was the start of the process. She also submitted that there was constructive knowledge of her disability because managers – particularly mental health professionals – should know what the requirements of the Equality Act were. The investigation into work based concerns had not been handled properly as she had been kept in the dark, and the imposition of a PIP at the time when she was returning to work from six months of leave in a different office was unnecessary and disproportionate. She should have been supported through ordinary supervision arrangements.

152. Following that submission the Tribunal took the claimant through the issues for determination and sought clarity as to her case where appropriate. In the course of that discussion the claimant said that her ability to sort out the IAPT supervision arrangements in March to June 2015 had not been as effective as if she had not been a disabled person, and she felt her emails were going into vacuum and not being addressed by managers. There had been a perception of her as a "needy" individual. She did not identify any evidence before the Tribunal as a comparative disadvantage in relation to indirect discrimination, but emphasised her own experience and how she had struggled with the file review, the PIP and the investigation into work based concerns.

153. On the question of reasonable adjustments she submitted that the PIP did have a detrimental impact on her confidence and made her a lot more anxious to keep on top of things. The same was true of the work based concerns matter. She submitted that it would still have been a reasonable adjustment to have dropped those matters. There had been no indication at the time she went off that there was any serious problem, and these matters should have been addressed through normal supervision.

154. In relation to the harassment allegations she submitted that these were related to disability. The file review took place after the return to work meeting on 20 May 2015 and then took eight weeks. She acknowledged that the file review had been envisaged prior to that meeting (8 May 2015 at page 172). She felt that the meeting on 17 July had been related to her disability because she had never seen Miss Clark as hostile and aggressive before, and the same was true of the meeting on 6 August 2015. The omission of her name from the desk plan was also related to disability and submitted that all four of these matters created an intimidating or humiliating environment for her.

155. In relation to victimisation, the claimant withdrew her allegation relating to the desk plan, and in relation to the work based concerns and PIP she accepted there was no direct link but felt they had escalated after the grievance was lodged. Ms Brown had not been as supportive and encouraging after the grievance as she had been before it.

156. In relation to breach of confidentiality, the claimant withdrew the allegation relating to the desk plan but said that letters had not been addressed to her old

address before the grievance went in and there had been a flippant response to her concern about missing fit notes.

157. In relation to the protected disclosure complaint, the claimant submitted that it was in the public interest to have employees protected properly at work in relation to health and safety issues and she was content to leave it to the Tribunal to determine whether her Tribunal claim form had been disclosed to an appropriate person within the Employment Rights Act 1996.

158. As for the detriments, the claimant withdrew her complaint relating to the desk plan and accepted there was no causal link between her protected disclosure and the failure to respond to her email of 25 June 2016 about sick pay. However, she submitted that Ms Brown had changed her attitude once the grievance was lodged and that explained why the work based concerns had been pursued more vigorously from 27 June 2016, how the meeting on 1 July had been conducted, and why there was no response to the email of 5 July about the fit note. The same was true of the PIP. As for the grievance, her main concern was that there had been no communication with her during the process and no update as to what was happening.

159. The claimant was content to leave to the Tribunal the question of time limits and whether there was jurisdiction over the second claim in the absence of an early conciliation certificate.

Discussion and Conclusions

General Observations

160. Before the Tribunal addressed the specific complaints embodied in the List of Issues, we considered it appropriate to make some general observations about this case.

161. Although the claimant had at times used language which is ordinarily found in a constructive unfair dismissal complaint, such as references to a breach of trust and confidence and to a “final straw”, the claimant had not in fact resigned from her employment and there was no unfair dismissal complaint before the Tribunal. Instead the Tribunal was concerned with some specific complaints brought under the Equality Act and under the whistle-blowing provisions of the Employment Rights Act 1996. Those complaints could be regarded as falling into two categories.

162. The first category covered those complaints where the claimant alleged she was treated differently from others. This included the complaints of direct discrimination, victimisation, harassment and whistle-blowing detriment. Causation was crucial. In the direct disability discrimination complaint, the fact that the employer’s actions may have an adverse (or more adverse) impact on an employee because she is disabled is not sufficient to show that the actions were because of the disability. The role of the Tribunal is to scrutinise the mental processes of the decision maker to identify whether the employee’s disability had any material influence, consciously or subconsciously, on those mental processes. The same is true in relation to the victimisation and whistle-blowing detriment complaints where the reason for the detrimental treatment is said to be a protected act or protected

disclosure. The harassment complaint has a broader concept of causation ("related to"), and in addition requires evaluation of the consequences of the treatment. Broadly the key issue for this Tribunal in these complaints was not whether the claimant had been treated well or badly (although it was still necessary for there to have been a detriment), but why she was treated as she was.

163. The second category covered complaints where the claimant was treated the same as others but disadvantaged by that treatment. This covered indirect discrimination and breach of the duty to make reasonable adjustments. In an indirect discrimination complaint there must also be group disadvantage for disabled people resulting from the PCP. In those complaints it is particularly important that the Tribunal follows the statutory formula closely.

164. Against that background the Tribunal turned to the individual complaints in accordance with the List of Issues.

Issue 1(a): Direct disability discrimination – CBT supervision – March – June 2016

165. The claimant needed to submit three tapes of CBT sessions by mid June 2015 in order to complete the work needed for the diploma. By March 2015 the deadline had already been extended and it was now 12 months since she had returned to work with the respondent. When the sessions with Ms Boshoff ended in March 2015, Gordon Knowles was allocated by the respondent to supervise the claimant for the remaining work.

166. His workload was such that the claimant had difficulties getting supervision with him. She raised her concerns with Ms Brown in a series of emails starting on 9 April at page 167. Ms Barnes responded on 11 May (page 177) recognising the challenges and saying that she would make efforts to protect the capacity of Mr Knowles to provide supervision. Her view was that it was better to stick with Mr Knowles as the deadline for submissions was approaching, although she did offer in that email to look at alternatives as a matter of urgency. It did not appear that the claimant requested a change of supervisor but she stuck with Mr Knowles.

167. There were still issues, however, at the end of May (claimant's email 27 May at page 183) when the claimant said she had been given a further extension of four weeks but Mr Knowles was away on leave until early June. The claimant had to email Mr Knowles again on 5 and 10 June, and she expressed her frustrations to Miss Clark in an email of 16 June at page 208. Her planned meeting with Mr Knowles on 17 June was cancelled, however, because the claimant had already submitted her tapes and therefore it was pointless.

168. The gist of this allegation was that the respondent had failed to take proper steps to arrange adequate supervision between March and June 2015 because of the claimant's disability. The question for the Tribunal was whether the claimant's disability had any material influence on the steps which the respondent took or failed to take in that period.

169. In our judgment this claim failed. It faced three significant difficulties.

170. Firstly, the responsibility on the part of the respondent lay primarily with Ms Barnes. There was no evidence before us that Ms Barnes knew that the claimant

was a disabled person. The claimant had not even said as much to her direct line manager, Miss Clark, by that point.

171. Secondly, the claimant compared herself with her colleague, Ms McElroy, who successfully completed the diploma without difficulties of this kind relating to supervision. However, the comparison for the purposes of section 13 must be one in which the material circumstances of the comparator do not differ (section 23). We were satisfied that Ms McElroy was not in a genuinely comparable position with the claimant because she was not a person requiring an extended period of supervision after her 12 months' secondment. Her material circumstances differed.

172. Thirdly, and perhaps most importantly, there was no evidence from which we could conclude that the fact of the claimant being a disabled person played any part in the approach taken by managers to this issue. The cause of the difficulty was the other commitments of Mr Knowles. Efforts were made to help the claimant with that. Arrangements were made for her tapes to be placed on the G drive so that Mr Knowles could access them remotely. The offer was made to look for a change of supervisor if appropriate, an offer which the claimant did not take up (perhaps wisely).

173. Ultimately the Tribunal was satisfied that the burden of proof had not shifted to the respondent to prove a non discriminatory reason for this treatment, but that even if the burden had shifted the respondent had shown that the arrangements made for supervision of the IAPT work in this period were in no sense whatsoever influenced by the fact that the claimant was a disabled person. Had she not been a disabled person the respondent would have dealt with the matter in exactly the same way. The fact that her depression and anxiety may have made these problems more difficult for the claimant to cope with did not establish the necessary causation to give rise to direct disability discrimination. This complaint failed.

<u>Issue 1(b): Direct disability discrimination – PIP – July 2016</u>

174. This allegation formed item 1(b) in the List of Issues. It was that the implementation of the PIP for three months from July 2016 by Ms Brown when the claimant moved to Stockport amounted to less favourable treatment because of disability. The claimant compared herself with a hypothetical comparator.

175. The PIP arose out of the work based concerns which themselves arose once the claimant went off sick in January 2016. The first mention of an action plan to address such matters came in the meeting of 1 July 2016, as recorded in the subsequent letter of 4 July 2016 at the top of page 522. There was further discussion of the action plan at the meeting on 8 July 2016 with the claimant's new line manager in Stockport. Those notes appeared at pages 539-540. The reference was to an "action/support plan". The action plan itself appeared at pages 541-545.

176. We were satisfied that the imposition of this plan could reasonably be seen as a detriment to the claimant even though its aim was to support her and improve her performance. She had been off sick for six months with depression and anxiety. She was returning to a different work location in a different team where she had to adapt to different ways of working. The plan was potentially a precursor to more formal action under the capability policy if she did not improve and reach the required

standard. It was confidential, and it caused difficulties for her at Stockport in arranging the additional supervision meetings it required without being able to tell her colleagues why that was so.

177. The key issue, however, was whether the decision to impose the PIP was in any sense influenced, consciously or subconsciously, by the claimant's disability. The respondent argued that the PIP would have been imposed for any employee where performance concerns of this kind had been identified during a prolonged absence from sick leave, whether or not the employee was returning to the same team or a different team. It was a measure envisaged by the respondent's policy and one which was unrelated to the claimant being a disabled person.

178. We noted that although the claimant asserted that she was a disabled person in her grievance and in her claim form, it was not conceded by the respondent that Ms Brown knew of this. That point aside, however, we were satisfied that the claimant's disability played no part in the mental processes of Ms Brown in deciding to implement the PIP, and that the position would have been exactly the same with a hypothetical comparator in the same position as the claimant but who was not a disabled person. The factors which operated on Ms Brown's mind were her awareness of the difficulties in the previous year when there had been concerns about performance arising from Miss Clark's file review, leading to the "clear the air" meeting on 6 August 2015 but ultimately resulting in the claimant's grievance; the fact that there were serious concerns held by Ms Brown and by Dr Ramkisson which had only become apparent since the claimant went off sick at the end of January 2016; and the fact that the Trust needed the claimant to perform to the required standards going forward. Those were the reasons why Ms Brown decided that a PIP would be appropriate and the position would have been exactly the same for a comparator in the same position as the claimant save for being a disabled person.

179. Accordingly even if the burden of proof had shifted to the respondent we were satisfied that a non discriminatory explanation had been provided. Issue 2 was determined in favour of the respondent.

Issue 3: Indirect discrimination – file reviews – May and June 2015

180. The requirement to undertake file reviews in the Transition team in May and June 2015 at the instigation of Miss Clark was plainly a PCP applied to that team, and it applied to all members of the team, whether disabled or not.

181. The next question was whether the PCP would put disabled persons at a particular disadvantage when compared with persons who were not disabled. This was a question of "group disadvantage". The group had to be the four people in the Transitions Team as they were the only people to whom that PCP was or would be applied.

182. The claimant had some difficulties with the file review. She was already facing significant pressure from the deadline for submission of her IAPT tapes by 19 June 2015. She was due to go on annual leave at the end of June. She sent an email to Miss Clark on 17 June at page 212 saying that she was totally overwhelmed by the volume of work generated by the file review process. Miss Clark was encouraging the team to carve out time in their diaries to deal with this file review

work by having patient free days or not taking calls, but on occasion the claimant felt that she had no option but to see patients or take calls. However, it would be wrong for the Tribunal to infer from the difficulties experienced by the claimant that there must be a particular disadvantage on a group level for those in the group who were disabled. The claimant's difficulties were exacerbated by her IAPT tapes deadline and her impending annual leave, not necessarily by her disability. The Tribunal had no evidence about the disability status of the other individuals in the group or any clear evidence abut who struggled and who coped with the process. The claimant failed to provide evidence from which we could conclude that the PCP placed disabled people in the Transitions team at a particular disadvantage compared with people who were not disabled.

183. Even though that was our conclusion we considered it appropriate to proceed to the question of justification in any event. The aim of the file review in May and June 2015 was to get the Transition team files in good shape prior to the formal Trust audit. That was plainly a legitimate aim. The question was whether that aim could be achieved through a less discriminatory means. Miss Clark did not know what the Trust audit would involve, although she had some expectations about areas it was likely to consider. As it transpired her file review checklist was much more extensive than the relatively brief online audit process which the Trust subsequently implemented. The impact on the claimant was relatively minor: she felt under more stress at work although the standards being applied were those to which she was working in any event.

184. Had this been a live issue we would have found that the application of the PCP by Miss Clark was justified. In an ideal world the files would all have been perfectly maintained and up-to-date, and any deficiencies would have been identified in the supervision process week by week. Of course it is very rare for a workplace to operate in that fashion. The attempt by Miss Clark to catch up and get the files in good order in one go, allowing time to individuals to carry out the action points required following the file review, was a proportionate means of achieving this aim and there was no less discriminatory way by which the files could have been brought up-to-date at this time. The indirect discrimination complaint on this matter therefore failed.

Issue 4: Indirect discrimination – PIP – July 2016

185. This concerned the application of the PIP to the claimant from July 2016 upon her move to Stockport. We were satisfied that the respondent did apply a PCP in the form of the informal assistance section of its formal capability procedure. That was a PCP which could apply to any Trust employee, not simply the disabled person.

186. However, we concluded that the claimant had failed to provide any evidence in support of the contention that this PCP placed disabled people at a particular disadvantage. We had no information about the application of this PIP to anyone but the claimant. The claimant's own experience did not enable us to infer that there would be group disadvantage. The claimant accepted in cross examination that the PIP itself did not ask her to do anything which she would not have to do anyway. The disadvantage seemed to result from factors other than her disability. She was moving to a new team in a new location and having to get to grips with new ways of working. She was also not able to tell her new colleagues why she needed additional

supervision meetings as part of the PIP. Her concern, we concluded, was that this in some way undermined her professional standing in the eyes of her colleagues. Those were factors which were not related to her disability.

187. Had group disadvantage been shown, and had the claimant been put at that disadvantage herself, we would have found in any event that the application of the PIP was justified as a proportionate means of achieving a legitimate aim. There had been concerns about the claimant's work in 2015 resulting from the file review, and further more serious concerns had arisen while she was absent from January 2016. It was important for compliance with the required standards of file governance to be met if her return to work was to be a success. Normal supervision arrangements had not succeeded. There was no less discriminatory way of achieving this aim than by implementing the informal assistance part of the capability procedure. Accordingly this complaint of indirect discrimination failed.

Issues 5 and 6: Indirect discrimination – work based concerns

188. On its face the claimant was alleging that the respondent applied a PCP of conducting an investigation into work based concerns. We had no difficulty finding that such a PCP was applied by the respondent. However, there was no evidence at all before us as to whether such a PCP would put disabled people within the relevant pool (all of the respondent's employees) at a particular disadvantage. On that ground alone the claim would fail. In any event a PCP of investigating concerns when they arose would be a proportionate means of achieving a legitimate aim.

189. The schedule of complaints at page 103, however, put the matter in slightly more nuanced terms. It was clear from the detail that the claimant was not taking issue with the investigation of the concerns at all, but rather with the timing. Her point was that the matter should have been investigated when she first went off sick at the end of January 2016, rather than left (as far as she was aware) until some three months later, and that when investigated she should have been given specific files to address rather than have it raised with her in general terms with no details. Whatever the merits of those criticisms, there was no evidence that a PCP in those terms had been applied to anyone else. There was no evidence at all before us of the respondent having a practice of delaying pursuit of an investigation into work based concerns until such time as the employee was considered fit enough to be able to respond. Indeed, the capability policy at page 630 simply suggested that performance concerns should be addressed in a timely manner within an informal and supportive approach to improving performance. Accordingly on that ground alone the indirect discrimination complaint based upon a narrower PCP would have been unsuccessful.

190. For those reasons we concluded that the indirect discrimination complaints failed and were dismissed.

Issues 7 - 10: Reasonable adjustments – PIP – July 2016

191. For the reasons set out above we were satisfied that the respondent did have a PCP in the form of the informal assistance section of its capability policy, and that this was applied to the claimant in the form of the PIP.

192. We concluded, however, that the PCP did not put the claimant at a substantial disadvantage because of her disability compared to a person without depression and anxiety. For reasons summarised above we concluded that the factors making this PIP difficult for her were not related to her disability. They were because she was moving to a new team at the time and had to keep the PIP confidential. The same difficulties would have applied to a person who was not disabled.

193. Nevertheless we considered issue 8. If our finding had been that the claimant was at a substantial disadvantage because of her disability, had the respondent shown that it neither knew nor ought reasonably to have known that the claimant had a disability and was likely to be placed at that disadvantage?

194. In relation to disability we were satisfied that the respondent either knew or ought reasonably to have known that the claimant was a disabled person. The claimant had made that position clear in her grievance and in her first Tribunal complaint. The respondent knew from the claimant's records that she had a longstanding history of depression and anxiety and she had had two periods of work off (four months from December 2013 and six months from January 2016). A condition which is likely to recur is treated as continuing. The respondent was aware that the claimant had been on medication for an extended period and that it had been increased at various stages. The effect of medication is to be discounted in determining whether a mental impairment has a substantial adverse effect on day-to-day activities. We were satisfied that there was constructive knowledge of disability (if not actual knowledge) by the time of the imposition of the PIP in early July 2016.

195. More difficult was the question of knowledge of whether the claimant was likely to be at a substantial disadvantage because of her disability. We considered carefully what the claimant said about the PIP when it was being discussed, although that of course is not determinative of what the employer should reasonably have known. It was clear from the claimant's email of 28 June 2016 at pages 506-508 that her concerns were whether a PIP would be "unjustified, offensive and degrading". There was a reference in the same email to damage to her reputation and future career prospects. The matter was discussed at the meeting on 1 July and the discussion summarised in the letter of 4 July. At page 521 there was a record that the claimant asked a question about the effect of the PIP on her self esteem. There was also a note added by the claimant to that letter when she emailed it back to Mr Ruddy on 5 July (page 522) which said that:

> **"JB does not acquiesce to this humiliating capability procedure, as she has already stated in a previous email to Vicky Brown and Paul Ruddy, and therefore is compliant under protest for the sake of her mental health."**

196. Although that was a reference to her mental health, it was suggesting that undergoing the PIP was better for her mental health than the alternatives, presumably either not returning to work at all or facing formal capability procedures.

197. Overall we concluded that the respondent could not reasonably have been aware that as a disabled person the claimant was likely to be placed at a substantial disadvantage by the PIP compared with a person who was not disabled. It appears that the claimant herself did not foresee any such disadvantage, as her concerns related to self esteem, and whether it was humiliating or degrading.

198. The complaint of a breach of the duty to make reasonable adjustments failed. Issues 9 and 10 fell away.

Issues 11-13: Reasonable adjustments – investigating work based concerns

199. The schedule of complaints at page 106 suggested that the PCP was the investigation of work based concerns, but the real concern of the claimant appeared to be the delay in telling her about that investigation. She was not told until April 2016 when she had been off work for three months. In so far as her case was based on a PCP of delaying telling an employee about such an investigation, it had to fail. There was no evidence from which we could conclude that the respondent had a PCP of delaying informing employees because we had no evidence at all of how it handled other investigations about workplace concerns. We therefore proceeded on the basis that the PCP was one of investigating work based concerns when they arose. That clearly was a PCP applied by the respondent.

200. Did it put the claimant at a substantial disadvantage in comparison with a person who was not disabled because it had a detrimental impact on her mental health? We were satisfied that it did. The claimant reported as much at the time. In her email of 28 June 2016 to Ms Brown at pages 506 and 507 she said that her depression had been exacerbated by what she described as a campaign of frequent references to work based concerns without explanation or evidence, and she also said that her antidepressant medication had been increased following the meeting of 11 May. We were satisfied that this was not a minor or trivial disadvantage for the claimant and that it was a disadvantage which someone without her disability would not have faced.

201. The next question was whether the respondent could rely on the knowledge defence. That was a difficult issue because the position evolved over time. On the face of it the PCP of investigating work based concerns was first applied to the claimant in February 2016 when Ms Brown decided to look into the problems she saw on the files viewed when the claimant had gone on sick leave. There was another stage in the weeks that followed when a decision was taken not to raise these matters with the claimant because she was off sick. Once the grievance arrived it appeared that the claimant might potentially be well enough to discuss such matters, and the meetings on 11 May were structured so that the sickness review meeting took place first of all to enable Ms Brown to assess whether the claimant was well enough to deal with the work based concerns. As it transpired the claimant was not well enough to do so, and she made that point in the work based concerns part of the discussion as recorded as page 421. Ms Brown accepted that fully and the discussion did not proceed. There was then a further Occupational Health report in broadly positive terms on 24 May which held out the prospect of a return to work at a different location, and on 1 July Ms Brown again structured the meeting so that the sickness review preceded the work based concerns discussion. The letter of 4 July at page 519 recorded the claimant saying she was well enough to discuss the work based concerns. It was clear, therefore, that Ms Brown was conscious at all material times of a potential impact on the claimant's health of pursuing the work based concerns investigation by discussing matters with her face to face.

202. Even though that meant that the knowledge defence failed, however, we were satisfied that the adjustment for which the claimant contended was not a reasonable

one (issue 13). That adjustment was not to investigate the concerns but simply to comply with ordinary policies and protocols. That contention was based upon a misunderstanding of the legal framework. The adjustment would have to be implemented at the time that the PCP was to be applied. The claimant's case was based upon a retrospective assertion that had there been proper supervision in the months leading up to her going on sick leave there would not have been problems of this kind on her file. At the time when the concerns arose for Ms Brown, being the end of January or early February 2016, refraining from investigating them would not have been reasonable. They had to be tackled, as indeed the claimant accepted in cross examination. Accordingly this allegation of a breach of the duty to make reasonable adjustments failed and was dismissed. Issue 14 fell away.

Issue 15: Harassment – file review June 2015

203. This allegation concerned the file review required of the Transition team by Miss Clark in May and June 2015. We were satisfied that it was unwanted conduct as far as the claimant was concerned, in the sense that she did not want to have to undertake all the follow up work to get the files into order. It was already a busy time for her with the deadline for submission of her IAPT tapes. However, there was no basis on which we could conclude that the file review was related to disability. Miss Clark implemented it because she was aware that the formal Trust audit was pending and she wanted to ensure that the Transition team files were in good order prior to that formal audit. That had nothing to do with the claimant's disability and this complaint therefore failed.

Issue 16: Harassment – 17 July 2015

204. There were different accounts of what happened at the supervision meeting on 17 July 2015. The claimant gave her account in her grievance evidence statement on 2 May at page 388. There were two matters which particularly upset her. The first was what she described as a "tirade of criticism" about work matters. That took her by surprise because she had no idea of the content of the session or the number of things to be discussed. The second was the reference by Miss Clark to the email about her ability to supervise CBT work, which she had taken as a personal attack on her. The claimant felt that she was harassed by Miss Clark raising this repeatedly despite the claimant just apologising for it.

205. Miss Clark gave her account in the grievance interview on 2 June 2016 recorded at pages 451-461. On page 457 the note recorded her saying the claimant definitely did not cry in that session and from her perspective there was nothing untoward about it.

206. We found as a fact that the claimant was very upset by what was discussed in that session. Her colleague, Ms McElroy, noticed her in tears after it and it was that that resulted in the claimant speaking to Ms Brown. Ms Brown confirmed in her evidence that when she saw the claimant shortly after that meeting the claimant was upset and tearful. The notes of that discussion appeared at pages 240-241.

207. We were satisfied that there was unwanted conduct by Miss Clark towards the claimant in the sense the claimant did not want to be challenged over her work or to have the question of the emails raised again. However, we were satisfied that this

had nothing to do with the claimant's disability. Miss Clark raised the emails because she had genuinely been offended and upset by what she saw as a slight upon her professional competence which had been copied to her managers. It was this which drove her approach to the meeting. It had nothing to do with the claimant's disability. Accordingly the complaint of harassment related to disability failed.

Issue 17: Harassment – meeting 6 August 2015

208. The claimant was concerned with the lack of any clear agenda for this meeting and that she felt it was an opportunity for Miss Clark to vilify her once again. She described the meeting as "spiteful".

209. The reality, we concluded, was that the purpose of the meeting had been clear from her discussion with Vicky Brown on 22 July. The note at page 241 referred to there being a "three way meeting to clear [the] air". It was the claimant who wanted Ms Brown to attend with her.

210. In any event we were satisfied that there was no connection between the claimant's disability and the way in which this meeting was arranged and conducted. The issue was the damaged working relationship between the claimant and Miss Clark, resulting most recently from the misconstrued email about CBT supervision, and that had nothing to do with the claimant's disability. The complaint that this amounted to disability related harassment therefore failed.

Issue 18: Harassment – desk plan May 2016

211. This related to the circulation of a desk plan which did not have the claimant's name on it. The claimant was given an explanation at the time in an email of 9 June 2016 at pages 469-470, which was that an agency worker was at her desk while she was off and the manager (i.e. Miss Clark) did not want to cause her further distress. At the time the claimant responded to say that that made no sense and it would have been less distressing had her name been included.

212. In her oral evidence to our hearing Miss Clark elaborated upon this and explained that she knew that there had been a lot of new staff in the office since the claimant went on sick leave at the end of January 2016, and she was concerned that if the claimant's name appeared on the desk plan it was result in queries about who she was and why she was not in the office. She thought that such queries would be difficult to deal with and potentially lead to embarrassment for the claimant if she was being discussed whilst off sick. She therefore decided to leave the claimant's name off the plan. We accepted this evidence and found as a fact that this was the reason that Miss Clark did not include the claimant on the desk plan.

213. The first legal issue was whether that amounted to unwanted conduct. We were satisfied that it was unwanted as far as the claimant was concerned. Although there had been discussions about the possibility of a move to a different area, nothing had been sorted out. The claimant had been on sick leave for several months. To see a desk plan which on its face appeared to exclude her from the team was understandably a concern to her.

214. The next question was whether the omission of her name was related to her disability. We concluded that it was, in the sense that it arose because the claimant

was on long-term sick leave, and that in turn was a consequence of her disabling medical condition.

215. Did it have the purpose or effect of violating her dignity or creating the proscribed environment? We were satisfied that Miss Clark did not have any such purpose; indeed, her purpose was exactly the opposite because she wanted to prevent the claimant and her absence becoming a topic for office gossip.

216. In considering whether the conduct had the proscribed effect we took account of the matters set out in section 26(4). The perception of the claimant was relevant. As her email of 9 June 2016 at page 469 made clear, she was distressed and felt there had been a lack of empathy towards her. The other circumstances of the case, however, included that she had already expressed the view in the meeting on 11 May 2016 that she would not be able to return to Oldham CAMHS, and that the purpose of the desk plan was a practical one, namely to enable staff to know where to move on 13 July. That was information needed by the agency worker who would actually be occupying the desk on that date. We also took into account the fact that the claimant's absence from the plan would be noticed by those members of staff who had been working with her before she went on sick leave, which might lead them to think that she might not be coming back. Indeed, the concern that the news of her proposed move had been passed to Miss Clark formed the basis of the allegation of breach of confidentiality in relation to this matter, although the claimant accepted that Miss Clark had not known about the proposed move and withdrew this allegation during the hearing.

217. We also took into account whether it would be reasonable for the omission of the name from a desk plan attached to a group email for this purpose to have the effect in question. We would not consider such an effect to be reasonable. The plan was a minor administrative matter. At worst it could reasonably be seen as a bit insensitive on Miss Clark's part, although in truth she was being sensitive to how the claimant might feel if her name was included.

218. Overall, and having heard the claimant's evidence, the Tribunal was satisfied that the unwanted conduct did not violate her dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for her. Taking account of what was said in **Land Registry v Grant** we concluded that although the claimant's concern at it was understandable and well-founded, the conduct fell short of being serious enough to amount to harassment.

<u>Issue 20(b): Victimisation – investigation into work based concerns</u>

219. This allegation was that the investigation into work based concerns by Ms Brown amounted to victimisation because of the grievance. Logically this could not relate to the decision to investigate the concerns at all, because that predated the grievance. The focus of the claimant's case was her perception that once the grievance was lodged the attitude of Ms Brown towards her changed, and became less supportive, and that as part of this Ms Brown pursued the work based concerns more vigorously than she would otherwise have done.

220. From the claimant's perspective matters unfolded as follows. She lodged her grievance on 5 April 2016. She had not been told that there were any concerns

about her work in the minds of managers since she had gone on sick leave. On 20 April at page 352 Ms Brown emailed the claimant to invite her to a meeting to discuss sickness and some work based concerns. The claimant was told that she could be accompanied by a union representative or a colleague. No detail was given. The claimant's immediate response was to say that the date was not convenient, and Ms Brown responded to say that she would be in touch with a new date. The new date was supplied by email of 26 April 2016 at page 355. The relevant text appeared to have been pasted from the earlier email. The claimant responded on 27 April at page 355 by saying she was not entirely sure what the purpose of the meeting was (whether it was formal or informal) and saying she would prefer not to attend it until the grievance meeting on 4 May had taken place. She also asked for clarity as to the work based concerns and said she had lost confidence since the last meeting (9 March) when information became misconstrued and misrepresented by the time the minutes arrived.

221. The response from Ms Brown came on 28 April at page 358. She said that the meeting was a formal meeting and that there was a contractual obligation to attend it. No further information was provided despite the claimant's request. The claimant had not read this email and did not attend the meeting on 3 May. This resulted in the email from Ms Brown later that same day at page 412 in which Ms Brown said that failure to attend again would be a disciplinary offence. It was in response to that that the claimant sent her email of 5 May at page 412 in which she said that the last two emails had been intimidating and threatening. She said she was being treated in a harsh manner with no explanation or reason.

222. Subsequently there were two meetings on 11 May and Ms Brown readily accepted that the claimant was not well enough to discuss the work based concerns. They were eventually discussed at the meeting on 1 July when the claimant was willing to proceed.

223. There was some relationship between the timing of the grievance and the timing of the email raising work based concerns. Ms Brown formed the view that the length and detail of the grievance suggested that the claimant might be well enough to enable the work based concerns to be raised with her at a face to face meeting. We noted that she had taken advice from HR about this earlier on. It was also relevant that she wanted to have a sickness meeting before discussing work based concerns. With hindsight it might have been better had there been a sickness meeting in isolation and then a decision taken after the event about whether to raise the work based concerns at all. We were satisfied, however, that the work based concerns would have been raised with the claimant face to face at the appropriate time irrespective of whether she had lodged a grievance or not, and we did not conclude that Ms Brown was seeking to penalise the claimant or subject her to a detriment because of the grievance. The content of the grievance was a factor in her decision on timing but nothing more than that.

224. Further, in so far as the attitude of Ms Brown changed towards the claimant as matters developed, that seemed to be attributable to other factors. The email from the claimant at page 355 challenging what had gone on produced a response in formal terms from Ms Brown, and her email after the aborted meeting on 3 May referring to possible disciplinary action was prompted, we concluded, by her perception that the claimant had simply failed to turn up with no notification that

would be the case. It was not a detriment because of a protected act in the form of the grievance.

225. More broadly, Ms Brown did deal with the matter sensitively once she met the claimant on 11 May 2016, accepting fully that the claimant was not well enough to discuss such matters and that they could not be pursued. They were not pursued with the claimant until the time when the claimant was fit for work (1 July 2016). We therefore rejected the contention that the investigation into work based concerns constituted a detriment because of the protected act of lodging the grievance.

Issue 20(c): Victimisation – PIP

226. The same was true, we concluded, of the imposition of the PIP in July 2016. It flowed from the work based concerns and was the method of addressing those concerns once the claimant returned to work. There was no causal connection of any kind between the lodging of the claimant's grievance and the imposition of the PIP. The timing was determined by the fact that the move to Stockport had been arranged and therefore the claimant was able to come back to work. The PIP would have been imposed had the claimant not pursued a grievance since it was the appropriate way of addressing the performance concerns.

Issue 20(d): Victimisation – breaches of confidentiality

227. The allegation relating to the desk plan was withdrawn by the claimant, meaning there were two matters left for consideration.

228. The first matter related to using the wrong address on letters. This happened on three occasions. On the first occasion (11 May) the letter was actually sent by post to the claimant's old address. When this became apparent the respondent wrote again to that address and received a telephone call from the occupant saying the letter had been put in the bin. Nevertheless the claimant was understandably concerned that a letter of this kind had been sent to her old address, not least because it was not far from the address to which she had moved. The later letters which bore the wrong address were not actually sent out by post, only by email, although again one can understand the claimant's concern at this.

229. The key question for us was whether the fact the claimant had done a protected act by lodging her grievance played any part in the fact that these letters were wrongly addressed. On that point we accepted the evidence of Ms Brown that the error arose on the May letter because she was out of the office and rang a member of the administration team to get the correct address. Rather than engaging with the new computer system that member of staff checked a paper file and took the out of date address from it. That error resurfaced in the later letters because the address was pasted from the first version. This was a considerable embarrassment to the respondent, and Ms Brown had to compile an incident report about the breach of data protection on the first occasion. We found that this was an administrative error and there was no causal connection between the lodging of the grievance and the error, even though from the claimant's perspective the latter came after the former. This allegation of victimisation failed.

230. The second matter related to two occasions on which the claimant sent fit notes to Vicky Brown at Oldham which did not arrive. The claimant set this out in her annotations to the letter of 4 July 2016 at the foot of page 517 and raised it in an email to Vicky Brown on 5 July at page 531. The claimant herself noted that she had been told by Vicky Brown that she was moving on from Oldham although she would still be leading on the return to work plan.

231. It is a matter of conjecture as to what happened to those fit notes. It is possible that they never reached the respondent at Oldham but were lost in the mail; it is possible that they reached Oldham but were then sent on to Vicky Brown at her new workplace but did not arrive; or it is possible that they were deliberately misplaced by someone aiming to penalise the claimant for having lodged a grievance making allegations of disability discrimination. There was no evidence that it was the last of these possibilities as opposed to either of the other two, and therefore the claimant had failed to meet the burden of providing evidence from which the Tribunal could conclude that there was victimisation. The complaint therefore failed.

Issue 20(e): Victimisation – grievance procedure

232. As explained above, the claimant did not pursue flaws in the grievance procedure other than the delay and lack of prompt acknowledgement of the appeal. At the initial stage Ms Hodson dealt with matters within a reasonable timescale. The grievance was acknowledged on 20 April and the claimant provided a lengthy statement of evidence on 2 May. Ms Hodson interviewed her on 4 May. There were further interviews on 2 and 14 June, and Dr Ramkisson was interviewed on 27 June. The lengthy grievance outcome letter was issued on 29 July.

233. At the appeal stage, however, the position was unsatisfactory. The appeal letter from the claimant of 16 August was not even acknowledged by Mrs Parton, even though she read that email on 2 September (page 597). The claimant had no contact at all despite chasing up matters via Justine Heaton in October until the outcome letter was issued on 20 December (pages 620-625), reaching the claimant a day or so before Christmas. It was remiss of the respondent not to have acknowledged the appeal and the claimant should have been kept updated about progress and when a reply could have been expected.

234. However, the question for the Tribunal was not whether this was handled well or badly, but whether it was handled as it was because the grievance was a protected act. There was no evidence from which we could conclude that the disability discrimination elements of the grievance played any part in the reason it took so long. We were satisfied that the grievance took so long because Mrs Parton prioritised other aspects of her workload, and because she was out of the office on annual leave and training for significant periods during September and October 2016, and faced other pressing deadlines and commitments during November 2016. The length of time it took also reflected the fact that the claimant raised 62 different points in her appeal; Mrs Parton took the trouble to address each one in the appeal outcome letter.

235. Although the length of time and the lack of updates were a detriment, therefore, this was not in any sense because the claimant had done a protected act. The victimisation complaint failed.

Issue 22: Equality Act Time Limits

236. Having concluded for the reasons set out above that there was no treatment of the claimant which amounted to a breach of the Equality Act 2010, the Tribunal was satisfied that there was no conduct extending over a period giving the Tribunal jurisdiction over those matters which occurred prior to 27 December 2015.

Issue 23: Protected disclosure – grievance?

237. We turned to the protected disclosure detriment complaints contained in section G of the List of Issues. The first question was whether the grievance amounted to a protected disclosure. The respondent relied on the requirement that the claimant had a reasonable belief that her disclosure was made in the public interest. Ms Eeley submitted that the disclosure concerned the claimant alone and had no significance for any other member of the public. She relied on the decision of the EAT in **Chesterton Global v Nurmohamed**, and in particular on the statement in paragraph 36 that the effect of the amendments was to prevent a worker from relying upon a breach of her own contract of employment where the breach was of a personal nature and there were no wider public interest implications.

238. In submissions the claimant sought to address this point by saying that members of the public had an interest in the health and safety at work of their mental health practitioners because patient care might be affected if the practitioner was herself made ill by the way she was treated at work. That seemed to us to be a concern which was not evident from the grievance itself. The grievance was centred wholly on the way in which the claimant had been treated by her line manager. It did not suggest that any other members of the team were being treated in an inappropriate way. In our judgment the claimant could not reasonably have believed that the disclosure was made in the public interest. The breaches of health and safety and of legal obligations to which her concerns related were breaches of a personal nature with no wider public interest implications. It was not a protected disclosure.

Issue 24: Protected disclosure – ET1?

239. It followed that the same was true of the Employment Tribunal claim itself as this covered essentially the same ground. It was not necessary for us to resolve issue 25: whether disclosure to the Tribunal could fall within section 43G.

240. As neither disclosure was a protected disclosure the complaint under section 47B of the Employment Rights Act 1996 failed and was dismissed.

Issues 26 and 27: Detriments

241. We considered it appropriate to express briefly what our views on causation would have been had we found that the grievance and/or the Tribunal complaint were protected disclosures.

242. The claimant withdrew the allegation about the desk plan.

243. In relation to the failure to respond to her email of 25 June 2016 about reduction in pay, Ms Brown agreed that she did not respond to that email directly. However, she did not ignore it. She pursued the matter internally and arranged for the matter to be discussed at the meeting on 1 July. The pay position was swiftly corrected. The failure to email the claimant back was not influenced in any way by either of the alleged protected disclosures.

244. The letter of 27 June 2016 inviting the claimant to a meeting on 1 July to discuss a return to work and the work based concerns was not because of any alleged protected disclosure. Ms Brown had been working behind the scenes to get a different location sorted out. She explained in an email of 23 June 2016 at page 493 that she was also trying to get a different HR support because Ms Prasad was absent. The decision to pursue the work based concerns arose because the claimant was now fit to return to work. There was no causal connection with any protected disclosure.

245. The same was true, we concluded, of the meeting of 1 July 2016. The focus of Ms Brown was on getting the claimant back to work and on how the work based concerns would be managed. There was no link between any alleged protected disclosure and the conduct of this meeting.

246. The failure of Ms Brown to respond to the email of 5 July 2016 at page 531 about the missing fit note was attributable, we concluded, to the fact that Ms Brown did not think there was much she could say. She also regarded this as less significant than the claimant regarded it. There was no evidence from which we could have concluded that it was a consequence of any alleged protected disclosure.

247. The allegation (issue 26(b)) of flaws in the grievance procedure related primarily to delay and lack of contact at the appeal stage. We were satisfied that there was no link between the alleged protected disclosure in the grievance or the Tribunal claim and the length of time it took Mrs Parton to deal with matters. That was attributable solely to other pressures on her and her prioritisation of that workload. Although Mrs Parton was involved in responding to the Employment Tribunal proceedings on behalf of the respondent, we were satisfied that this played no part in her decision about how to handle the grievance. Accordingly even if the Employment Tribunal claim had been a protected disclosure this complaint would have failed on causation.

248. That left paragraph 26(c) of the List of Issues. Ms Brown's imposition of the PIP was due to the fact that the claimant was now returning to work, so the work based concerns needed to be addressed and managed. It had nothing to do with any alleged protected disclosure.

Issue 28: Early Conciliation

249. This issue was in one sense academic given that we had decided the complaints brought in the second claim form on their merits. However, we concluded that the claimant had met the requirement of undergoing early conciliation about the "matter" to which the proceedings in the second claim form related. Even though the

events about which she companied took place after the issue of the certificate by ACAS on 10 May 2016, **Compass Group UK v Morgan** shows that the issue is not necessarily a temporal one (see paragraph 21 of the EAT's judgment). The use of the word "matter" rather than "claim" or "cause of action" in section 18A is significant, as is the voluntary nature of early conciliation (as opposed to notification). The "matter" to which the second claim form related was the deteriorating working relationship in which the claimant saw herself as being subjected to disability discrimination and victimisation. It was based on further instances of that treatment, and therefore related to a matter about which the claimant had already provided information to ACAS as prescribed.

Conclusion

250. For the reasons set out above all the complaints brought by the claimant in these proceedings failed and were dismissed.

Employment Judge Franey

20 June 2017