THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
(1) Mr D Hedgecock **(2) Mr E Clark** **(3) Ms C Sinclair**	**AND**	**City of Sunderland College**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at: **North Shields** **On:** **8 May 2017 (reading day)**
9, 10, 11, 12, 15, 16, 17, 18 May 2017

Deliberations: **19 May 2017**

Before: **Employment Judge Hargrove** **Members:** **Mr J Adams**
Ms D Winter

Appearances

For the Claimant: **Mr T Wilkinson of Counsel**
For the Respondent: **Mr S Sweeney of Counsel**

JUDGMENT

The unanimous judgment of the Employment Tribunal is as follows:-

1 The claims against the second respondent Nigel Harrett are dismissed upon withdrawal.

2 The reason or principal reason for the claimants' dismissal was a reason related to a redundancy. The claims of unfair dismissal and of automatically unfair dismissal for making public interest disclosures are not well founded.

3 The claimant Mr Clarke was at all material times a disabled person under section 6 of the Equality Act. His claim of a failure to make a reasonable adjustment to

permit him to be legally represented at the grievance appeal hearing on 31 October 2016 is well-founded. He is entitled to an award for injury to feelings only in relation to that claim which has been agreed between the parties at £1000. All other claims of direct discrimination and of a failure to make reasonable adjustments are dismissed as not well-founded.

4 The claimant Ms Sinclair's claim of being subjected to a detriment by an act of the respondent for a reason related to her being a part time worker is well-founded. If the discrimination had not occurred we find that there was a 40% chance that she would have successfully applied for and remained in employment in a capacity as a Business Executive on .6 of an FTE, having been slotted in. She is entitled to an award for injury to feelings and an award for loss of earnings. The parties must report within 14 days whether a remedies hearing is required and its length.

REASONS

1 In this judgment the claimants are referred to by their initials as **DH**, **EC** and **CS**. By an ET1 dated 22 November 2016, the three claimants, all former Employee Relations Managers (ERMs) for the respondent, claimed that they had been unfairly dismissed. The dismissals all occurred at the end of a general redundancy round in the college in 2016, in the case of the claimant **DH**, by letter of 21 June (page 703) and in the case of **CS**, by letter of 27 June (page 708), with effect from 30 June 2016, and in the case of the claimant **EC**, on 31 August 2016. In addition they claimed that the reason put forward by the respondent for their dismissal, namely redundancy, was not the true reason and, in particular, that the true reason was that they had collectively made disclosures of wrongdoing which were protected, under sections 43B and 103A of the Employment Rights Act. There were also ancillary claims of being subjected to detriments for making public interest disclosures (PIDs). Even if the disclosures were not qualifying or protected as PIDs, the claimants asserted that the matters that were raised were the real reasons for their selections for redundancy and that redundancy was a sham. Finally in that respect it was asserted in any event that the dismissals were unfair whatever the reason.

Separately **EC** also claimed that he was disabled in respect of the impairment of depression; and that he had been subjected to detriments constituting direct discrimination on grounds of his disability contrary to sections 13 and 39(2)(b) (not including dismissal); and of failures to make reasonable adjustments contrary to section 20 of the Equality Act.

CS also claimed that she had been subjected to les favourable treatment (in particular by Jane Thompson) for reasons related to her part time status as an ERM, contrary to regulations 5(1)(a) and/or (b) of the Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000.

2 The respondent asserts that the claimants were all fairly dismissed for redundancy. It denies that the claimants made any public interest disclosures, or that, if they did, they had nothing to do with the dismissals. It also disputes that EC was disabled; its knowledge of it; and that it was guilty of any act of

discrimination or failure to make reasonable adjustments. It is common ground that the claimant was a part time worker at the material time, but any less favourable treatment for that reason is denied.

3 The material statutory provisions

3.1 Unfair dismissal

Redundancy is one of the admissible grounds for dismissal under **section 98** of the **Employment Rights Act**. Redundancy is more particularly defined in **section 139** of the Act which materially provides:-

> "(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to …
>
> (b) the fact that the requirements of that business –
>
> (i) for employees to carry out work of a particular kind … have ceased or diminished or are expected to cease or diminish."

If the respondent proves that the reason or principal reason for dismissal was redundancy, the Tribunal then has to decide whether the dismissal for that reason was fir applying **section 98(4)** of the Act:-

> "Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

3.2 Public interest disclosure

Section 43A of the Act defines a protected disclosure as meaning:-

> "A qualifying disclosure as defined by section 43B which is made by a worker in accordance with any of sections 43C to 43H."

A qualifying disclosure as defined in **section 43B(1)** means:-

> "Any disclosure of information which in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following …
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;
>
> (c) that a miscarriage of justice has occurred, is occurring or is likely to recur …".

A qualifying disclosure is protected under section 43C, materially to this case, if it is made to his employer.

Section 47B provides:-

> (1A) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer on the ground that the worker has made a protected disclosure.
>
> (1B) A worker (W) has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done –
>
> (a) by any worker of W's employer in the course of that other worker's employment …
>
> (1C) Where A is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

Meaning of detriment: In this and the other provisions below where that word is used, the Tribunal applies the definition laid down by Lord Nicholls in **Shamoon v Chief Constable of RUC [2003] IRLR 285 HL**:

> "In order for a disadvantage to qualify as a detriment, it must arise in the employment field in that the court or tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work".

Section 48(1A) provides that a worker or employee may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of **section 47B**. **Section 47B(1A)** makes the employer liable for detriments by another worker in the course of employment with the employer.

Section 48(2) provides that when a complaint under section 47(1A) "It is for the employer to show that the ground on which the act or failure to act was done". This is the reversal of the burden of proof provision similar to

that in section 136 of the Equality Act, which applies to the discrimination claims in this case.

In relation to dismissal, **section 103A** of the Act provides that:-

> "An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or if more than one the principle reason) for the dismissal is that the employee made a protected disclosure".

3.3 **Disability discrimination**

Section 6 of the **Equality Act** provides that a person has a disability if that person has a physical or mental impairment and the impairment has a substantial and long term adverse effect on that person's ability to carry out normal day to day activities.

Further provisions about disability are also contained in **paragraphs 2 and 5** in **Schedule 1 to the Act**. **Paragraph 2** provides that:-

> "The effect of an impairment is long term if –
>
> (a) it has lasted for at least 12 months,
>
> (b) it is likely to last for at least 12 months, or
>
> (c) it is likely to last for the rest of the life of the person affected".

Paragraph 5 provides materially as follows:-

> "(1) An impairment is to be treated as having a substantial adverse effect on the ability of the person concerned to carry out normal day to day activities if –
>
> (a) measures are being taken to treat or correct it, and
>
> (b) but for that it would be likely to have that effect".

Direct discrimination

Section 13 of the Act defines direct discrimination as follows:-

> "(1) A person A discriminates against another B if, because of a protected characteristic, A treats B less favourably than A treats or would treat others".

Section 39 of the Act materially provides:-

"(2) An employer (A) must not discriminate against an employee of A's (B):

(c) by dismissing B;

(d) by subjecting B to any other detriment".

Duty to make adjustments

Section 20(1) provides:-

"(1) Where this Act imposes a duty to make reasonable adjustments upon a person, this section, sections 21 and 22 in the applicable schedule apply; for those purposes a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements.

(3) The first requirement is a requirement, where the 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".

Section 21(1) provides that:-

"A failure to comply with the first requirement is a failure to comply with a duty to make reasonable adjustments".

Regulation 8, paragraph 20 of that Act, headed Lack of knowledge of disability, materially provides as follows:-

"(1) A is not subject to a duty to make reasonable adjustments if A does not know, and could not reasonably be expected to know –

…

(b) that an interested disabled person ;has a disability and is likely to be placed at the disadvantage referred to in the first … requirement".

3.4 **Part Time Workers (Prevention of Less Favourable Treatment) Regulations 2000**

It is not in dispute that CS was a part time employee of the respondent at all material times.

Regulation 5(1) provides that:-

"(1) A part time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full time worker –

(a) as regards the terms of his contract; or

(b) by being subjected to any other detriment by any act or deliberate failure to act of his employer.

(2) The right conferred by paragraph (1) applies only if –

(a) the treatment is on the ground that the worker is a part time worker; and

(b) the treatment is not justified on objective grounds".

The respondent has not sought to rely in this case upon any justification defence that the Business Executive post could not be done other than on a full time basis.

4 **List of issues**

4.1 Did the claimants prove that they or any of them made any disclosure which was:

(a) qualifying; and

(b) protected?

4.2 Were the claimants or any of them subjected to a detriment by the respondent by any act or failure to act, by a worker of the respondent in the course of his/her employment? If the claimants show that they were subjected to a detriment, the burden shifts to the respondent to prove that the detriment had nothing to do with the making of any public interest disclosure.

Dismissal

4.3 Have the claimants proved on the balance of probabilities that the reason or principal reason for dismissal was the making of a public interest disclosure? Alternatively –

4.4 Have the claimants put in issue with proper evidence a basis for the conclusion that the selection of the claimants for dismissal for redundancy was for a reason or reasons other than redundancy?

4.5 Had the respondent proved on the balance of probabilities that the reason or principal reason for dismissal was redundancy and not for that other reason or reasons?

4.6 Were the dismissals for that reason fair or unfair?

Disability

4.7 Has the claimant CS proved that he was disabled at the material time?

4.8 Was the claimant subjected to a detriment because of his disability?

4.9 Did the respondent apply to the claimant a PCP which put him at a substantial disadvantage because of his disability?

4.10 Did the respondent know or should it reasonably have been expected to know that CS was disabled and that he was likely to be placed at a disadvantage by the application of the PCP?

4.11 Was there a failure to make any reasonable adjustments?

5 The Tribunal will identify the disputes of fact relevant to the resolution of these issues in the next following chronology based upon the evidence given to the Tribunal by the following witnesses:-

For the respondent

5.1 Nigel Harrett (NH) – formerly Vice Principal, now Deputy Principal, of the College.

5.2 Iain Nixon (IN) – Executive Director, Commercial Activity for the College.

IN is alleged to have produced the business case for the inclusion of the ERMs within the pool for selection for redundancy.

5.3 Alison Fellows (AF) – a Governor of the College since 7 July 2015 who sat on the grievance appeal, initially raised by the claimants on 15 June 2016, as a member of the panel which met on 31 October 2016.

5.4 Helen Willan (HW) – HR Manager at the College.

5.5 Helen McCoy (HM) – HR Director of the College.

5.6 Jane Thompson (JT) – Director of Apprenticeships and Curriculum Development and EC's direct Line Manager from September 2014 until October 2015.

5.7 Ellen Thinnesen (ET) – College Principal and Chief Executive from 1 January 2016 who had initiated the 2016 restructure, and had investigated the claimants' collective grievance of 15 June 2016 and did not provide the outcome, not upholding the grievance until 26 September 2016.

For the claimants

The claimants also gave evidence in the order in which they appear as claimants. It is to be noted that they did not rely upon a witness statement provided to the Tribunal by a Mr Watson in respect of events between October 2004 and July 2011 when he had been employed by the College.

6 **The claimants' work history leading up to their common employment as ERMs**

6.1 There is a useful summary of the positions held by **DH** at page 119; for **EC** at page 118 and 763A; and for **CS** at page 120.

6.2 There were restructures of the respondent in 2013 and 2016 which affected all three claimants in different ways. In addition, separately from the restructures, there were other changes affecting their jobs. On 1 April 2014 **NH** signed a service agreement on behalf of the College with Reed NCFE. This event is particularly relevant to a number of aspects of the claimants' unfair dismissal claims. The first is that they allege that the contract outsourced part of the roles of the existing ERMs; and thus contributed to the process which led in March 2016 to the decision to make their roles redundant. Secondly, they allege as part of their PID claims that the process which led to the appointment of Reed NCFE constituted a breach of the EC and national Regulations governing the procurement of contracts, and thirdly that the payments due from the respondent to Reed, particularly in relation to the payment of a success fee for each College brokered apprentice placed (which they claimed was £450 – it was in fact £350) again contributed to the need to make costs savings in the Business Development Team in 2016. They also claim that the three but later four Reed employees who came to work at the College were in effect doing part of their jobs. At the request of the Tribunal organisation charts were provided during the hearing which illustrated the various changes in structure and line management in particular affecting the claimants.

6.3 From May 2006 **DH** was an Area Leader Business Solutions. In July 2011 **DH** was an Area Leader for Maths and English Solutions in Adult and Community Education under the line management of JT. (**CS** was shown as an Area Leader in a separate sector). In the same structure chart NH is shown as Vice Principal for Curriculum and Student Support.

6.4 A structure chart dating from September 2013, prior to a restructure which occurred from October 2013 onwards, shows **DH** and **CS** as Area Leaders together with Peter Robertson under the line management of Heather Harrop. A major part of their responsibility was for apprentices. Higher up the management chain was Mr D Hall as Director of Employer Provision. Julie Raine was shown as Assistant Principal in the Vocational Curriculum and, above that, NH as Vice Principal. At the time **EC** was Catering Manager in Facilities Management but he is not shown on that organisation chart.

6.5 At the end of October 2013 there was a restructure meeting affecting the whole of the Maths and English Solutions Department. There was a proposal to abolish the role of Area Leader and to replace it with a new Employer Relationship Manager (ERM) role for which the Area Leader role had been ring fenced. Some two days before the consultation process was due to end on 29 November 2013 there was a proposal from management that the salary be reduced by some £6,000 with a promise of performance related pay discussions with the unions.

6.6 On 6 December 2013 **DH** raised a grievance in writing with Julie Raine, the Assistant Principal, concerning the consultation process. The grievance is to be found at pages 305-312. In summary **DH** raised the following areas of concern:-

(a) the right to representation for those who were not members of trade unions during the consultation process;

(b) the conduct of Dave Hall during the consultation process and in particular concerns that Dave Hall had formed part of the panel which would select Area Leaders for the new ERM post;

(c) inadequate consultation;

(d) the process and criteria used to select his job role to be included within the redundancy process;

(e) the proposed reduction of his salary from an Area Leader salary of some £33,000 to £27,000;

(f) a proposal that the job description and person specification for the new ERM post would require a degree or equivalent qualification as one of the essential criteria.

Also on 6 December 2013 **DH** went off sick.

6.7 NH was appointed to deal with the grievance. He produced an investigation report in 2014 which is to be found at pages 327-348. He found that the main points of concern raised were unfounded. There are two particular issues from the list which remained of contention during the Tribunal hearing. The first related to the proposed salary reduction and the second the imposition of the requirement of a degree or similar qualification as an essential qualification for the new ERM post for which the Area Leaders were to apply. These are dealt with in summary form at pages 346-347 at the end of NH's report. During the Tribunal hearing it was suggested in cross-examination that NH had some influence over the claimants' selection for redundancy in 2016.

6.8 Whilst still absent **DH** submitted a grievance appeal which was heard by the then Principal Ann Isherwood on 9 June 2014. **DH**'s appeal was submitted via Helen McCoy, the Director of HR, on 3 February 2014 and

was lengthy – see pages 359A-V. The claimant put in a written request for further information and was not satisfied with the response. The appeal hearing was held on 9 June 2014. It was chaired by the Principal and attended by Helen McCoy, NH and HW. Notes of the meeting are at pages 410- 418. The outcome letter, effectively rejecting the grievances, is dated 20 June 2014 and is to be found at pages 421-425.

6.9 By this time, **DH** had been offered one of the ERM posts and had returned to work on 2 June 2014. By this stage the respondent had in effect abandoned its attempts to persuade the union to agree to the implementation of performance related pay and an agreement had been reached with the unions that the salary for the new ERM role should be comparable to that of the previous Area Leader roles. The particular areas of contention had been that the proposed salary reduction had only been raised by the respondent at a very late stage in the negotiations and consultation; and the imposition of the degree requirement. The salary issue appeared to have been resolved. The proposal for the imposition of the degree qualification remained, but it appears that it was subsequently recognised that **DH** had an equivalent qualification and was not required to undertake a degree course**. DH** asserts that the addition of himself and EC to the existing ERM roles was designed to place them in a holding area until the next restructure. In evidence JT denied that she had been overstaffed at that time.

6.10 There are two structure charts, one of which shows the post 1.1.14 senior management team structure and another headed "Employer Facing Hub Structure Chart". The term "employer facing" illustrates the importance of the apprenticeship provision to the respondent. The SMT structure shows Ann Isherwood as the Principal, NH still as Vice Principal and under that an Executive Director role for Commercial Activity and Employer Facing Provision – Apprenticeships/Traineeship as vacant. It was however filled by IN who was appointed from April 2014. The Employer Facing Hub Structure Chart shows IN's post as Executive Director at the top with Jane Thompson reporting to him as Director of Enterprise and Commercial Development. Under her, there are identified five ERM posts, then identified as being occupied by **CS** on 0.5 of an FTE, and Peter Robinson, Christine Murphy, Mary Allen and Paul Stafford, the latter being a Job Brokerage and Recruitment Manager. It is to be noted that **DH** was not included within that structure chart because he was on sick leave on 1 January 2014. Accordingly, it is necessary to look at the next structure chart dated October 2014 at the start of the 2014/15 academic year which includes **DH** as ERM; and **EC** as Work Placement Manager.

6.11 **EC** became Area Leader for Hospitality, Catering, Retail and Cleaning from May 2005 until October 2009 when he was appointed General Manager for Catering within the College's Directorate for Facilities Management, under Karen Wade. He claims that NH was critical of his performance via Karen Wade and that the October 2013 restructure of facilities management was designed to get rid of his role. He further claims that his depression began at or about this time. He says that he

first approached his GP in late 2013 – the GP records confirm that it was 5 December 2013 – and was then placed on antidepressants. In his disability impact statement at paragraph 7 (but not in his witness statement) EC claims that he was approached by Karen Wade in January 2014 enquiring about his health. He says that he said that he was not coping. She contacted HW, HR Manager, who confirmed in her evidence that she had offered him counselling directly rather than via occupational health. She proposed that he signed up for six sessions to be paid for by the College. She says that she explained that it would remain confidential, but that he should contact Karen Wade to notify if he wished to proceed. On 7 January 2014 he e-mailed HW and Karen Wade to say that he had been given an appointment for the next Tuesday. HW acknowledged it – see page 350A. There was also alleged to have been a further conversation towards the end of the sessions about whether or not his Line Manager should be informed. There is a separate structure chart for facilities management which shows his role land that of two Site Service Managers which were also scheduled for deletion. In fact during the redundancy process he had secured the role of Work Placement Co-ordinator, which role he started in February 2014 with full and then 50% pay protection until 30 June 2015. See page 763A.

6.12 The role of Work Placement Co-ordinator was within the Foundation Learning Department for students with a range of learning difficulties. His job description can be found at pages 442-444 of the bundle. This was an employee facing role. He was under the line management of Jane Thompson. He claims that sometime after the Easter break in 2014 he was informed by Phil Storey, the Health and Safety Manager of the College, that his name had come up in relation to work placements during a discussion and that NH was furious that he was working in foundation learning. JT was also alleged to have been present at the meeting and had been told to take him into her team. It was later the same day when JT telephoned **EC** and told him that he was now working for her and that the work placement role was across college.

6.13 He claims that his workload increased significantly from September 2014 and this forms part of one of his specific claims of disability discrimination with which we will deal specifically later in these reasons. He further claims that JT put a proposal that the claimant's job should be upgraded into an ERM role which was originally rejected.

6.14 In November 2014 an advertisement appeared externally for the role of Facilities Manager with a requirement for previous experience in catering management. This document is at page 434 of the bundle. In response to that advertisement **EC** raised a grievance which he handed to IN and which was acknowledged by HN by e-mail on 11 November 2014 – see page 430. In essence his complaint was that a role which was the same or very similar to his own previous role had been advertised without notice to him. During the grievance letter he raised the issue that during the time of the 2013/14 restructure and proposal for his redundancy he was having personal problems as well as the worry over work and that he was "in a

very low place and was still on antidepressants". He had earlier been interviewed for the post of Maintenance and Catering Manager but had been unsuccessful. He also in his grievance raised issues about his treatment during his time as a Facilities Manager. JT is alleged to have read and discussed the grievance with **EC**, and thus to have acquired knowledge of his disability.

IN is also to have read the grievance before passing it to the then Principal Ann Isherwood. He had in the meantime confirmed to Helen McCoy that he would not be interested in applying for the new externally advertised Facilities Management post – see e-mail of 14 November, page 445.

6.15 On 1 January 2015 JT submitted a proposal to the staffing panel for the re-grading of **EC**'s post as an ERM role. The staffing panel included NR, IN and HN. That application was granted. There is a useful summary of this claimant's posts and the salary levels including pay protection leading up to his appointment as an Employee Relationship Manager as from 1 January 2015 at page 763A.

6.16 The final position prior to the 2016 restructure is set out in a further organisation chart which shows IN as Executive Director of Commercial Activity, JT as Director of Apprenticeships and Commercial Development, and underneath her, Peter Robertson previously ERM has become Lead ERM and the cohort of ERMs now consists of **DH**, **EC** following his re-grade, Christine Murphy, Mary Allen, Paul Stafford and **CS**. By this stage **CS** had established a pattern of part time working. Back in September 2013 she had put in an application to JT to reduce her working hours from 5 days to 4 days (.8 FTE). At that time she was working .2 FTE as an Area Leader in Employer Provision working alongside **DH**. The remaining .8 was a role in administration that she wished to reduce to .6 of an FTE. She and her partner at the time had opened a business together as a restaurant. This claimant also had family responsibilities as an only child for her elderly mother who was in ill health. There was also an elderly uncle with severe mental health problems. That application was granted with help with her application from JT – see pages 208A-208M. In the 2013 restructure her position became similar to that of **DH** which we have described above. In the course of that restructure **SC** was appointed initially to an ERM role at .5 of an FTE. She was working full days, Wednesday, Thursday and Friday morning. She then agreed also to work Friday afternoons taking her role up to .6 of an FTE. This final position is established in a new contract issued to her on 11 March 2015 – pages 474-485 – in which her normal working week was established as being for 22.2 hours.

6.17 The final position of the ERMs immediately prior to the March 2016 restructure was thus:-

DH – 1 FTE; (in post from 02/06/14)
EC – 1 FTE; (in post from 01/01/15)
CS - .6 of an FTE; (in post from 01/01/14)

Mary Allen - .6 of an FTE;
Paul Stafford – 1 FTE;
Christine Murphy – 1 FTE.

This totalled 5.2 FTEs for ERMs.

6.18 **Events leading up to March 2016 restructure**

ET was due to commence as the new Principal as from January 2016. Initially the claimants' case appeared to be that NH had played a pivotal role in the process which led to the ERMs role being put at risk. In particular, in the ET1 the claimants asserted that NH was responsible for the process which led to the Reed service agreement; and had signed the contract (which was true). He was originally joined as second respondent and the whistle-blowing claim against him was only withdrawn at the outset of this hearing. The respondent's witness statements did not make it clear who and in what circumstances the claimants' jobs came to be placed in the at risk category in the much larger restructure. The respondent's case became clearer in particular when we heard the evidence of IN, HM and ET. ET produced some additional documents to the Tribunal which were then attached to her witness statement. She had had meetings with individuals in the senior management team prior to the commencement of her appointment, on 27 November 2015. This included IN. There is a note which she wrote in November 2015 which indicates that she was reviewing the structure and finances of the College. She told us she was concerned about the quality of performance in the Apprenticeships Division and the College's willingness to deal with the then proposed Government reforms of apprenticeships, which included the introduction of a levy on large employers which was due to come into effect in April 2017. She expressed a concern about the College's lack of strategic marketing. In an e-mail to NH dated 3 December she proposed an agenda list for SMT meetings. In her witness statement she said that some six weeks prior to starting her appointment she had set about the analysis of the respondent's financial health and identified a need to secure £4.5 million worth of cost savings before the end of July 2016. She said that she was aware that in March 2016 the College was to undergo Government scrutiny on two key points; financial sustainability and curriculum alignment to skills priorities in the North East; and that the College needed to be reviewed in readiness for that visit. We have no reason to doubt her evidence on this aspect of the case and it has not been materially challenged.

6.19 Although IN does not state this in his witness statement, we accept that he was tasked by her to review the Business Development Team which included the ERMs. Other senior managers were tasked to report on different sectors. It is unclear, and there is no documentary evidence of it, when this request was made. It must have been some time between 1 January and 9 February 2016 because on that date there was a Board of Governors meeting at 6:00pm – see pages 535B-C – attended also by IN. In it the following appears:-

> "The Principal advised that the senior leadership team is forensically viewing all activity to identify the optimum way in which the reduction can be mitigated (that is the expected £4 million funding reduction for 2016/17) whilst minimising staff losses, however it was envisaged that £1 million would need to be removed from non pay and the remaining £3 million from pay costs".

Sometime earlier in that day ET had a meeting with IN and NH. IN did not produce a completed business plan at the meeting – the completed business plan is an undated document to be found at pages 584-588. ET told us that there was a discussion of the ERM roles. IN had proposed that whatever the roles were to be the salaries should remain the same. That is salary points 30 to 34. We accept that she paused the meeting, left the room and spoke to a colleague experienced in the sector, a Ms Cathy Hough (at Doncaster College); she said that her staff were struggling to understand other models for business development. In the course of this conversation she wrote down information about salary levels at other colleges for Business Development Officers. The document which was produced to the Tribunal at the outset of the hearing (but was not shown in this format to the meeting on 9 February 2016) at page 588A catalogued the pay range at seven other colleges. The lowest in the range was £16,000 and the highest at £26,000. She then returned to the meeting and then "mandated" a salary for the role at £26,000. She was adamant that it should not exceed £30,000. She had not at that stage seen any job descriptions for the ERM post, and no job descriptions or person specification had been prepared for any new posts.

6.20 **The commencement of the consultation process**

On 22 March 2016 ET issued by e-mail a bulletin to staff, "Fit for the future – Staffing review and College Restructure (pages 572-574). This amounts to 45 day consultation period on the proposals for a review of staffing and structures against a background of reduced College income from funding reductions, increasing costs and a decline in student numbers. The bulletin described savings of approximately £1.4 million in non pay costs and a target of £3.8 million to be cut from the pay costs. ET expected that all of the staff affected by the proposals would by this time have been contacted by the HR Department for a briefing on the proposals, the process of consultation, how and where to ask questions and what support was to be available. The bulletin included an invitation to two briefing sessions held later that day led by NH and David Howells, Vice Principal Finance and Resources, and contact e-mail addresses for questions.

Also on 22 March, the briefing sessions included the use of a power point presentation agreed by the Senior Leadership Team (pages 557-571). This included:-

- The rationale for review;

- Financial background and outline plan;
- The scope of the consultation;
- Proposals for the new structures (under the heading "Senior Leadership Team, Curriculum and Quality, Student and Customer Experience, Personal Development, Business Development, Curriculum Delivery Areas and Support Departments);
- Consultation period.

The proposals for business development had the headings:-

- Apprenticeships;
- Business and executive managers;
- Recruitment and training co-ordinator;
- International.

These headings related to two separate business cases, one for international work and one for apprenticeships (including the Business Executive Managers and Recruitment and Training Co-ordinator). The job descriptions and person specifications for Business Executive Managers and Recruitment and Training Co-ordinator had been developed by IN. The title BE Manager (later BE) was chosen by ET to reflect a change she claimed in the focus of the work. HM had chosen to ring fence these posts for ERMs.

The documents circulated to the trade unions included:-

(a) the HR1 at pages 536-537 (which identified 42 possible redundancies inter alia);

(b) a letter to accompany the HR1 addressed to the trade unions (UCU and Unison) with an initial impact assessment at pages 543-544 and, as Schedule 1, the list of proposed redundancies with the numbers in the pool from Assistant Principal downwards, and the new posts with potential redeployment opportunities.

There was a separate heading which set out the proposed method of selection, in almost all cases by recruitment and selection. In particular, in business development (page 549) six ERM posts on pay points 30-35 representing 5.2 FTEs (see above) were identified with new posts or potential redeployment posts identified as being 3 BEs on salary point 26 and one Recruitment and Training Co-ordinator on point 15.

6.21 The job description and person specification for the position of ERM can be found at pages 194-199.

The job description and person specification for the position of BE can be found at pages 199A-F. A significant issue raised during the hearing was the extent which if at all these two job descriptions described different jobs or the same jobs.

6.22 There are a significant number of similarities in the roles with wording being slightly changed in both the job descriptions and the person specification. IN and JT gave evidence as to what they considered to be the main difference between the ERM and BE roles. IN outlines what he believes the differences are in paragraphs 30-34 of his witness statement, in general terms the ERM role being focused on selling free "products" to employers, most notably apprenticeships. The relationship with employers being narrow in focus with the offer of delivery of specific products, whilst dealing with employers of all sizes across a wide range of industries, the relationship with the employer being transactional in nature with no targets financial or otherwise being set.

By comparison the BE role needed to generate new business from a narrow range of industry sectors and targeting large employers and working with the employers with the greatest potential for growth in revenue for the College. The relationship between the BE and the employer was to be more strategic and holistic in nature with targets set at individual levels for income generation and the financial value of the prospective business.

The respondent placed emphasis on the retraining requirements for the role. When slotted into the role of BE from ERM, with effect from 1 August 2016, Christine Murphy (CM) did not receive any additional training prior to taking up the post. After her appointment to the BE role there had been two days training from an external provider covering a range of topics. At paragraph 34 of his statement IN states the training included:-

> "Undertaking organisational and training needs analysis, securing sales and contracting, and key account management to support the new approach. I have also received training in the use of social media to support networking and generation of new needs".

In her evidence JT acknowledged that the ERMs were trained on labour market intelligence (EMSI database) and that they had used this as a tool to help analyse the market for their particular sector to see where the opportunities were. JT also acknowledged that, although working closely with the ERMs, she had not been consulted by IN about the BE job descriptions or person specification before he produced them.

In giving their evidence **DH, EC** and **CS** also said that they had the knowledge, skills and understanding required to undertake the BE roles. The fact that CM was "slotted into" the BE role and successfully completed a trial period without significant training being required was an indication of the similarity of the roles.

6.23 It is to be noted that the restructure affected 125 Managers and staff. The total number of new posts or changes to posts was 83, and the total number of staff potentially at risk of redundancy was 42. Thus the claimant's six ERM posts formed a relatively small part of the number of jobs at risk.

6.24 **Consultation**

There were a series of consultation meetings, both collective and individual, in the course of which or during which process the claimants raised issues which they rely upon as being public interest disclosures, four in number although there is a fifth communication which has also been referred to. The Tribunal will identify the specific communications within the chronology of the consultation. The first collective consultation meeting took place on **14 April 2016**. It was attended by all of the ERMs and IN, HM and D Howells. In the course of this meeting **DH** read a collective statement which is to be found at pages 551-553. A copy of the statement was not however handed to management, at least at that stage. The statement was endorsed with the names of all of the ERMs on the bottom. It contains a highly critical analysis of the process whereby the Reed NCFE contract had been negotiated, and the costs involved. The statement contained a reference to it having been described as a "monumental cock-up". Evidence given to the Tribunal by the claimants is to the effect that at a meeting in September 2015 that expression had been used by Peter Robertson, then an ERM, to describe the process in particular whereby the success fee was to be paid. The document contains the following statement:-

> "The general feeling amongst us sitting here was that senior management within the College are guilty of incompetence and have made a serious mistake that by the end of the contract will cost the College potentially hundreds of thousands of pounds in unearned commission payments to Reed … The business case and associated redundancies put forward is a total sham, given the £29 million investment in the city centre vocational campus …".

The statement linked these facts as being "a major contributory fact why half of us in this room will be out of work very soon and those that remain will face a 24% reduction in their salary". This document is said to be the first disclosure of information constituting a PID. The respondent's notes of that meeting, which refer to the statement, are at page 593. In addition there is a note that **EC** stated that a Reed Manager had told him that by next year Reed would be doing his job. HM is recorded as stating that this was a proposal and was not set in stone and that she would be talking to senior management.

6.25 The **Second** disclosure said to be protected was in the form of a freedom of information request dated **18 April 2016** (page 605). This document was signed by **DH** and noted at the bottom that all of the ERMs were a party to the request. In the middle paragraph he stated:-

> "I understand that all of the College's goods/services contracts in excess of £50,000 must be subject to procurement and open for tender and any contracts in excess of £172,514 are advertised in the official journal of the European Union. As the Reed NCFE

contract would have exceeded both these thresholds could you please supply me with the following documents/information".

There is then set out 12 separate requests for information including the Official Journal of the EC contract notice, tender specification, a list of any organisations invited to tender, a list of the organisations that completed and submitted a tender, the names of the persons appointed by the College to evaluate the tenders and any conflict of interest declarations made. Number 6 requested a declaration made to the panel that a Mr Downes, Executive Director of Reed NCFE, had previous links with the College as he had previously been Managing Director of Blue Square Trading and what was done to ensure Reed NCFE did not gain a competitive advantageous by association?

6.26 The **third** disclosure said to be protected is by letter to Sue Pollard, Administration Manager dated **25 of April** at page 617. The letter again was endorsed by all of the ERMs. It asked for additional information about the Reed NCFE contract including the invitation to tender, a list of all publications where the invitation to tender was advertised, and a request as to who undertook due diligence on the contract.

6.27 A **second** consultation meeting took place on **26 April 2016** attended by the ERMs and IN on behalf of management. The notes of that meeting are at page 618. **DH** again raised the issue of the Reed NCFE contract as a "bone of contention", which was the subject of the FOI requests; and the grievance contained in the statement read at the **first** consultation meeting. It was envisaged that the staff would put forward a counter proposal to the proposed redundancies affecting ERMs, subject to the provision of further information.

6.28 A further more lengthy consultation meeting took place on **4 May 2016** attended by EC, DH and two other ERMs; IN and HM on behalf of management. The notes are at pages 627-635. There were further requests for financial information in particular by **EC**, concerning the income and expenditure associated with apprentices. **DH** asked questions about the Reed NCFE contract with particular reference to success payments. **EC** also queried the proposals for a salary of £26,000 for the new BE role. IN mentioned a range of salary comparisons of between £20,000 and £33,000. No specific counter proposals were put at that meeting.

6.29 Also on **4 May 2016 DH** raised four questions concerning the Reed NCFE contract with Sue Pollard as an FOI request citing the "Public Contract Regulations 2015". The questions were:-

"(1) When it became evident that the new contract terms were necessary did the college follow the guidance within the Public Contract Regulations 2015 and insist on a new procurement/re-tender procedure? (This was a reference to the renegotiation of the contract, which was due to expire in

2017, in 2015 and 2016 whereby the success payments were reduced and finally deleted).

(2) Who within the college was made aware that the college had entered into a contract that as Helen McCoy states 'became apparent that the financial model in regards to success payments was not sustainable'. Was Ann Isherwood, the Principal in post at the time of the contract renegotiation aware of this problem and were governors made aware of the situation?

(3) A list of all publication (print and electronic) where the amended invitation to tender was advertised?

(4) Who undertook due diligence on the amended Reed NCFE contract? IN provided some information on income and expenditure of apprenticeship and staff costs on 9 May, but declined to provide any financial information on the Reed NCFE contract on the grounds of commercial confidentiality".

6.30 A **fourth** collective consultation meeting took place on **12 May 2016** attended by the three claimants and Christine Murphy; and by IN and HM on behalf of management. The notes are at pages 638-643. It was at this meeting that the ERMs (principally via **DH**) put forward two counter proposals: it is to be recalled that the respondent's proposal (set out at page 549) had been that the six ERMs on salary points 30-35 should be replaced by three BEs on point 26 and one Recruitment and Training Coordinator on point 15. **DH'**s first counter proposal was that there should be 3.6 FTE BEs and one FTE Recruitment Coordinator. It is to be noted that that proposal would have meant the retention of the three claimants and Christine Murphy, **SC** making up the .6 FTE. (Subsequently Mary Allen took voluntary redundancy; and the sixth ERM Paul Stafford was at that time seconded to a post in Health and Education). This proposal was based on the proposition that their salaries should remain the same. The second counter proposal was that all of the staff in the business team including IN, JT and Peter Robinson (to be appointed Lead RN) should take a percentage pay reduction.

In response, HM stated that the proposals would be considered.

6.31 The **fifth and final** collective consultation meeting took place on **20 May 2016** with the same attendees (notes at pages 652-655). IN rejected the claimants' proposals for 3.6 BEs:-

"The additional .6 resource cannot be justified therefore it remains at 3 FTE posts along with the one Business Development Manager all having client facing portfolio work to be focused as follows; 1 Health and Care; 1 Advanced Manufacturing and Engineering; 1 Digital and Professional; 1 Public Sector. IN clarified that this did

> not mean that they would not be looking at other sectors but that other sector responses would depend on the nature of the enquiry".

Some further discussion continued. The respondent thus confirmed its original proposal of three BEs and a Training Coordinator led by a BDM. However, IN had secured ET's agreement that the top of the pay scales for the job should be at £29,721 rather than £26,000 for the BEs. The claimants' salary was in addition to be the subject of pay protection to **31 March 2017**. The second counter proposal of an across the business development team pay reduction was also rejected. IN responded that it would not be just one area but would have had to be the whole College. HM responded that it was not something the College had considered in the past. That concluded the collective consultation process, which formally expired on **22 May**.

6.32 On **27 May 2016** the respondent wrote to the ERMs including the three claimants enclosing a pro forma application form for the BE roles identified for the 3.6 at risk staff. It is material to state that the letter includes the following:-

> "The college will continue to consider job share, part time working or requests to reduce hours in order to absorb the reduction as an alternative to this process".

On **2 June 2016** Susan Pollard responded shortly to **DH**'s FOI request of **4 May**. The answers were:-

> "(1) The Reed NCFE contract commenced in April 2014 and was subsequently modified in accordance with the terms of the contracts. The Public Contract Regulations 2015 apply to new procurement exercises commenced on or after 25 February 2015.
>
> (2) The senior leadership team which included Ann Isherwood reviewed the financial model.
>
> (3) As stated above the contract was not re-tendered. There is therefore no list of publications.
>
> (4) The contract was renegotiated by the executive director commercial activity and the deputy principal in consultation with the SLT and they undertook judicial diligence as part of this role".

6.33 On **16 June 2016** the three claimants and Christine Murphy submitted a formal grievance signed by each of them. The document (pages 680-683) raised a whole series of questions and concerns in particular about the Reed NCFE contract and the circumstances and process of its inception and implementation. It asked for a "thorough investigation of the facts and figures". This is the **fourth** disclosure relied upon as a PID.

ET was appointed as investigating officer and conducted investigation meetings, on **29 June 2016** with **DH** (page 733); **EC** (page 739), and **CS** (page 746).

6.34 From **20 June 2016** individual consultation meetings took place with the claimants; attended by IN and HM. None of the claimants had applied for the BE job. In the case of **EC** he said he was not sure what to do. In the case of **DH** he said he did not wish to apply for the post "due to salary reduction". In these circumstances DH's employment was set to end on **13 June**.

CS's meeting took place on **23 June** (see page 705). There is an important dispute about the availability of part time working in the BE role. **CS** says that at a prior meeting with JT, the date of which she cannot identify, JT had told her that the BE job would not be suitable for part time working because of the necessity of maintaining relationships with important clients five days a week. JT denies this. **CS** says that she mentioned this conversation during a meeting on **23 June** with IN and HM, but that is not recorded in the note. **CS** accepts however that the note is correct in that HM told **CS** that she could apply for the post and request that it be on a part time basis. **CS** is however reported as saying that would be not worth working on a part time basis on the new salary; and that she could not work full time because of external commitments.

6.35 Termination letters were sent out on **27 June** in **CS**'s case, which she returned signed on **1 July**. The employments of **CS** and **DH** ended on **30 June** and they each received a redundancy payment and pay in lieu of notice. **EC**'s meetings took place on **20 June** and **1 July**. He too did not apply for the BE post or any other posts. He agreed to work until **31 August 2016**.

6.36 ET did not produce a response to the grievance raised by the claimants on **16 June** until **26 September**. On **14 July** and **21 August** however letters were written to **DH** on behalf of ET stating that there was a delay in responding to the grievance "due to staff holidays and diary commitments". The claimants claim that the delay was deliberate and was an act of detriment for the making of PIDs. It is a matter of record that ET had interviewed the claimants on **29 June**; and eleven others – some on the senior management team – in the period **30 June** to **21 July** and re-interviewed two of them, JT and David Howells, on **24 and 31 August**.

6.37 ET's outcome letter of **26 September** rejected all the ten points specifically identified in the claimants' original grievance in some detail (see pages 767-776). It is appropriate to summarise some of the responses to questions:-

> "(1) Why was a VEAT application used instead of an open tender as outlined in the college publication How to do Business Guide, and also against all published LSC/SFA

recommendations, if this had been done this would have given the opportunity to other interested parties competitively to tender for this contract.

Findings

Nigel Harrett, Deputy Principal has explained that prior to the procurement of Reed NCFE there had been liaison with several other colleges in addition to the Association of Colleges. Alongside the college's market research, it was understood that Reed NCFE had a unique position within the marketplace in relation to their proposed services. Within the legal requirements of the Public Contract Regulations 2006, Pam Veitch (Director of Procurement and Governance) advised NH (Deputy Principal) that –

(i) the nature of the Reed NCFE service education (the educational services) could be categorised as a part B service. This means that there is no requirement for a contract notice to be published in the official journal of the EU and only very limited rules and regulations concerning for example technical specifications and contract award notice information would apply if the contract was tendered;

(ii) whilst Reed NCFE had a proven track record and was recognised as a unique provider in the marketplace, it was important to test this view;

(iii) in the interests of openness and transparency a voluntary ex anti transparency (VEAT) notice, declaring the college's intention to enter into a contract with Reed NCFE would provide assurance.

I can confirm that the VEAT notice was published in the OJ of the EU on 15 March 2014. The notice made clear that the college would enter into a contract with Reed NCFE after a deadline of 10 full calendar days. There were no expressions of interest or enquiries from other providers received by the college in respect of the VEAT notice.

The college is of the view that it has been fully compliant particularly to procurement law. Any view that the college has failed to follow its legal duties is disputed.

Decision taken: not upheld.

We refer to the answer to that question in full as an illustration. There were equally comprehensive replies to the other questions for example –

"(2) Why was Reed NCFE contracted to deliver learning employability opportunities when this could have been delivered by the existing pre employment team at a fraction of the costs incurred?

(3) From reading the contract that was signed by college management who actually wrote the contract and it appears to be written to Reed NCFE's advantage and as the college was the contracting party why was the contract stacked against college interests.".

In her response to that question ET explained in summary that NH and Pam Veitch, Director of Procurement and Governance had examined a draft contract template initially sent to the College by Reed NCFE – not an unusual practice within the College and/or generally in the procurement by colleges of contracts of this type; that a report had been presented to the governing body meeting held on **23 March** attended also by an external adviser; that subsequently the approval of the contract on the terms proposed was given by the governing body; that following receipt the initial draft contract went through numerous changes and that it was signed by NH on **31 March 2014** having been vetted by Pam Veitch and agreed by the governors.

(4) You note from the colleges "How to do business guide" that the director of procurement and governance is responsible for advising on all procurement matters and provides guidance and arranges contracts on behalf of the college. This being the case, what involvement has the director had in checking the due diligence of the contract and how did the term and payment trigger college brokered apprenticeships get through the checking process when it has such a detrimental impact upon the costs to the department?."

In the view of the Tribunal a very full answer was given to that question.

"(5) Once we were advised of the mistake that had been made in the contracting stage with Reed NCFE and that Reed NCFE were being paid £450 plus VAT for any involvement with any apprenticeship, not just apprenticeships that Reed NCFE had directly recruited, we immediately offered to take back the recruitment and selection process within our team to limit the costs to the college. Previously within a team meeting we were told that we were too costly to be involved with the recruitment and selection of candidates, how can this possibly be the case when we are paying Reed NCFE £450 plus VAT per candidate? And why was this offer refused?"

In summary ET's very full answer to that question was that the contract referred to two types of apprenticeship; college brokered and Reed NCFE brokered. The College had received written documentation from Reed not permitting the College to release their pricing model for commercial reasons. However the figure of £450 plus VAT was inaccurate, different success payments were made for Reed brokered and college brokered apprenticeships. The success payments had been reduced in the college's favour in 2015 and removed entirely in 2016. ET rejected that Peter Robertson had said that there was a monumental cock up in the Reed contract. She had spoken to Peter Robertson who did not recall using the phrase. He had also interviewed other managers. Peter Robertson has not been called to give evidence before the Tribunal. We accept that it is at least a possibility that he did make a remark of this kind but in the light of ET's further findings we do not accept that it was an apt description. ET concluded her question by stating "I have found no evidence to support a view that there could have been a value in moving the recruitment and selection process into the role of the ERMs and certainly no evidence of any financial reason".

There is a **second** claim of PID detriment made by the claimants in the Tribunal proceedings in respect of ET's response letter that she had failed to address many of the claimant's concerns in the grievance outcome. However DH has withdrawn his claim in that respect although EC and CS continued to pursue it. We have given a full description of her response to one of the questions and a summary of her responses to other questions. In our view, and having heard yet more detailed explanations of the circumstances of the negotiation of the NCFE contract going back to 2011 in particular from NH, and relating to a period before ET was ever involved with the College, this lead us to the conclusion, insofar as it is relevant, that there was nothing wrong with the way in which the College handled the negotiation and implementation of the contract. To suggest that ET deliberately failed to answer questions because the claimant's had made a PID is wholly devoid of merit. That finding does not mean however that <u>at the time that the claimants raised the grievance</u> they did not have a reasonable belief that the contents showed or tended to show a breach of a legal obligation.

6.38 The claimant's **third** claim of PID detriment relates to the appeal process:-

The claimants notified their appeal against the grievance rejection on **5 October 2016** (page 797) and **10 October 2016** claiming that there were issues which required further investigation; that the claimants remained dissatisfied that the processes surrounding the implementation of the Reed NCFE contract had been fully transparent and open; questioning whether management had been fully aware of the commission payments which had allegedly had a significant effect upon the department and the redundancy process. The claimants assert that at the commencement of the appeal hearing on **31 October** the claimants were told by the chairman that "The appeal would be considering any new evidence of facts, but was not to hear what had already been raised as part of the

grievance" – see opening note at pages 824-834. The respondent called one of the governors on the appeal panel, AF, to give evidence about the appeal process. The respondent contends that notwithstanding the chairman's opening statement to the panel, they did allow the claimants to raise old points and considered them in some detail. The appeal outcome was notified by letter of **4 November 2016** – see page 835. The panel did not uphold the appeal and did make some recommendations. They concluded that the Principal had carried out a full and thorough investigation of the facts in circumstances relating to the grievance; that the College had followed due process and procedure in awarding the contract; there was no financial irregularity in the awarding of the contract and that the governors of the College were satisfied at the time the contract was entered into that it was in the best interests of the College and would further its objectives. The letter noted that whilst the committee had decided not to uphold the appeal it had listened very carefully to the issues raised by the claimants on **31 August** and believed that there were lessons to be learned by the College for the future. The panel recommended to the College and the SMT that a pro forma due diligence was established to provide a framework for a consistent approach to investigating potential partners in the future; that the College look more closely at the tools and data available to assess whether or not the arrangements with partners offered value for money; and that conversations between senior managers and staff within the College should be held in a professional and objective manner.

The detriment alleged by the claimants is that the panel, as a result of the opening observation of the chair, Mr Lawson, had refused to consider what had already been raised as part of the grievance but only any new evidence or facts. We have accepted AF's evidence that in fact that was not the process whereby the appeal hearing was in the event undertaken; that there was a full consideration of all of the points that the claimants wished to make during the process; that there is no factual basis whatsoever for the conclusion that the treatment of their appeal amounted to a detriment; and that in any event there is also no basis whatsoever for the contention that the way in which they treated the grievance had anything to do with the fact that it was, or was not, a public interest disclosure.

6.39 In addition to dealing with the issues so far identified in this chronology, the Tribunal needs to mention the other issues which arise in **EC**'s discreet discrimination claims; and **CS**'s claim of being treated less favourably than an equivalent full time worker.

EC claims:-

(1) That he was subjected to unreasonable performance targets from September 2014 onwards and that included the requirement to place foundation learning students whose needs were particularly demanding. The allegation was directed to JT.

(2) That the manner in which the Facilities Manager's post was advertised in **November 2014** without speaking to him first amounted to a detriment.

These were asserted to be acts of detriment constituting direct discrimination. These claims were alternatively labelled as a failure to make reasonable adjustments. A further separate claim was made of a failure to make a reasonable adjustment to allow EC legal representation of the grievance appeal.

In the case of **CS**, she claimed that she had been subjected to a detriment as a part time worker by JT in the remark said to have been made that the new BE job would not be suitable for part time working.

7 Conclusions

7.1 Having considered the parties' written closing legal submissions which we do not repeat here as they are a matter of record, and with which we do not disagree in any material particular, we can state our conclusions quite shortly. As to the unfair dismissal claims, we do not accept that the claimants or ERMs generally were singled out for selection or selected for redundancy either by reason of having raised any public interest disclosure or for any other improper or inappropriate reason. Having considered collectively the various documents put forward by the claimants which are said to set out their protected disclosures we have accepted that there was a disclosure of information which in the reasonable belief of the claimants tended to show at the time that they were made, that there was a tendering process for the Reed contract which had not complied with the EC tendering requirements or the relevant Public Contract Regulations dating from 2006. That there was such a belief and a reasonable belief we accept at the time it was originally made in the period up to **16 June 2016** grievance. It is a fact, as we found that as ET's investigation reasonable concluded, and as the evidence before the Tribunal particularly from NH demonstrated, that there was in fact no breach of any legal obligation; and any belief which the claimants had, ceased to be reasonably held after ET's conclusion letter. ET was independent in her investigation in the sense that she had had nothing whatsoever to do with the original Reed contract, not having any connection with the College in 2014. Notwithstanding that, it is noteworthy that the claimants throughout this litigation have persisted in attempting to prove that there was in fact a breach of a legal obligation or at least some form of financial impropriety viz the claimants' suggestion that a previous Principal or a relation of the Principal might have had a financial interest in Reed winning the contract. The claimants' e-mail requests as late as **April 2017** to which there was a response on **4 May 2017** demonstrate a continuing search for a non existent smoking gun. The claimants had however achieved protection as whistle-blowers by and from **16 June 2016.** Although we do not accept that DH's frequent FOI applications which would have been a nuisance and taken up management time were of themselves PIDs, they are to be taken into account with the grievance

itself. There is also a requirement upon a whistle-blower to demonstrate that they are raising matters in the public interest or the whistle-blower's belief therein. Although belief in the public interest has not featured in the evidence of the claimants, it has not been challenged by the respondent and we are satisfied that whilst it was used by the claimants to support their challenge to their selection for redundancy, the nature of the issues raised and the fact that it was said to have effected the College's finances generally and all six of the ERMs, was sufficient to satisfy the public interest test. The finding that there was a public interest disclosure does nothing to prove that it was in any way connected with the reason for the dismissal even if the one chronologically followed the other. Despite the determined and detailed challenges by Mr Wilkinson on behalf of the claimants to the respondent's witnesses, we do not believe that the fact that the claimants had made a public interest disclosure played any part whatsoever in the decision to make them redundant. It is noteworthy that when the case began in the Tribunal the principal culprit in the matters leading to the claimants' dismissal was said to be NH, who had dealt with the claimant **DH**'s grievance that he had raised as long ago as **December 2013** and whom **EC** accused of being unduly critical of his performance in his previous capacity as General Manager for Catering in a different department also back in 2013. As the evidence before the Tribunal unfolded however it became apparent that NH had little if anything to do with the process of selection of the posts to be at risk in the 2016 reorganisation. There were many other posts put at risk than those of the ERMs. The prime motivator for the restructure was, it was clearly demonstrated, ET prior to and upon her arrival in the College in **January 2016**. The person principally responsible for making the decision to include the ERMs at risk in the at risk category was IN and it was ET who had identified for herself that the ERMs' pay was at a higher level than roughly equivalent posts in other colleges. It is hardly consistent with the claimants' assertion of a sham process designed to get rid of the claimants that the claimants should then be offered the opportunity to apply for the ringfenced replacement jobs of BEs. Nor do we accept, even if it were not established that the claimants had made public interest disclosures that there was any perception that the claimants collectively or individually had become a nuisance whereby providing an improper motive for dismissing them. The lengthy chronology of events set out in the reasons above, in paragraph 6, which had to include a description of **DH**'s grievance back in 2013 and other treatment of **EC** back in 2013 has occupied the attention of the Tribunal, unnecessarily as it has turned out, because we are satisfied so as to be sure that the respondent has established that there were genuine business reasons for the reduction in the requirements of the College for the number of ERMs and genuine business reasons for their jobs to be recast in terms of the priorities for the future. Albeit that it was not particularly thorough, for these reasons we find that the reason or principal reason for dismissal in the case of each of the claimants was redundancy.

We are also satisfied that there was ample and sufficient consultation both on a collective basis and individually with the claimants. The respondent

was entitled to reject the counter proposals put forward by the claimants. The Employment Tribunal is not entitled to question the genuine business reasons for making redundancies provided that they are the genuine reasons. The respondent made genuine offers of alternative employment to the claimants of the vacant BE roles albeit that there would have needed to be a selection process, and moved to the extent of increasing the salary by nearly 15% from the original proposed £26,000 to £29,700. There was also the offer of pay protection until the end of **March 2017**. The fact is that the claimants elected not to apply for the jobs for reasons of their own, although it is to be noted that Christine Murphy elected to accept. Although we have accepted that the two jobs had substantial similarities there were we accept some differences and in particular a difference in focus. For these reasons we find that the decision to dismiss to have been a fair one.

7.2 Although we have found the claimants did make a public interest disclosure we do not accept that they were subjected to any detriment (including the dismissal) because they had made the PID. The **first** detriment, which we have not yet dealt with was the delay in notifying the outcome of the grievance. The rules for the investigation of grievances provided a time limit for the outcome but it was hopelessly unrealistic to expect ET to comply with that time limit having regard to the extent of the questions asked by the claimants in the grievance and the extent of the investigation which she had to undertake and at that particular time of year. Furthermore, ET kept the claimants informed of the delay and the reasons for it. Even if it could be said that the delay amounted to a detriment, which the Employment Tribunal does not accept, the claimants fail on the causation issue. The reason for the delay was clearly not deliberate inaction on ET's part and had nothing to do with the claimants' making of the PID itself. We have already made findings rejecting the other two PID detriment claims; namely a failure by ET to address their concerns and a sham appeal which did not give the claimants an opportunity to raise what they wanted. The essence of the claimants' case is a complaint that the respondent did not agree with any of the grievance points raised by the claimants. That was because there was nothing in them worthy of merit.

7.3 We now state our conclusions on **EC's** disability claims. We are satisfied on the contents of the claimant **EC**'s disability impact statement dated **2 February 2017**, at pages 892-896 of the bundle, and from the claimant's evidence to the Tribunal that the claimant has satisfied the test of disability since early 2014 in respect of a continuing condition of depression. We have accepted that the adverse effects of the depression included loss of confidence, loss of social ability and poor short term memory affecting his ability to shop. The adverse effects however did not include his ability to perform most normal day to day activities at work. We have taken into account that the claimant has been in receipt of treatment with antidepressant medication since **December 2013** and also initially at least underwent counselling. We conclude that, applying the deduced effect principle, the claimant's condition and the adverse effects of it would have

been worse had he not been on medication. We take into account that doctors do not generally prescribe medication if it does not have any effect, particularly for long periods of time. The evidence that the respondent knew that he was disabled is very limited as is the evidence that they were aware that the condition was likely to cause him disadvantage at work., at least during the period up to late 2016 with which we will deal below. The principal factual findings in this respect are set out at paragraph 6.11 above. However the claimant never took any time off for depression and does not appear to have approached management to indicate that he had any particular difficulties at work as a result of depression. He was never referred to occupational health and we do not consider that the respondent can be faulted for not referring him to occupational health, having arranged for him to receive counselling in 2013/2014, which was concluded. There was a conversation at the end of it about whether or not he should inform his line manager but he does not appear to have taken that step. Nor do we include on the balance of probabilities that the respondent ought to have known those facts and to have been aware to his managers since that he was disabled and placed at a disadvantage at work as a result. Even on the assumption that they did know or ought to have known at that time or later, the claimant's first two allegations of direct discrimination are in our view not made out by him even in such a way as to reverse the burden of proof. The essence of the claimant's case is that he was given a greater workload and in particular that targets were set for his workload, which included foundation learning students. However the evidence is that no specific targets were set and he was given the same workload as anyone else or at least there is no evidence that he was given more. His second claim that he was placed at a disadvantage because of his disability because the respondent advertised the facilities management post without notifying him in advance is wholly unconvincing and he was unable to explain in his evidence the relationship between the advertisement of the facilities management post and his disability.

We reach a different conclusion however about his third claim of a failure to make reasonable adjustments. On **25 October 2016** an e-mail was sent by **DH** ostensibly on EC's behalf to the respondent six days before the appeal to the governors in respect of the grievance raised on **16 June**. It reads:-

> "I am working with Ed and Caroline today on the appeal to governors and Ed has asked me to e-mail this on his behalf.
>
> In line with the appeals procedure under the sections headed Legal Representation and I quote
>
> > "Where a member of staff has a particular disability which puts them at a substantial disadvantage in relation to the proceedings permitting a lawyer to present his/her case would be a reasonable adjustment to be considered".

> As the college is aware I suffer from depression and anxiety for which I was seen by the college's occupational health adviser in Gosforth. I am still on prescribed medication for these conditions. I therefore formally request that I am permitted legal representation at the appeal hearing as per the above college policy extract. I would be grateful if you could give this your urgent consideration so that I can make the necessary arrangements".

The email had EC's name at the bottom. There was a request for a response to be sent directly to EC's hotmail address. HM responded on the same day – see page 813:-

> "I am writing to let you know that although we have considered your request for legal representation at the upcoming appeal hearing carefully, this request is refused. Your appeal does not fall within the main category of situations where we would permit legal representation ie the allegations raised do not involve very serious misconduct on your part which could lead to your eg being prevented from working with children.
>
> We have also considered the issue of your ill health. The college takes the view that it would not be a reasonable adjustment to allow you to bring a legal representative in this situation. It is not clear from your e-mail what serious disadvantage in relation to the proceedings you think you would face without legal representation but our view is that it is reasonable to expect you to rely on either the support of your colleagues with whom you have jointly submitted your appeal or on being represented by a work colleague or trade union representative which opportunity has been offered to you and which you have declined.
>
> We shall of course take all reasonable steps to ensure that on the day any specific requests for eg additional time to get your points across or adjournments eg to collect your thoughts can be accommodated".

It was submitted by the respondent during the Tribunal hearing that this application was in effect a ploy by all of the claimants to seek to obtain legal representation at the hearing, and was not a genuine application by the claimant for assistance in presenting his own case. We accepted **EC**'s evidence that it was a genuine application by him; that he had a legal representative in mind; and that he had agreed to pay for the attendance himself. We accept that the stress of appearing at what the claimant would have considered to have been an important appeal hearing on a point of principle which was complex would have put him at some disadvantage although we also accept that that was not apparent from the way he was able to present his case at the hearing. The claimant did not raise during the hearing that he was under any particular difficulty. In conclusion we consider that there was a practice applied by the College of the same kind as is applied by many employers not to allow

representation at disciplinary or grievance hearings. It is to the respondent's credit that they do have a written policy which allows legal representation in the exceptional circumstances set out in the policy. They did not however apply the adjustment in this case and we find that it amounts to a failure to make a reasonable adjustment although we consider that it would only attract a modest award of compensation, which has now been agreed between the parties.

7.4 That leaves the claim by **CS** for being subjected to a detriment as a part time worker. In essence that depends on the dispute of fact as to whether or not she was told during the redundancy process by JT that the new post would not be suited to part time hours. The respondent relies upon the contents of the minutes of the meeting on **23 June 2016** where there is no doubt that the claimant was told by HM that she could apply for the post and request that it be on a part time basis. The respondent denies the claimant's claim that she said at that stage that she had been told that she could not apply. The claimant's account of the conversation prior to that date however is supported by an e-mail she sent to Anna Hoyland on **16 June**, which is at page 683A of the bundle:-

> "I was also advised that the positions would not necessarily be suited to part time hours. I am not in a position to be able to work full time at present".

On the balance of probabilities such a remark was made and we accept that it materially affected her decision whether or not to apply for one of the vacant posts and it was a detriment for the purposes of regulation 5 of the 2000 Regulations. We have to consider what flowed from that remark. The respondent's case was quite simply that it would have had, if made, no effect because she was told on **23 June** that she could apply for the post and request that it be on a part time basis but did not do so. In addition the claimant stated it was not worth her while working part time on the new salary. The question we have to ask ourselves is what are the chances that the claimant might have applied notwithstanding if the remark had not been made? We accept that it **did** influence her decision not to apply; and if it had not been said, we assess that there was a 40% chance that she would otherwise have applied for the post, for which she would have been successful, and which she would have taken up.

EMPLOYMENT JUDGE HARGROVE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
16 June 2017
JUDGMENT SENT TO THE PARTIES ON

26 June 2017

AND ENTERED IN THE REGISTER

P Trewick

FOR THE TRIBUNAL