Appeal No. UKEAT/0048/13/BA

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON, EC4Y 8AE

At the Tribunal
On 20 & 21 August 2013
Judgment handed down on 29 January 2014

Before

HIS HONOUR JUDGE DAVID RICHARDSON

MR A HARRIS

MRS M V McARTHUR FCIPD

NORTHUMBERLAND TYNE & WEAR NHS FOUNDATION TRUST APPELLANT

DR A GEOGHEGAN RESPONDENT

Transcript of Proceedings

JUDGMENT

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APPEARANCES

For the Appellant	MR ADRIAN LYNCH (One of Her Majesty's Counsel) & MR RICHARD STUBBS (of Counsel) Instructed by: Ward Hadaway Solicitors Sandgate House 102 Quayside Newcastle upon Tyne NE1 3DX
For the Respondent	MS NAOMI ELLENBOGEN (One of Her Majesty's Counsel) & MS ELEENA MISRA (of Counsel) Instructed by: The Associate Law Firm Cobalt Business Exchange Cobalt Park Way Newcastle upon Tyne NE28 9NZ

SUMMARY

DISABILITY DISCRIMINATION – Reasonable adjustments – Sufficiency of reasons

VICTIMISATION DISCRIMINATION – Protected disclosure – Detriment – Sufficiency of reasons

Appeal allowed because (1) the Tribunal's reasoning on the question of the Respondent's actual and constructive knowledge of disability was flawed and insufficient; (2) the Tribunal did not give proper and sufficient reasons in respect of its findings that there were breaches of the duty to make reasonable adjustments; (3) the Tribunal did not apply **Tarbuck v Sainsbury's Supermarkets** [2006] IRLR 664; (4) the Tribunal did not give proper and sufficient reasons in respect of its findings that the Claimant was subjected to detriment on the grounds of making protected disclosures; (5) certain findings made by the Tribunal were perverse, and these findings materially influenced the Tribunal's assessment of the Respondent's witnesses.

HIS HONOUR JUDGE DAVID RICHARDSON

1. Dr Antoinette Geoghegan ("the Claimant") was employed by the Northumberland Tyne & Wear NHS Foundation Trust ("the Respondent") as a consultant child and adolescent psychiatrist and child psychotherapist in the Northumberland Child and Adolescent Mental Health Service (CAMHS). She was and is herself a disabled person by reason of depression and attention deficit hyperactivity disorder ("ADHD"). She alleged that the Respondent subjected her to detriment for making public interest disclosures ("whistleblowing") and failed in its duty to her to make reasonable adjustments consequent upon her disabilities. The Employment Tribunal sitting in Newcastle (Employment Judge Johnson presiding) upheld these claims in a judgment dated 4 October 2012. The Respondent appeals against this judgment.

2. The Tribunal heard the Claimant's case over some 9 days in September 2011 and a further 4 days in April 2012, the long break being necessitated by the illness of a witness. It reserved judgment until 4 October 2012. The written reasons run to some 55 pages and contain a detailed review of what occurred between the Claimant and the Trust between 2007 and 2010.

3. We heard the Respondent's appeal on 20 and 21 August 2013. There was, in addition to the appeal itself, a substantial application for permission to amend the Notice of Appeal which for the most part we refused. This is our reserved judgment.

The Tribunal's strong language

4. It is convenient to mention at the outset one feature of the written reasons which was the subject of much argument.

5. The Tribunal reached findings adverse to the Trust set out in strong language and very broad terms. Criticisms of the Trust's witnesses were couched in remarkable language at various points in the judgment – "authoritarian and domineering", "showed unpleasant insensitivity", "uncompromising and oppressive manner", "total disregard for the claimant's sense of grievance and stress", "oppressive inconsiderate and high handed in the extreme". It was said that the reporting of a particular incident as a "serious untoward incident" was "both malicious and capricious". At one point the Tribunal said –

> **"The respondent's conduct towards the claimant was calculated, deliberate and oppressive and implemented in the knowledge that it would impact upon the claimant's ability not just to perform her duties but to attend work at all. The respondent purported to mislead the claimant into believing that her investigations [sic] were being investigated and taken seriously when in fact they were either ignored or treated with little more than contempt, impatience and vitriol."**

6. On behalf of the Respondent Mr Adrian Lynch QC argued that the Tribunal's language is intemperate and this, together with its failure to engage with the Respondent's case, shows that it has abandoned altogether its duty to be objective. He applied for permission to amend the Notice of Appeal to emphasise this point: we will return to this application in a moment.

7. The use of intemperate language is not in itself a ground of appeal. The proper approach to reasons which are couched in such terms appears from the following authorities.

8. In **HM Prison Services v Johnson** [2007] IRLR 951 Underhill J (as he then was) said (paragraph 36):

> **"The language in which the Tribunal expresses its criticisms of the Appellants is often highly-coloured. This will be apparent from some of the passages that we quote; and elsewhere we find such terms as 'atrocious', 'astonishing' and 'failed miserably'. Tribunals are entitled to use strong words when dealing with conduct which merits it: there is no duty to be bland. In this case the Tribunal evidently felt that the Claimant had been very badly treated by the Appellants. It had the full evidence before it and saw and heard the witnesses, and we would be very slow to find that that overall judgment of the Appellants' conduct was unfair. But the very vehemence with which it is expressed raises a suspicion, which Mr Stilitz understandably urged on us, that the Tribunal's indignation clouded its judgment. We have had to do our best to look behind the epithets and focus on the actual issues."**

9. In **Co-operative Group v Baddeley** [2013] UKEAT UKEAT/0415/12 Keith J said (paragraph 37):

> **" ... there are dangers in a tribunal using language which is stronger than would normally be considered appropriate. We have already said that you lay yourself open to the criticism that you have lost your objectivity. It is one thing to want to tell it how it is, but it is quite another to do so in a way which might lead people to think that you have abandoned your detachment, and that you have an agenda of your own. It was, we think, unwise for the tribunal to express itself in a way which was less than judicious. The use of moderate language indicates that you approach things in a measured way. The upshot of it is that the robustness of the language which the tribunal used in this case has caused us to subject the judgment to even greater scrutiny than might otherwise have been justified."**

10. The proper response of the Employment Appeal Tribunal, in such a case, is to look carefully behind the epithets and focus upon the actual issues to see whether the Tribunal has applied the law correctly and made its findings of fact on a lawful and rational basis. No special test applies: the tools of legal analysis available to the Appeal Tribunal are sufficient to identify whether the Employment Tribunal's judgment is vitiated wholly or in part by legal error, which is the remit of the Appeal Tribunal by virtue of section 26 of the **Employment Tribunals Act 1996**.

The application for permission to amend

11. As originally drafted the Notice of Appeal contained grounds set out under seven headings, some of which were developed in considerable detail. These grounds concerned time points (grounds 1-2), date of knowledge (ground 3), reasonable adjustments (ground 4), protected disclosure (ground 5), a specific point concerning adequacy of reasons (ground 6) and a number of individual perversity points (ground 7).

12. Subject to one point, to which we shall come in a moment, the proposed amended Notice of Appeal did not include entirely fresh grounds, but essentially repeated grounds in the existing Notice of Appeal, drawing them together and relying on them along with the language

the Tribunal used in support of an argument that the Tribunal had entirely lost objectivity in its judgment and reasons. We rejected this application. The effect of this amendment, if granted, would have been to lengthen the grounds of appeal substantially and in numerous respects to repeat what were essentially similar grounds in two different places. We saw no need for the amendment: a generalised attack on the Tribunal's objectivity is no substitute for detailed examination of the Tribunal's determination of the issues: see **Johnson** and **Baddeley**. The grounds upon which the Respondent wished to attack the Tribunal's determination of the issues were already in the Notice of Appeal.

13. We gave leave only in respect of one short discrete point taken in the amended grounds of appeal. This concerns an issue which we will describe below as the "360° feedback forms" issue. The issue was of importance because the Tribunal's finding in respect of it led to trenchant criticism of two senior members of the Respondent's management. Although the ground was new the Claimant was on notice of the proposed amendment for some time prior to the hearing of the appeal and was in a position to argue it. Applying the overriding objective and the guidance in **Khudados v Leggate** [2005] ICR 1013 we granted permission to amend in this respect.

The background facts

14. The Tribunal's findings of fact run to some 37 close-typed pages. The summary which follows necessarily omits much detail.

15. The Claimant was employed by the Trust with effect from November 2000. Her contract was to work with children up to the age of 16. During the period with which the claim was concerned the Claimant's immediate line manager was Dr Chipchase, associate medical director and then clinical director. In turn his line manager was Dr Kaplan, associate medical

director. Dr Joseph was the executive medical director of the Respondent and the most senior member of medical staff to give evidence.

16. By way of background it is relevant to note that between November 2002 and March 2003 the Claimant was absent due to work related stress. She shared with the then medical director of the Trust concerns she was having about difficulties in meeting the long term needs and ensuring the health and safety of patients with chronic and persistent disorders such as ADHD and autism spectrum disorder. For a while a second full-time consultant worked alongside her: this arrangement lasted until September 2005, after which there was some cover from a locum consultant.

17. From 2002 onwards the Claimant continued to be treated by a consultant psychiatrist, Dr Tacchi. Dr Tacchi was eventually to write a letter dated 13 August 2008 which gave a diagnosis of recurrent depressive disorder and (probably) attention deficit hyperactivity disorder. By reason of this diagnosis it was common ground at the Tribunal hearing that the Claimant was at all material times a disabled person. It was, however, not common ground that the Respondent knew or ought to have known that the Claimant was a disabled person until August 2008. Indeed it was not accepted that the Respondent knew the Claimant continued to be under treatment.

18. By 2007 the Respondent – in particular Dr Kaplan and the Director to whom she reported – were determined to implement some changes in the way in which child psychiatric services were provided. They wished all child psychiatrists to see patients up to the age of 18. They also wished to develop an "on-call" service to cover out-of-hours emergencies. The Claimant and at least one other consultant refused to undertake such work – as they were entitled to do under their contracts. The Tribunal found that these refusals were sources of irritation and

resentment towards them "from management". Additionally, Dr Kaplan wished the Claimant to relinquish a role as team-co-ordinator, which she was reluctant to do. By July 2007 these were matters of concern and distress for her.

19. On 3 September 2007 Dr Geoghegan referred herself to Dr Barz, a specialist in occupational medicine, because she was experiencing what Dr Barz described as "intermittent physical and psychological symptoms of stress". Dr Barz wrote to Dr Kaplan recommending a workplace assessment and a personalised stress risk assessment. The letter referred to Dr Geoghegan's previous episode in 2002-2003. Dr Kaplan replied to the effect that Dr Chipchase would carry out such an assessment.

20. On 7 November the Claimant sent an email to Dr Chipchase. She told him that a staff grade vacancy urgently needed to be covered because there were more than 70 open cases in excess of what she or the specialist registrar could cover. She said that patients had requested complaint leaflets. Dr Chipchase came the same day to examine her diary and check her workload. As a result he formed the view that her output and workload amounted to an "unacceptably low level of activity", well below his expectation of a CAMHS consultant. There was an exchange of emails which the Claimant found distressing, followed by a management supervision meeting on 23 November at which Dr Chipchase expressed his views in what the Tribunal found to be insensitive and unsympathetic terms.

21. It was not until 26 November that a stress assessment meeting took place. Dr Chipchase advised the Claimant that they needed to meet again with support from human resources and a representative from the BMA. The minutes were sent to the Claimant on 5 December. A stress risk assessment was produced on 6 December.

22. On 13 December 2007 the Claimant began a period of sick leave, describing her condition as "incapacitating stress symptoms". The Tribunal made the point in its reasons that by this date it was some 3 and a half months since she had first referred herself to occupational health, but there had still not been a completed workplace assessment.

23. The Claimant returned to work on 31 December. She learned that in her absence at a team meeting she had been criticised by her team co-ordinator, Mrs Cairns. The specialist registrar wrote a report about the matter, saying that Mrs Cairns' comments were made in a very negative and critical way; and the Claimant referred the matter to the Nursing and Midwifery Council for investigation. (Much later – in May 2009 – the Claimant also submitted a grievance to the Respondent concerning this matter seeking an apology from Mrs Cairns. The grievance was upheld in this respect; Mrs Cairns wrote a letter of apology dated 2 July 2009.)

24. The Claimant's return to work was short-lived – between 31 December and 26 February (and for part of that time she was on annual leave). During that time a team meeting took place which Dr Chipchase attended unannounced at which the Tribunal found the tone of Dr Chipchase and Mrs Cairns to be insensitive and unsympathetic. There was also a meeting between the Claimant, Dr Kaplan and Dr Fairbairn. The Claimant agreed to the monitoring of her workload (although she later withdrew from this agreement) and agreed to a further referral to occupational health in the light of her stress issues.

25. On 26 February 2008 the Claimant began a period of sick leave which was to last until 2 February 2009. She had seen Dr Barz again on 22 February 2008. Dr Barz wrote a letter to Dr Kaplan mentioning the **Disability Discrimination Act** for the first time. This is an important letter: we will deal with it when we come to the grounds of appeal.

26. An organisation known as the National Clinical Assessment Service provides case management services to healthcare organisations to help resolve concerns about the practice of doctors and to make recommendations to assist practitioners to return to safe service. This was first contacted by Dr Joseph on 28 April. NCAS recommended that it was essential to clarify health concerns; that the Claimant was likely to need referral to a specialist psychiatrist or psychologist; and the report should say whether the provisions of the **Disability Discrimination Act** were applicable and whether there should be reasonable adjustments. After further correspondence Dr Joseph accepted the Claimant's request to be referred to a different occupational health consultant, Dr Paterson. He in turn referred to Dr Tacchi, who wrote to him the letter dated 13 August 2008 to which we have already referred. By letter dated 19 August 2008 Dr Paterson informed Dr Joseph that the Claimant's illness would fall within the remit of the **Disability Discrimination Act**.

27. Dr Paterson's letter informed the Respondent that the Claimant was now fit for work – but it also said that he did not think she should return to work until all the issues in a pending investigation had been resolved. The Respondent was indeed reluctant for the Claimant to return to work until there was an agreed date and timescale. The Claimant complained that she was being excluded without any due process. The Tribunal was critical of the Respondent during this period for an "uncompromising and oppressive approach to the way the Claimant should be managed".

28. By 17 December, however, agreement had apparently been reached, and the Claimant, after making amendments, signed a letter which stated that her concerns had been "fully resolved". The letter set out five specific "agreed adjustments" which included notably a job plan by virtue of which she saw an average of just six cases per week. On 28 January 2009 Dr

Paterson confirmed that the Claimant was now fit to return to work. A phased return from 2 February 2009 was agreed.

29. The Claimant continued to work during 2009. We shall have to deal with some specific findings of the Tribunal later in this judgment; but it will suffice for the moment to say that the Claimant continued to complain about the way she was managed, describing meetings with management as "hostile and little more than a forum for continued challenging, attacking and undermining of my role". She alleged that the meetings were causing distress and damage to health; and amounted to "constant harassment". This criticism was contained in a formal complaint dated 24 September 2009. Dr Joseph again referred the matter to NCAS; and the Claimant protested about the referral.

30. By January 2010 the Claimant had escalated her complaints to the level of chief executive. Mr Duncan was the acting chief executive. She raised a catalogue of complaints, including a "toxic culture of organisational undermining, bullying and harassment", concerns about patient safety because consultant psychiatrists were undermined, the referral to NCAS which she regarded as misleading, and attempts to obstruct her from carrying out her professional duty. She did not, however, wish to pursue a formal grievance. Mr Duncan set in hand an independent assessment and said he would arrange a further occupational health referral and a meeting with NCAS. There was further correspondence in which the Claimant objected to the person who would carry out the investigation and refused to agree to a further occupational health assessment or to a joint meeting with NCAS. She said that unless named persons in the management structure were suspended from having any contact with her she wished to have a short period of special leave. When special leave was refused she took sick leave under protest. She did not return to work after this time.

31. There followed a series of reports and grievances. These included: a report by an independent investigator, Mr Levy; a report by Dr Harker, a consultant occupational health physician, an investigation and report into the Claimant's grievances by Mr Thornton, and an appeal process and hearing leading to a further report by Mr Robertson in 2011. The Claimant was still absent from work at the time of the Tribunal hearing and (we understand) this remains the position.

The Tribunal's reasons in outline

32. The Tribunal began by summarising the procedure followed at the hearing (paragraphs 1-3). It then summarised the issues in paragraph 4, noting that the Claimant's claim was put in two ways. Firstly, it was alleged that the Respondent failed in its duty to make reasonable adjustments. Here the issues had been identified at a case management discussion and distilled into a document which the Tribunal quoted in full. We shall return to these issues later in this judgment. Secondly, it was alleged that the Respondent had subjected the Claimant to detriment for making protected disclosures (in common parlance, for "whistleblowing"). The protected disclosures were set out in a table in paragraph 42 of the ET1 claim form. The detriments were listed in the reasons. They were broad in nature: again we will return to them later. The Tribunal also noted (in paragraph 5) that there were potential time points, since the complaint was presented on 28 April 2010 and many complaints concerned matters more than 3 months prior to that time.

33. In paragraph 6 of its reasons (which runs to some 3 pages) the Tribunal set out its assessment of the evidence of the witnesses who appeared before it. Strong findings were made against some of the Respondent's witnesses – in particular Dr Chipchase and Dr Kaplan. There then followed findings of fact in paragraph 7, which runs to 95 subparagraphs over 37 pages. The Tribunal then set out the law concerning whistleblowing (paragraph 8) and disability

discrimination (paragraph 9). The Tribunal referred to documents in which submissions had been set out.

34. The Tribunal's conclusions are (relative to its reasons as a whole) quite brief – just some five pages. Within these pages it dealt with time points (paragraph 10), date of knowledge of disability (paragraph 11), failure to make reasonable adjustments (paragraph 12) and "whistleblowing" (paragraph 13). These last two paragraphs deal in broad terms with the issues, relying to a significant extent on the underlying findings of fact without tying them in any detail to the precise issues. This is not necessarily an error of law: as long as the relevant findings are made in the Tribunal's reasons there is no rule that they must be brought together at the end. It is, however, a good discipline for a Tribunal to return to the issues and set out clear findings in respect of them point by point. It also makes for a set of reasons which is easier to read.

Perversity grounds

35. The Respondent has challenged a number of the Tribunal's findings of fact on perversity grounds. It is convenient to deal with these challenges first before we turn to its reasoning on the key issues. There is a practical reason for this. We are satisfied that some of the perversity grounds (but not all) have been made out, so that there are some findings of fact by the Tribunal which cannot stand. But it does not necessarily follow from erroneous findings of fact that the reasoning of the Tribunal overall must be set aside. The impact of such findings on the Tribunal's overall reasoning must be assessed in the context of the issues as a whole.

36. Because Parliament has expressly provided that there is to be an appeal to the Appeal Tribunal only on a question of law, there is only the most limited scope for an appeal on the

grounds of perversity, which is essentially a challenge to a finding of fact or evaluation. Thus in the leading case, **Yeboah v Crofton** (2002) IRLR 634 at para 93 Mummery LJ said –

> **"Such an appeal ought only to succeed where an overwhelming case is made out that the Employment Tribunal reached a decision which no reasonable tribunal, on a proper appreciation of the evidence and the law, would have reached. Even in cases where the Appeal Tribunal has "grave doubts" about the decision of the Employment Tribunal, it must proceed with "great care",** ***British Telecommunications PLC –v- Sheridan*** **[1990] IRLR 27 at para 34."**

37. He explained (paras 94 and 95):

> **"94. Over the years there have been frequent attempts, consistently resisted by the Employment Appeal Tribunal, to present appeals on fact as questions of law. The technique sometimes employed is to trawl through the Extended Reasons of an Employment Tribunal, selecting adverse findings of fact on specific issues on which there was a conflict of oral evidence, and alleging, without adequate particulars, supporting material or even proper grounds, that these particular findings of fact are perverse and that therefore the overall decision is perverse. An application is often made to obtain the notes of evidence made by the chairman in the hope of demonstrating that the notes are silent or incomplete on factual points, that the findings of fact were not therefore supported by the evidence and that a question of law accordingly arises for the determination of the Employment Appeal Tribunal.**
>
> **95. Inevitably there will from time to time be cases in which an Employment Tribunal has unfortunately erred by misunderstanding the evidence, leading it to make a crucial finding of fact unsupported by evidence or contrary to uncontradicted evidence. In such cases the appeal will usually succeed. But no appeal on a question of law should be allowed to be turned into a rehearing of parts of the evidence by the Employment Appeal Tribunal..."**

38. *The "untoward incident" finding.* It is convenient first to deal with a particularly serious finding made by the Tribunal against Dr Chipchase and Dr Kaplan. The Claimant had supported the plan of a team member to discharge a particular child, but had then become uneasy about the decision and had spoken direct to the parent of the child, only informing the team member afterwards (which the team member found to be undermining). The parent suspected abuse; and the suspicions were soon confirmed. The Claimant's concerns about discharge were therefore correct even if her method of dealing with the matter may have been unorthodox. The Tribunal found that Dr Chipchase, with Dr Kaplan's agreement, had reported the Claimant's meeting with the parent as a Serious Untoward Incident under a policy for such matters. The Tribunal said (paragraph 7.55):

> **"The Tribunal found this to be a clear and obvious example of the respondent ..... singling out the claimant for oppressive and unjustified criticism as a reprisal for earlier complaints. It was also an example of the respondent choosing to follow its own procedures when it suited them to do so so as to accuse the claimant ....."**

39. Later, in paragraph 7.95, the Tribunal found that the categorisation of the matter as a Serious Untoward Incident was "malicious and capricious".

40. The Tribunal was mistaken in its finding that Dr Chipchase, with Dr Kaplan's agreement, had reported this matter as a Serious Untoward Incident. No such report was made. The finding is perverse in the true legal sense – there was no basis in the evidence for it.

41. Ms Ellenbogen told us that the Tribunal's error may have originated in a misreading of a written submission by Ms Misra. She also explained that there had been an occasion when a Serious Untoward Incident report was made concerning the Claimant. That, however, was a quite different matter. It concerned an occasion when the Claimant refused to see a child who was referred to her.

42. In the context of a 15 day case with many documents and much detail minor errors of fact in a Tribunal's reasons are readily understandable. We consider, however, that this was a significant error, leading to adverse criticism of two professional persons on a wholly incorrect basis. We will evaluate its importance later in this judgment.

43. *Dr Barz's letter dated 22 February 2008.* This letter did not set out a diagnosis: it said that she had given the Claimant advice to contact her treating specialist. It recorded that she described "symptoms of exhaustion" and said that the "only identifiable triggers are her perceptions of pressure at work". The letter said that if further occupational health input was

required Dr Barz would be happy to provide it with the Claimant's agreement and upon receipt of a referral letter. It contained the following passage.

> **"It would be up to an employment tribunal to decide if Dr Geoghegan's health condition would fall under the remit of the Disability Discrimination Act 1995 (as amended 2005). Should her health condition fall under the DDA then adjustments to her working conditions might be considered as reasonable adjustments to help her remain healthy at work."**

44. The Tribunal described this letter in the following way (paragraph 7.25):

> **"For the first time it was mentioned in that letter that Dr Barz considered the claimant's health condition to "fall under the remit of the Disability Discrimination Act"."**

45. Taken at face value this finding is unsustainable. The letter did not offer any opinion by Dr Barz on the question whether the Claimant's health condition fell under the remit of the **Disability Discrimination Act 1995**: it pointed out that potentially this was an issue for a Tribunal to decide at some point in the future. There is an important difference between an occupational health physician offering a considered view that a condition falls within the 1995 Act on the one hand and flagging up the issue for consideration on the other. We have asked ourselves whether the Tribunal's description was simply a question of poor phraseology, but we are unable to dismiss it in this way. It was relevant to the question of the Respondent's actual or constructive knowledge of disability, and we will return to it in that context.

46. *Mr Duncan's involvement.* We have explained that Mr Duncan became involved in the Claimant's complaints at a relatively late stage in January 2010. The Tribunal set out its assessment of him in paragraphs 6(vii) of its reasons. It found his evidence to be factually accurate but said that

> **"His was the opportunity to properly investigate both sides of this conflict in accordance with the Respondent's detailed Policies and Procedures, but he singularly and without justification failed to do so."**

47. This is a finding of a different type to the ones we have so far found to be perverse. It is a general criticism rather than a specific finding. It is, however, not a criticism of the results of the various investigations (as Ms Ellenbogen submitted to us): it is couched as a personal criticism of Mr Duncan. We can see no basis for it in the Tribunal's subsequent findings: indeed, when the Tribunal came to deal with Mr Duncan's involvement (in paragraphs 7.71 and following within its reasons) it did not repeat any criticism of a failure on his part properly to investigate the matter. The Tribunal presumably did not expect the acting chief executive to carry out the investigation personally. Nor can it have expected him to institute a formal grievance procedure, since the Claimant specifically disavowed any desire to use this procedure. However he promptly instigated a series of investigations the effect of which we have summarised above. The results may not have been palatable to the Claimant or to the Tribunal; but the Tribunal set out no basis for any personal criticism of Mr Duncan and we can see none. Some of the detriments alleged to have been motivated by the Claimant's whistleblowing were decisions of Mr Duncan. We shall return to this finding in that context.

48. *The "360° feedback" forms.* While she was absent from work in 2009 the Claimant, without informing the Respondent's management, sent to a number of colleagues a 360° form seeking feedback on her work role including her relationship with patients and colleagues. She intended the forms to be completed anonymously by the colleagues concerned, but she intended them to be returned directly to her at her home address. On learning of the matter Dr Joseph wrote to the Claimant a letter dated 30 May 2008 saying that he was keen to support the Claimant in seeking a 360° appraisal, but requested that it should be done through the system purchased by the Respondent available online. This, he said, would provide her with a validated and confidential response which could be used as part of her appraisal. He asked her not to request feedback in the way she had. Ms Farr, the service manager, wrote to members of

staff pointing out that the process was not official and asking them not to complete the questionnaire.

49. The Tribunal was highly critical of Ms Farr - and Dr Kaplan and Dr Joseph whom she had consulted. It said that

> **"..the respondent's handling of this incident was oppressive, inconsiderate and high-handed in the extreme. The Tribunal found that the purpose of Lorna Farr's circular, as instructed by Drs Kaplan and Joseph, was to prevent the Claimant from gathering information which may have been of assistance to her..."**

50. The Tribunal did not refer in its reasons to the letter written by Dr Joseph to the Claimant explaining the reason for the stance he took. Nor did it refer to the purpose of a 360° feedback in modern employment practice as part of an assessment process. It is common for such feedback to be organised through a software system which ensures its anonymity and availability. The letter of Dr Joseph was to our mind unexceptionable. It was a moderate response given that the Claimant had not sought any advance permission for what she did. We do not think any Tribunal on a proper appreciation of the evidence could have concluded that it was "oppressive, inconsiderate and high-handed" to require that the 360° feedback process was used properly. As Dr Joseph made clear in the letter which the Tribunal omitted to mention, the Respondent did not object to its proper use.

51. *Dr Chipchase and the stress risk assessment.* As we have noted, Dr Barz recommended a stress risk assessment in his letter to the Respondent dated 3 September 2007. The Tribunal was entitled to be critical of the Respondent's delay in accomplishing this stress risk assessment. However at one point in its findings it stated that by 7 November "the claimant had still not heard from Dr Chipchase concerning the stress risk assessment". He had written to her about it on 5 October; she had replied on 15 October; and he had replied in turn on 16 October

asking for their secretaries to schedule a meeting. The Tribunal's finding that the Claimant had not heard from Dr Chipchase concerning the risk assessment by 7 November was simply wrong. The truth was more nuanced: Dr Chipchase had contacted the Claimant; either of them (it seems to us) could then have been more proactive in pursuing the matter.

52. *Other perversity grounds.* The Respondent sought to argue that the Tribunal's reasons were perverse in a number of other respects, set out in ground 6.7 of the Notice of Appeal. Some grounds relate to points of detail of no significance in the overall picture; others are bound up with the Tribunal's overall assessment of Dr Chipchase and Dr Kaplan. It would overburden this judgment to set out and deal with each of these issues in detail. Suffice it to say that in respects other than those specifically mentioned already in this judgment we do not consider that the high standard for findings of perversity is made out.

<u>Duty to make reasonable adjustments: statutory provisions</u>

53. At the relevant time the duty of an employer to make reasonable adjustments in favour of an employee arose by virtue of section 4A(1) of the **Disability Discrimination Act 1995**. The duty applied, however, only where the employer knew or ought to have known that the employee had a disability which had the kind of adverse impact for which section 4A(1) required adjustment to be made. These provisions, so far as relevant to this case, provide as follows.

> **"4A(1) Where—**
>
> **(a) a provision, criterion or practice applied by or on behalf of an employer .....**
>
> **places the disabled person concerned at a substantial disadvantage in comparison with persons who are not disabled, it is the duty of the employer to take such steps as it is reasonable, in all the circumstances of the case, for him to have to take in order to prevent the provision, criterion or practice, or feature, having that effect.**
>
> **(3) Nothing in this section imposes any duty on an employer in relation to a disabled person if the employer does not know, and could not reasonably be expected to know ...... that that person has a disability and is likely to be affected in the way mentioned in subsection (1)."**

Date of knowledge of disability

54. It was conceded that the Respondent knew of the Claimant's disability by August 2008. However the claim that the Respondent had failed in its duty to make reasonable adjustments encompassed alleged breaches in 2007 and earlier in 2008. It was not conceded that the Respondent knew or ought to have known of the Claimant's disability at that time.

55. The Tribunal did not mention in its findings – but it is important to appreciate – that the Claimant told the Respondent that she was *not* significantly depressed. In a summary for a meeting which she prepared in January 2008 she wrote –

> **"November 2002 AG obliged to take sick leave for 4 months due to work related stress and depression (first ever period of sick leave since first employment in 1980). AG has remained free from significant depressive symptoms but has suffered a recurrence of stress symptoms since spring/summer 2007)."**

56. In fact, as Dr Tacchi's letter dated 13 August 2008 subsequently made clear, she had been treating the Claimant as an outpatient since 2002, and the Claimant was suffering from "Recurrent Depressive Disorder and a probable diagnosis of Attention Deficit Disorder". There appears to have been nothing in writing from the Claimant or any doctor to inform the Respondent of these diagnoses prior to August 2008.

57. The Tribunal dealt with this issue as follows.

> **"11.1 It was argued by Mr Stubbs that the respondent neither knew nor ought to have known that the claimant suffered from a disability ....**
>
> **11.2 The claimant's disability is recurrent depressive disorder and a diagnosis of probable attention deficit hyperactivity disorder. Drs Chipchase, Kaplan and Joseph are all specialists in mental health. There is clear evidence from the claimant's personnel records that she had been absent from work for lengthy periods suffering from depression. It was clear from the reports of the occupational health physician that the claimant almost certainly satisfied the test of a disabled person. The advice obtained by the respondent from NCAS also included reference to the fact that the claimant was probably a disabled person. The Tribunal found it inconceivable that the respondent did not "know" that the claimant suffered from a disability. If they did not, then they certainly ought to have known. In simple terms, the exception set out in section 4A(3) of the Disability Discrimination Act did not provide any protection to the**

respondent in these circumstances. The respondent's attempts to deny the actual or imputed knowledge of the claimant's disability only served to further damage their credibility."

58. On behalf of the Respondent Mr Lynch criticised the Tribunal's findings and reasoning in this passage in the following ways. (1) It wrongly asserted that the Respondent denied actual or constructive knowledge of the Claimant's disability altogether: the issue related to the period prior to 19 August 2008. (2) It failed to address the date from which the Respondent acquired such knowledge, which was the true issue to be determined; and made no sufficient findings on this question. (3) If the Tribunal intended to refer to the period prior to 19 August 2008, it was incorrect to say that personnel records demonstrated that she had been absent from work for lengthy periods suffering from depression – there was one such absence in 2002. (4) Again, if the reference to "reports of the occupational health physician" referred to the period prior to 19 August 2008 the reasoning is incorrect and appears to rely on the perverse finding that Dr Barz said she considered the Claimant to be a disabled person. (5) The Tribunal's concluding remarks are misplaced – knowledge was only in issue during the period prior to August 2008.

59. On behalf of the Claimant Ms Ellenbogen answered these criticisms as follows. (1) It is true that the Tribunal did not identify in its reasons that the issue related to the period prior to 19 August 2008: this would not in itself amount to an error of law. (2) The Tribunal did not expressly state when knowledge was first acquired, but must have found that the date of knowledge was in September 2007: the significance of the self-referral at that time would not have been lost on the Respondent's witnesses, who were all mental health professionals. (3) and (4) References to absences and reports of the occupational health physician were apposite, given that the Tribunal was not restricted to considering the first date of knowledge. In particular, the absence in 2003 was for depression as well as stress and would have been significant to the Respondent's specialist witnesses. (5) The Tribunal's remarks concerning credibility disclose no error of law and were open to it.

60. To our mind the critical question for the Tribunal to determine was the date at which the Respondent acquired actual or constructive knowledge that the Claimant had a disability. This is the issue upon which the Tribunal should have concentrated. Once such knowledge was acquired there is no reason on the facts of this case to suppose that it would ever again have been lost.

61. We consider that the Tribunal's reasoning shows that it lost sight of this issue – indeed it seems to have lost sight of the concession made by the Respondent that there was actual knowledge in August 2008. The Tribunal's reasoning makes reference to matters about which the Respondent could not and did not know in 2007. There were no "absences from work for lengthy periods suffering from depression" by 2007 – only a single period of absence in 2003 which (as the Claimant herself emphasised to the Respondent) was the only such period of absence in 27 years of service. There were no reports of occupational health physicians indicating that the Claimant "almost certainly" satisfied the test of a disabled person. The letter in September 2007 made reference only to "intermittent" symptoms of stress. The letter of Dr Barz was, as we have already found, the subject of a perverse finding by the Tribunal: we think it is impossible to avoid the conclusion that this finding is carried over into the reasoning in paragraph 11.

62. We therefore conclude that the Tribunal's reasoning on this question cannot stand. It was not sufficient for the Tribunal to make a general finding, based on a variety of material over different time periods, that the Respondent always knew or ought to have known that the Claimant had a disability. We are not confident that the Tribunal ever really addressed or identified the date at which the Respondent acquired such knowledge. If it did, its finding is

vitiated by its process of reasoning, for it has listed and taken into account matters about which the Respondent cannot have known at that date.

Reasonable adjustments

63. Where an employer is alleged to be in breach of the duty to make reasonable adjustments imposed by section 4A(1) of the 1995 Act the Tribunal should identify (1) the provision criterion or practice ("PCP") which the employer applied, (2) the identity of the persons who are not disabled with whom comparison is made, and (3) the nature and extent of the substantial disadvantage suffered by the employee. Without these findings the Tribunal is in no position to find what (if any) step it is reasonable for the employer to have to take to avoid the disadvantage – see **Environment Agency v Rowan** [2008] IRLR 20 at paragraphs 26-27 (Judge Serota QC).

64. We would add one further point. The duty to make an adjustment is a duty to take a "step" or "steps" to avoid the disadvantage. Just as the Tribunal should expect to identify the PCP, the comparators and the nature and extent of the substantial disadvantage, so it should expect to identify the step or steps which it was reasonable for the employer to have to take to avoid the disadvantage.

65. The Tribunal quoted **Rowan** appositely in its reasons (paragraph 12.1). It was however argued by Mr Lynch for the Respondent that the Tribunal's reasons were deficient, making no adequate findings as to the PCPs in issue, the alleged substantial disadvantage and whether the adjustments relied on by the Claimant were reasonable. It was further argued that the Tribunal found one adjustment – the carrying out of a stress at work assessment without delay – which was not in law a reasonable adjustment (**Hay v Surrey County Council** [2007] EWCA Civ

93). It was further argued that the Tribunal made findings of failures to make reasonable adjustments which were not pleaded.

66. Ms Ellenbogen submitted that the Tribunal's self direction in law by reference to **Rowan** was correct and that it must be taken to have followed that direction in analysing the evidence. She argued that the structure of the judgment was such that it was not possible to read the conclusions without the underlying detailed factual findings. The Tribunal stated the issues correctly and it was implicit in its findings that it accepted the adjustments for which the Claimant contended were reasonable.

67. It is, we think, important first to understand how the Claimant had put her case. This had been summarised in a document prepared by Ms Misra. The Tribunal quoted it in full in paragraph 4A on page 3 of its reasons.

> **"Reasonable adjustments**
>
> **Whether the respondent was under a duty pursuant to section 4A of the Disability Discrimination Act to**
>
> **(i) undertake a personalised stress risk assessment for the claimant in respect of her work**
>
> **(ii) take steps to proactively manage the claimant's working hours and workload**
>
> **(iii) manage the claimant sensitively and sympathetically**
>
> **(iv) deal with any complaint against the claimant swiftly and in a manner which would not unduly increase the claimant's anxiety**
>
> **(v) reduce diverse demands upon the claimant, increase the certainty of the claimant's working arrangements and provide the claimant with appropriate structure to her work so far as reasonably practicable (as referred to in the letter of 13 August 2008 .. from Dr Tacchi**
>
> **If there was a duty to make reasonable adjustments (which is not admitted by the respondent) then the claimant claims that the duty was breached by reason of**
>
> **(i) Dr Chipchase's manner in carrying out the risk assessment on 23 November 2007 and his management of the claimant, which the claimant alleges to have been confrontational and unsupportive**
>
> **(ii) the respondent not producing the risk assessment report for the claimant until 5 December 2007**
>
> **(iii) the respondent's handling of the Lorna Farr complaint in 2008**

> **(iv) Mrs Farr emailing members of the claimant's team on 30 May 2008 to advise them not to complete 360 degree appraisal forms for the claimant, at a time when she was a complainant against the claimant**
>
> **(v) the respondent failing to reduce the demands of the claimant's work, to increase the certainty of her working arrangements and to provide her with appropriate structure to her work, as referred to on 13 August 2008 when Dr Tacchi wrote to the respondent, on a continuing basis until presentation of her claim."**

68. It is unfortunate that the reasonable adjustments claim reached the Tribunal in this state. The formulation did not set out the PCP alleged to have been applied by the Claimant, did not identify who the comparators were or how the Claimant was placed at a substantial disadvantage in comparison with them and did not identify with any degree of particularity what steps it was reasonable for the Respondent to have to take to prevent the disadvantage.

69. The Tribunal's conclusions were set out in general terms. After referring to **Rowan** and setting out a portion of the particulars of claim, the Tribunal continued as follows.

> **"12.3 It was said by the Employment Appeal Tribunal in *Leeds Teaching Hospital NHS Trust v Foster* UKEAT/0552/10/JOJ that doubt was cast on whether a failure to provide support could amount to a PCP. However, the claimant's position was that the respondent had failed to manage her in a sensitive and sympathetic manner by proactively managing her working hours and workload, by reducing diverse demands on her, increasing the certainty of her working arrangements and providing her with the appropriate structure to her work so far as reasonably possible. The Tribunal found that the respondent either failed or refused to apply its own stress at work policy and managing diversity policy when dealing with the claimant. The Tribunal found that there was a duty imposed upon the respondent to implement these policies and that its failure/refusal to do so amounted to a failure to take steps to proactively manage the claimant's working hours and workload and to reduce the diverse demands upon her and to provide her with an appropriate structure to her work. The Tribunal found that this amounted to a PCP that satisfies the definition in section 4A(1)(a) of the Disability Discrimination Act 1975.**
>
> **12.4 The non-disabled comparators in the claimant's case are the other members of the clinical staff within the CAMHS Unit dealing with an equally heavy caseload of patients, particularly those [patients] suffering from attention hyperactivity disorder.**
>
> **12.5 The nature and extent of the substantial disadvantage suffered by the claimant was her inability to cope with the respondent's demands that she increase her workload, that she should see patients aged below 18 years, that she should no longer work from home and that she should agree to take part in the "on call" rota. The claimant's mental impairment was such that her perception of this treatment was one of oppressive bullying, harassment and demeaning of her professional standing and reputation. The effect of the respondent's treatment upon the claimant was such that her mental impairment was exacerbated to such an extent that her performance at work deteriorated until eventually she was unable to work and was certified as being unfit for work for lengthy periods.**
>
> **12.6 Following the decision of the Employment Appeal Tribunal in *HM Prison Services v Johnson* [2007] IRLR 951 the Tribunal found that the respondent's failure/refusal to follow its own stress at work policy and managing diversity policy were steps which the respondent had failed to take. Had they followed those steps then the impact upon the claimant and thus the substantial disadvantage suffered by her would probably have been much reduced.**

12.7 In summary, the Respondent was under a duty to make those reasonable adjustments set out in paragraph 4(A) on page 3 above and failed in that duty as is set out again on page 3."

70. In our judgment this reasoning does not provide any adequate basis for upholding the Claimant's claims of failure to make reasonable adjustments.

71. In the first place, the reasoning does not address the issues the Tribunal had to decide. The only finding concerning a PCP is within paragraph 12.3 of the Tribunal's reasons. The Tribunal appears to have thought that the failure of the Respondent to apply its stress at work policy and diversity policy to the Claimant amounted to a PCP and that applying those policies were the "steps" which should have been taken. But these were not reasonable adjustments alleged in Ms Misra's statement of the issues. It is axiomatic that the task of the Tribunal is to decide the issues which have been put forward by the parties – not to recast those issues and make findings for itself.

72. Secondly, the Tribunal did not identify in any practical way what PCPs the Respondent is said to have applied or what steps the Respondent ought to have taken to fulfil its duty. Two examples will suffice to make the point.

73. The Claimant's complaints included a failure to reduce the demands of the Claimant's work. Detailed though the Tribunal's findings are in some respects, there are no concrete findings as to what the demands of her work were and what steps should have been taken and when to reduce those demands. The Tribunal seems to have thought that the failure in this respect lasted until the commencement of proceedings, but it had found that by December 2008 agreement had apparently been reached by virtue of which she would see an average of just six cases per week. There are no findings as to why this was not a reasonable adjustment in respect of her workload or what a reasonable adjustment would have been.

74. The Tribunal also upheld a complaint that the Respondent was in breach of the duty to make reasonable adjustments by emailing members of the Claimant's team on 30 May 2008 to advise them not to complete 360 degree appraisal forms for the Claimant. We have already found that the Tribunal's conclusions in this respect were perverse. But the Tribunal in any event never asked the question what PCP was being applied. The PCP appears to have been to uphold the proper use of the 360 degree appraisal procedure. If so, it is difficult to see why this placed the Claimant at a substantial disadvantage compared to those who were not disabled.

75. We have selected two examples, but we are satisfied that the same criticisms apply across the board to the Tribunal's conclusions on the question of reasonable adjustments. We have carefully considered Ms Ellenbogen's submission that any inadequacy in the Tribunal's conclusions can be made good by reference to the Tribunal's findings of fact. Having carefully considered those findings, we reject that submission.

76. It is also now well established law that the reasonable adjustments to which the section 4A duty is applicable are concrete steps to prevent disadvantage as opposed to a process of consultation or assessment which may lead to such steps: see **Tarbuck v Sainsbury's Supermarkets** [2006] IRLR 664 at paragraphs 77-78 (taken to be correct, but without adversarial argument, by the Court of Appeal in **Hay** at paragraphs 9-10). The Tribunal was aware of this law: see paragraph 9.6 of its reasons, where it quoted **Spence v Intype Libra** [2007] UKEAT/0617, another authority to similar effect. Nevertheless we think the Tribunal must have fallen into error in this respect as well. (1) The policies to which the Tribunal referred will have set out general guidance and procedures to be followed rather than concrete steps to prevent disadvantage in the Claimant's particular case. (2) The Tribunal evidently found delay in making the assessment report to be a breach of the duty to make reasonable

adjustments: but it is plain from the authorities that delay in making an assessment is not of itself a breach of the duty to make reasonable adjustments.

77. For these reasons the Tribunal's conclusions on the question of the duty to make reasonable adjustments cannot stand. There is, however, one further point to add for completeness. We have quoted paragraph 4A on paragraph 3 of the Tribunal's reasons as containing a summary of the Claimant's case on reasonable adjustments. This is how the Tribunal appears to have understood it: the Tribunal referred to the paragraph as being Ms Misra's distillation of the issues. In a note to us Ms Ellenbogen suggests, by reference to earlier pleadings and orders, that paragraph 4A was not intended by the Claimant to be a summary or distillation of the issues but an addition to the issues. Mr Lynch accepts that this may have been the case; but we note that in her written closing summary Ms Misra said (paragraph 6) that "the breaches of s.3A(2) DDA are set out in the addendum to the list of issues" (see also paragraphs 1 and 3 of that document). Whether the Tribunal was or was not correct to regard the addendum as a summary rather than an addition cannot affect our judgment that, on the issues which were certainly for its determination, the Tribunal did not give proper reasons.

Protected disclosures and detriment

78. Part IVA of the **Employment Rights Act 1996** makes provision for certain disclosures by workers to qualify for protection under the 1996 Act. By section 47B(1) it is then provided that –

> **"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."**

79. Section 48 makes provision for a complaint to the Employment Tribunal in such a case; and section 48(2) provides that on such a complaint it is for the employer to show the ground on which any act, or any deliberate failure to act, was done.

80. The Claimant relied upon twenty distinct protected disclosures which were set out in a table in the rider to its ET1. The earliest protected disclosure was said to be on 7 November 2007, the latest on 15 February 2010.

81. The same document set out the Claimant's allegations of detriment in a single paragraph. In due course the following detriments were identified by Ms Misra as in issue, and were recorded by the Tribunal in paragraph 4 of its reasons. We repeat them here, apart from one which was subsequently withdrawn.

> **"(i) Dr Chipchase subjecting the claimant to hostility from 2007 to 2010 and in particular on 23 July 2007, 16 January 2008 and 19 August 2009 ...**
>
> **(iii) Dr Joseph referring the claimant to NCAS in 2009**
>
> **(iv) Mr Duncan removing the claimant from her team at the end of January 2010.....**
>
> **(v) Mr Duncan denying the claimant's request for special leave in 2010**
>
> **(vi) The respondent tolerating an environment in which Mrs Farr, Mrs Cairns and Mrs Stewart were able to and did undermine the claimant's role as a senior clinician and criticised her for requiring reasonable adjustments to be made to her working practices/arrangements from 2007 to 2010."**

82. After the evidence before the Tribunal concluded Mr Stubbs produced written submissions which dealt with the "whistleblowing" aspect of the claim in paragraphs 164 to 256. He disputed whether any of the twenty alleged disclosures were qualifying protected disclosures: he went through them individually, setting out his case that they were not disclosures of information (**Geduld v Cavendish Munro Professional Risks Management Limited** [2010] ICR 325) or did not disclose information of the requisite types (see section 43B(1) of the 1996 Act) or were not made in good faith. He made submissions as to the

detriments in issue, arguing in some cases that they were not detriments (e.g. (v) above) or were not deliberate failures (e.g. (vi) above) and in any event that they were not done on the ground of any protected disclosure.

83. The Tribunal referred to Mr Stubbs' submissions: it said that he dealt with protected disclosures at paragraphs 164 to 174 whereas in fact there were detailed submissions running up to paragraph 256. The Tribunal was, however, aware of the full document, and we take its reference to "paragraphs 164 to 174" simply to be a mistake.

84. The thrust of Mr Lynch's attack on the Tribunal's reasoning in respect of protected disclosures is once again that it did not meet the requisite standard: it did not tell the parties, or the Appeal Tribunal, why it had decided key disputed points in the way it did. He relied on **Harrow v Knight** [2003] IRLR 140 (paragraph 5) for the proposition that in victimisation cases, such as a protected disclosure claim, the Tribunal should set out and consider individually the elements necessary to establish liability. He argued that this approach was absent from the Tribunal's reasons. He took us to key points in the Respondent's case which, he said, were not addressed in the reasons. He further argued that the Tribunal had found detriments which were not pleaded (in paragraph 13.2 and 13.3 of its reasons) and conflated elements of the discrimination claim with the protected disclosure claim.

85. Ms Ellenbogen submitted in response that the Tribunal had directed itself correctly as to the law concerning detriment on the grounds of protected disclosure and had set out in paragraph 12 conclusions on all the necessary elements. It had expressly referred back to its findings of fact. Its reference to the isolation of the Claimant as a detriment did not diminish its findings and conclusions in other respects. It was hardly surprising that the Tribunal found links between the discrimination claim and the protected disclosure claim.

86. The Tribunal's conclusions were as follows.

> **"13.1 In paragraphs 17.11 to 17.80 above the Tribunal has set out its findings of fact with regard to the 20 specific disclosures made by the claimant. In each case the Tribunal found that the contents or subject matter of the complaints made by the claimant amounted to "information" as described in *Gelduld v Cavendish Munro*. They were not simply allegations made by the claimant which did not convey any facts. Each complaint was fact specific and contained sufficient information for the person or persons to whom the disclosure was made to be able to identify the subject matter of that disclosure.**
>
> **13.2 In each case, the disclosure was made to the claimant's employer pursuant to section 43C(1)(a) of the Employment Rights Act 1996. In each case the disclosure was made in good faith by the claimant. The Tribunal found that the claimant genuinely and reasonably in all the circumstances believed that the matters about which she complained were true. It was reasonable for the claimant to believe that the matters about which she complained were indeed true. Whilst the Tribunal acknowledged that there was a breakdown in the working relationship between the claimant and Doctors Chipchase, Kaplan and Joseph, there was no evidence that the claimants's disclosures were motivated by ill-will or bad faith towards any of them. The accumulative effect of the claimant's complaints which amounted to protected disclosures was to reinforce the respondent's refusal to manage the claimant sensitively and sympathetically or to implement its own stress at work and diversity and equality policies. The respondent's discriminatory treatment of the claimant was influenced by her numerous protected disclosures. There was therefore a clear causal connection between the protected disclosures and the respondent's acts or omissions. Those disclosures were at the very least a material factor in the respondent's continued course of discriminatory conduct and less favourable treatment towards the claimant.**
>
> **13.3 In addition to those matters referred to in para.4(B) on page 4 above, the detriment suffered by the claimant included her isolation by both senior and junior work colleagues, the exacerbation of her mental condition, her inability to properly perform her duties and eventually her enforced absence from work due to illness."**

87. The Tribunal has a duty to give proper reasons for its decision. Thus it should explain how it has applied the law to its findings of fact in order to determine the issues – see rule 30(6)(e) of the **Employment Tribunal Rules 2004** (now replaced, but applicable in this case). In **<u>Meek v City of Birmingham District Council</u>**, Bingham LJ stated that, although tribunals are not required to create 'an elaborate formalistic product of refined legal draftmanship', their reasons should:

> **"... contain an outline of the story which has given rise to the complaint and a summary of the tribunal's basic factual conclusions and a statement of the reasons which have led them to reach the conclusion which they do on those basic facts. The parties are entitled to be told why they have won or lost. There should be sufficient account of the facts and of the reasoning to enable the EAT or, on further appeal, this court to see whether any question of law arises ..."**

88. Likewise in **English v Emery Reimbold & Strick Ltd** [2002] EWCA Civ 605, [2003] IRLR 710 Lord Phillips MR stated that 'justice will not be done if is not apparent to the parties why one has won and the other has lost' (para 16), and gave the following guidance as to the essential requirements of a judicial decision (at paras 19–21):

> **"If the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision........**
>
> **...... The essential requirement is that the terms of the judgment should enable the parties and any appellate tribunal readily to analyse the reasoning that was essential to the judge's decision."**

89. As we have already observed, these requirements need not necessarily be set out in the concluding paragraphs of a set of reasons. But it is essential that the issues raised by the parties should be properly addressed within the reasons.

90. We have reached the conclusion that the Tribunal did not do so. It is not possible to see from the Tribunal's reasons how it dealt with the specific issues which it had to decide.

91. Some specific examples will illustrate the position. In January 2010 the Claimant asked Mr Duncan for special leave pending an investigation; Mr Duncan wished her to work elsewhere in the organisation rather than have special leave. This was a pleaded detriment. There were issues as to (1) whether some disclosures to Mr Duncan were made in good faith, (2) whether refusing special leave was a detriment, (3) whether it was by reason of any protected disclosure. It is a serious matter to make a finding against an acting chief executive that he subjected an employee to a detriment on the grounds of making a protected disclosure. The issues were not addressed in any specific way at all in the Tribunal's reasons. To the extent that the Tribunal made any personal criticism of Mr Duncan it was (as we have seen)

unjustified by any finding it made. In any event the Tribunal found him to be truthful as a witness, and yet appears to have rejected the reasons given for his actions without any explanation.

92. There was also a pleaded detriment that Mr Duncan removed the Claimant from her team at the end of January 2010. Similar issues arose: it was in particular argued that the Claimant herself did not envisage working with her team since she asked for special leave. Again the issues were not addressed in any specific way in the Tribunal's reasons.

93. The first pleaded disclosure was dated 7 November 2007. The alleged detriment, however, was said to have begun earlier in 2007 – hostility by Dr Chipchase at a meeting on 23 July 2007. This alleged detriment antedates and therefore cannot possibly be on the grounds of any pleaded disclosure. However, because the Tribunal did no more than state an overall finding it did not reject this alleged detriment. Moreover, the very fact that, on the Claimant's own case, the alleged hostility of Dr Chipchase pre-dated the disclosures alleged ought to have alerted the Tribunal to the need to make careful findings as to whether any treatment by Dr Chipchase of the Claimant was related to the alleged disclosures or to other, underlying matters to do with attempts to change working practices.

94. Some of the alleged disclosures plainly met the requirements of section 43B. There were, however, short arguable points made by Mr Stubbs as to whether other disclosures contained "information" or otherwise fell within the ambit of section 43B. None of these were addressed. There appears, indeed, to be no finding that the disclosures fell within section 43B(1)(a)-(f). For the most part it appears to us that they did; but Mr Stubbs argued the contrary in respect of some alleged disclosures, and his arguments were not addressed.

95. These are examples only: the underlying problem is that the Tribunal did not address many of the issues raised by the Respondent in any specific way, and we do not think that the "omnibus" conclusion suffices for the parties, or the Appeal Tribunal, to know how they were resolved.

96. We return to the effect of those findings of the Tribunal which we have found to be perverse. We conclude that the Tribunal's unjustified criticism of Mr Duncan has materially affected its conclusions concerning those detriments for which he was responsible. Further the Tribunal's assessment of the credibility of Dr Chipchase and Dr Kaplan was particularly strong. We conclude that it rested to a significant extent on findings which we have held to be perverse – not least the "untoward incident" finding. We have reached the conclusion that the Tribunal's assessment of credibility has been materially affected by its factual errors, and that the Tribunal's reasons would in any event have been unable to stand.

Time points

97. The Tribunal's reasoning on time points was also the subject of appeal. Since the appeal must in any event be allowed for the reasons we have given we will deal briefly with this aspect of the case. The Claimant's case was that the treatment of her by the Respondent's management amounted to an ongoing situation or continuing state of affairs (see **Commissioner of Police of Metropolis v Hendricks** [2003] ICR 530). The Tribunal accepted that this was so. The Tribunal's reasons for doing so were closely bound up with its conclusions on the substantive issues, and therefore cannot stand.

98. However, it is not open to the Employment Appeal Tribunal to substitute its own view on time issues unless, on a true appreciation of the law, only one result was possible on those issues. We are not in a position to say that this is the case. Whether the Claimant's treatment

amounted to an ongoing situation or continuing state of affairs is (given the allegations in this case) dependent on findings of fact. Likewise the question whether, if out of time, the Claimant's time for bringing a disability discrimination claim should be extended on the ground that it is just and equitable to do so is dependent on questions of fact and evaluation which are for the Tribunal.

Outcome

99. It follows from our reasons that the appeal must be allowed. Applying criteria set out in **Sinclair Roche & Temperley v Heard** [2004] IRLR 763, we have no doubt that the matter must be remitted to be re-heard by a freshly constituted Tribunal – a conclusion which we do not reach lightly, but regard as inevitable given our reasons for allowing the appeal. The freshly constituted Tribunal must start entirely afresh; it must reach its own assessment of the witnesses unaffected by any views of the previous Tribunal.

100. We have already commented on the state in which the reasonable adjustments claim reached the Tribunal. It is essential that the Claimant should make clear her case on each of the different elements of such a claim.

101. Finally, we commend to the parties the potential value of skilled mediation if this has not already taken place.