THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT**
MEMBERS: **MS B LEVERTON**
MR M WALTON

BETWEEN:

Ms A Kingsley

Claimant

AND

Brighton Housing Trust

Respondent

ON: **14, 15, 16 and 17 August 2017.**
IN CHAMBERS ON: **18 August and 1 September 2017**
Appearances:

For the Claimant: **Mr G Ennis, lay representative until 11:15am on day 1 thereafter in person**

For the Respondent: **Ms B Huggins, counsel**

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that the claims fail and are dismissed.

REASONS

1. By a claim form presented on 4 November 2015 the claimant Ms Alyson Kingsley claims unfair dismissal, automatically unfair dismissal and detriment for having made a protected disclosure, disability discrimination and breach of contract.

2. The claimant worked for the respondent from 1 October 2010 to 28 May 2015. Her job role was that of a START Officer. The respondent is a charity and registered housing association working in Brighton and Hove, Eastbourne, Hastings and other parts of Sussex. It provides a range of services to vulnerable people including housing services, mental health services, addiction services and other support.

The issues

3. A first preliminary hearing took place in this matter on 20 January 2016 before Employment Judge Freer. The claimant was ordered to provide further and better particulars of her claim and a second preliminary hearing was listed to take place on 23 March 2016.

4. On 22 March 2016 the respondent sent a list of issues to the claimant and the tribunal with its agenda for the preliminary hearing on 23 March 2016, which took place before Employment Judge Zuke. The claimant confirmed at that hearing that the list properly summarised her complaints. The issues are therefore as set out below.

5. The hearing was originally listed for 17 October 2016 for five days. The claimant applied for a postponement on health grounds. The application was opposed by the respondent and was granted by Employment Judge Baron based on the medical evidence.

6. The case was relisted for five days commencing on 3 July 2017. The respondent applied for a postponement due to witness non-availability. This application was granted by Regional Judge Hildebrand.

7. The issues are as follows:

<u>Ordinary unfair dismissal</u>

8. What was the reason for dismissal? The respondent relies upon the reason of redundancy which is a potentially fair reason under section 98(2)(c) of the Employment Rights Act 1996 (ERA).

9. If the reason for dismissal was redundancy, has the respondent acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the claimant? The tribunal will consider:

    a. Was there a genuine redundancy situation?
    b. Was the claimant given appropriate warning of her redundancy?
    c. Was the claimant fairly selected for redundancy?
    d. Did the respondent sufficiently consult with the claimant?
    e. Did the respondent give reasonable consideration to whether suitable alternative roles existed so as to avoid redundancy?

10. If the claimant succeeds in this claim, should compensation be reduced by way of a Polkey reduction?

<u>Victimisation</u>

11. Did the claimant do a protected act by way of raising a grievance and/or raising complaints regarding being disadvantaged for considering

redeployment because of sickness absence?

12. If the claimant did a protected act, did she suffer any of the following detriments?

    a. The respondent not addressing the grievance in a timely and appropriate manner?
    b. Not addressing the grievance before redundancy?
    c. Not accepting the first grievance?
    d. Being placed under pressure to amend the grievance?
    e. The selection of parties to investigate the grievance?
    f. Not allowing the claimant to appeal the grievance outcome?
    g. Dismissal on 29 May 2015

Disability status

13. At all material times from 9 July 2014 to 29 May 2015 was the claimant a disabled person for the purposes of section 6 of the Equality Act 2010 by way of her condition of stress?

14. Did the respondent have knowledge at all those material times of the claimant's stress condition and it amounting to a disability, or ought they to reasonably have known in all the circumstances?

Direct disability discrimination

15. Has the claimant been treated less favourably because of disability when compared to Ms Rachel Burrows?

    a. Being placed on half pay whilst signed off sick from work in November 2014?
    b. Not being offered reasonable adjustments and not giving consideration to transferring her to another project?
    c. Not being told about the Employee Assistance Scheme until Spring 2015?
    d. Not allowing her to speak on behalf of Rachel Burrows in relation to Ms Burrows grievance against the respondent in December 2014 and April 2015?

16. Has the claimant been treated less favourably because of disability when compared to Ms Sandra Lugowski; namely not being paid during absence from work while Ms Lugowski was paid in full whilst suspended from work during the course of 2014 – 2015?

Reasonable adjustments

17. Did the respondent apply the following PCPs?

    a. Not following the advice of occupational health?

b. Not dealing with employee complaints/grievances relevant to bullying and harassment?
c. Not extending the period of consultation and/or notice periods when investigating grievances/grievances appeals?

18. If any such PCPs are proven, was the claimant put at a substantial disadvantage in comparison with persons who are not disabled? The substantial disadvantage relied upon (1) causing her to become "very unwell" and/or (2) disadvantaging the claimant in relation to considering redeployment options.

Disability harassment

19. Did the respondent engage in unwanted conduct related to her disability?

a. Hassling her whilst off sick with regards to amending her grievance?
b. Not accepting the claimant's first drafted grievance?
c. Not taking the claimant's grievance seriously?
d. Taking a lengthy period before investigating the grievance?
e. Inviting the claimant to a meeting with no confirmed agenda of what it related to in March 2015?
f. Inviting the claimant to a meeting at which her manager was present whom she had cited in her grievance in November 2014?

20. Did any such unwanted conduct have the purpose or effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for her?

Protected disclosures

21. Did the claimant make the following disclosures of information?

a. On 31 December 2014 raising a grievance about bullying and harassment?
b. In March 2015 and 6 May 2015 raising issues surrounding the redundancy procedure?
c. In July 2015 and August 2015 appealing the grievance outcome?
d. In March 2014 and July 2015 relevant to the health and well-being surveys?
e. In August 2013, July 2014 and October 2014 relevant to other parties' grievances?

22. Did any proven disclosure, in the reasonable belief of the claimant tend to show a failure to comply with a legal obligation and/or the endangerment of health and safety of an individual?

23. Was the disclosure made to the correct person and did the claimant reasonably believe that such information was in the public interest? The respondent confirmed at the outset that it was not in dispute that

the disclosures were made to the employer.

24. Did the claimant suffer the following detriment because of any such disclosure: failing to consider her grievance or issues raised including a failure to address allegations of bullying and harassment in the workplace.

Time limits

25. Aside from the claim for unfair dismissal, are the claims within time such that the tribunal has jurisdiction to hear them?

Clarification sought on the protected disclosures and protected acts

26. On day 1 we asked the claimant to be clear as to the words relied upon for her protected disclosures and her protected acts. She sent to the tribunal at 11:03pm on 14 August 2017 a four-page email setting out the matters she wished to rely upon. Two pages of this consisted of detriments and we had made it clear and confirmed with the claimant on day 2 that it was the wording of the protected acts and disclosures that we had asked for and not further details of detriment.

27. The respondent said that the latest particulars expanded on the list of issues and brought up new matters but still did not clarify the precise wording relied upon. After hearing from both parties, we decided to admit the document but limited it to matters already identified in the list of issues and excluding any new disclosures or protected acts or detriments relied upon in that email.

Witnesses and documents

28. There was a bundle of documents of two lever arch files running to just under 1,000 pages.

29. For the claimant we heard from the claimant herself and from two former employees of the respondent, Ms Rachel Burrows and Ms Jane Eyles. Ms Burrows appeared pursuant to a Witness Order.

30. The witness statement on the claimant's side from Ms Eyles was only introduced on day 1. After checking overnight between days 1 and 2, the claimant accepted that she had not exchanged this statement with the respondent and the respondent had only had sight of it on day one. The respondent objected to its introduction and said that it was not able to call rebuttal evidence.

31. The statement was relatively short, 10 paragraphs in length. The claimant had a lay representative and was effectively a litigant in person. We gave leave to the claimant to admit this statement with leave for the respondent to ask supplementary questions of its

witnesses in order to deal with any of the points arising in Ms Eyles' statement. We also gave leave to the respondent, if it chose to do so, to introduce any late rebuttal evidence although this was difficult for the respondent as the witness they wished to call (Mr Robert Robinson) was on a sabbatical in Spain. We also told the respondent that if they wished us to consider an email from the relevant witness from Spain we would consider it. Ms Eyles' employment did not run concurrently with the claimant's employment and her evidence did not relate to the period under consideration for the claimant.

32. For the respondent the tribunal heard from (1) Mr Andy Winter, Chief Executive, (2) Ms Gemma Baldwin, HR Manager and (3) Ms Nikki Homewood, Director of Services. We had a supplemental statement from Mr Winter consequent upon the late introduction of the statement from Ms Eyles.

33. We had a written skeleton argument from the respondent. We had an opening statement and a short skeleton argument from the claimant, prepared by her then representative Mr Ennis.

34. On day 1 the parties helpfully agreed a timetable under Rule 45.

35. At 11:15am on day 2, after a break, the claimant dis-instructed her representative Mr Ennis and thereafter acted in person.

36. Additionally we had written closing submissions from the parties which are not replicated here. These submissions were fully considered, along with any case law referred to and relied upon, whether or not expressly mentioned below.

Late postponement application

37. The claimant dis-instructed her representative at 11:15am on day 2 just before we were about to commence her evidence. The claimant then applied for a postponement so that she should find a new representative. The respondent opposed the application relying on the fact that there had been 2 prior postponements and the claim was issued in 2015.

38. We were told that Mr Ennis, the lay representative, had only been instructed late on Sunday 12 August 2017 and prior to this the claimant had been planning to represent herself. Mr Ennis informed the tribunal that it was his first time in the employment tribunal and that he was more familiar with the County Court. We took the view that the case should not be further postponed as the evidence would become increasingly stale and the claimant had anticipated acting in person. We were unanimous that it should go ahead.

Findings of fact

39. The respondent is a charity and registered housing association working in Brighton and Hove, Eastbourne, Hastings and other parts of Sussex. It provides a range of services to vulnerable people including housing services, mental health services, addiction services and other support. The claimant worked for the respondent as a START (Skills to Acquire and Retain a Tenancy) Officer.

Disability status and knowledge of disability

40. The claimant relies upon the condition of stress as amounting to a disability under section 6 Equality Act 2010. The claimant's first sickness absence from work was on 22 November 2011 for abdominal pain for one week. She had a few days sickness absence in April/May 2012 for a respiratory condition. There were sick notes for both these absences.

41. In November 2013 the claimant had two days off sick for stress and this was self certified. The claimant's evidence was that she was advised by her manager to put "stress at work" on her self-certificate – which she did – but this was not originally her own description of the reason for her absence on that occasion.

42. The first certified absence for "work-related stress and anxiety" was on 9 July 2014 for 10 days (bundle page 423). The claimant did not return to work from sickness absence after 9 July 2014 and thereafter all her sick notes stated "stress at work" only.

43. In November 2014 the respondent wrote to the claimant stating that they wished to make an occupational health referral. The claimant was examined by occupational health nurse adviser Ms Hepworth on 12 February 2015 and a report was produced on 16 February 2015 at page 550-551 of the bundle.

44. The OH report included the following:

> *It appears that Alyson has been quite significantly unwell over the past six months, with some considerable impact on her psychological well-being. She has been under the care of her GP and has been following the advice given. At present she reports that her symptoms are continuing to improve. Her mood is generally stable. However, she has some ongoing fatigue and some anxiety in relation to the current work situation.*
> *In my professional opinion and based on assessment today, Alyson is considered fit for some work from a purely medical perspective. However, her prognosis in relation to a return to her substantive duties is very much dependent upon the continued management and timely outcome of any management processes. I believe, for example, that she has raised a grievance and that the outcome of this is awaited. It will be important that issues such as these are resolved in order to*

further aid her recovery. The ultimate solution to this issue is likely to be management not medically orientated as symptoms appear to be attributed to specific issues in the workplace.

45. The OH nurse was asked whether she considered the claimant's condition fell within the terms of the Equality Act. She said "*No; not in my professional opinion. Stress is not a recognised medical condition as such and it is anticipated that Alyson will make a full recovery."*

46. The OH nurse was also asked whether the claimant was able to attend workplace meetings. She said that she thought the claimant was medically fit for the meetings but it was generally accepted that such meetings could be distressing so she set out a number of measures to help alleviate distress, such as allowing the claimant to be accompanied, allowing comfort breaks, holding the meeting at a neutral location, being given sufficient notice for any meeting and providing an agenda in advance.

47. The claimant was sent a copy of the OH report and did not raise any objection or dispute with its content.

48. The claimant's evidence was that her mental health fluctuated but that there were days when she was unable to get out of bed. She was asked if she could wash and iron her own clothes and she said that she had a "huge wardrobe" and just allowed her laundry to pile up. She found it difficult to wash and iron her own clothes and some days she would remain in her pyjamas all day.

49. The claimant did not prepare her own food, she relied on takeaways. She found it difficult to go out of the house and found it especially difficult to go anywhere near the respondent's premises. She posted in her sick notes rather than deliver them personally. There were times when she could not even walk around the corner from where she lived. The claimant lived in a shared household.

50. At times she was neither sleeping nor eating. The claimant had counselling sessions roughly fortnightly and made the effort to attend those appointments, travelling by bus, because of the benefit that the counselling session was likely to bring.

51. The claimant eventually began to do some voluntary work but this was not until the summer of 2015, after the relevant period under consideration.

52. In relation to knowledge of disability the respondent was aware that the claimant had been off sick since 9 July 2014. By the date of the decision to dismiss she had been off sick for just under 10 months and by the effective date of termination, for just under 11 months.

53. We took account of the evidence of Ms Gemma Baldwin from HR. The

claimant was unhappy that she had not been asked to provide any input into her colleague Ms Rachel Burrows' grievance when she (the claimant) was happy to assist with that investigation. Ms Baldwin said that it was the respondent's practice not to contact long-term sick employees on such matters. It was not a formal policy but a practice.

54. As to how they made the decision not to contact the claimant in relation to Ms Burrows grievance, Ms Baldwin said to the claimant in oral evidence: "*I knew just how unwell you were, it was myself in regular contact with you; I knew from our conversations just how unwell you were at the time and I did not think it would be a good idea to call you".* Ms Baldwin said it was a judgment call she made not to contact the claimant about Ms Burrows' grievance. Ms Baldwin also said *"We were concerned about not adding more pressure to you, you said you were extremely anxious walking past the office, attending meetings, so we met….off site…"*

55. When dealing in evidence with the reason why the respondent considered that the claimant should be treated differently from her comparator Ms Burrows, Ms Baldwin said that the difference in her view was that Ms Burrows was signed fit for work whereas the claimant was signed unfit for work by her GP. In tribunal questions Ms Baldwin was asked about the discrepancy in the OH report stating that the claimant was "fit for some work" and the GP certificate stating that she was unfit for work. Ms Baldwin said that they relied upon the view of the GP who was actively monitoring the claimant's condition. Therefore to the extent that there was a discrepancy between what the OH nurse said and what the GP said, the respondent took the view that the GP's opinion should be preferred.

56. The claimant complains that she was not offered reasonable adjustments and consideration was not given to transferring her to another project. She relies on Ms Burrows as her comparator. The material difference between the claimant's circumstances and those of Ms Burrows was that Ms Burrows had been signed by her GP as fit for work. Although the OH report in respect of the claimant stated that she was fit for some work from a purely medical perspective and that the ultimate solution was likely to be management and not medically orientated, at no point did the claimant's GP sign her as fit for work or tick the section on the medical certificate which states "*You may be fit for work taking account of the following advice: A phased return to work; Amended duties; Altered hours or workplace adaptations*".

<u>Sick pay entitlement</u>

57. The claimant accepts that her contractual sick pay entitlement based on her length of service was five months full pay and five months half pay (bundle page 86). In oral evidence the claimant said she had no dispute with the way in which her sick pay was managed.

58. The claimant had the benefit of union representation. On 12 March 2015 her union representative Ms Diana Leach asked the respondent if they would be willing to pay the claimant's full-time salary from the date of submission of the grievance on 31 December 2014. The claimant had been on half pay since November 2014 which was due to reduce to nil pay from 14 April 2015. The union's position was that in the light of the length of time it had taken to progress the grievance it was felt that the claimant should not suffer financially for this delay.

59. Ms Baldwin replied on 13 March 2015 (page 603) stating that the respondent was following their policy and that they did not offer variations from that policy.

60. The claimant responded to Ms Baldwin at some length on 20 March 2015 (page 621-622) seeking reinstatement of her pay. The claimant said that she was aware of a colleague (whom she did not name) being placed on special leave. The Head of HR, Ms Mhairi Miller responded on 31 March 2015, page 641, stating that it was not appropriate for them to discuss another employee's circumstances, but that the other employee was not certified as medically unfit for work. Ms Miller said that as the claimant was unfit for work, they would not be offering special leave.

61. The claimant raises this as a complaint of direct disability discrimination and relies upon Ms Sandra Lugowski as her comparator (list of issues page 78 of the bundle and as set out in the issues above). The claimant accepted that Ms Lugowski was suspended under the terms of the disciplinary procedure and agreed that it was a completely different situation.

62. The claimant also compared herself with Ms Rachel Burrows in relation to being placed on half pay in November 2014. The tribunal heard evidence from Ms Burrows. Ms Burrows had 13 years service with the respondent. Under the terms of the Sickness Absence Management Policy (page 112) she was entitled to six months full pay and six months half pay. She was therefore in materially different circumstances to the claimant in that she had a greater entitlement by one month, both as to full and half pay during sickness absence, based on length of service. Ms Burrows is not disabled.

63. Ms Burrows' termination date with the respondent was 31 March 2015. She told the tribunal that she went off sick at the beginning of September 2014. In November 2014 Ms Burrows was signed fit for work and she was given a short-term project of four weeks' work on some of the respondent's policies. It was due to her certification as fit for work that she returned to work in November 2014.

64. When that project finished, close to Christmas 2014, Ms Burrows was

placed on garden leave and was told that this would not affect her sick pay entitlement.

65. Had Ms Burrows remained off sick, she would have reduced to half pay in early March 2015. In the intervening period she had done four weeks' work. She did not therefore reach the end of her full sick pay entitlement prior to the termination of her employment on 31 March 2015.

The Employee Assistance Scheme

66. The claimant complained as an act of direct disability discrimination that she was not told about the Employee Assistance Scheme until the Spring of 2015. We find against the claimant on this. On 25 November 2014 Ms Baldwin wrote to the claimant and in the concluding paragraph she stated "*I have also enclosed details of our Employee Assistance Service to provide free and confidential advice to staff on work-related and personal matters."* The claimant said that the leaflet was not enclosed. Her complaint nevertheless is that she was not told about the scheme until the Spring of 2015.

67. We find that she was told about the scheme and the bare bones of what it did in November 2014. Had she been interested in this and wished to pursue it, it would have been open to her to email Ms Baldwin to say that the leaflet was not enclosed but she was interested. By way of comparison, in evidence Ms Burrows said that she thought she was aware of the Employee Assistance Scheme, but she did not use it as she was not interested in it.

The grievance process

68. The claimant's grievance was not lodged until 31 December 2014. The matters giving rise to the claimant's grievance started in September 2013 when she began to find the nature of her supervision with her then line manager Ms Liz Duff, increasingly overbearing. In November 2013 the claimant had two days off sick due to work-related stress. On her return she told her then line manager Ms Duff, that she felt completely demoralised following supervision and was feeling insecure in her job as there were shifting parameters. The claimant took the view that the only factor that she could see which indicated a reason for the change in style was the appointment of a new senior manager Mr Roland Williams. The grievance complaints ran to 18 pages (bundle pages 507-524).

69. The claimant's case was that during her sickness absence prior to 31 December 2014 the respondent should have treated her situation as if she had already lodged a grievance against her managers Ms Jones and Mr Williams "*because HR knew she was going to*".

70. The claimant relies upon a telephone conversation with HR Manager Mr Nick Matthews in July 2014 shortly after she had been signed off sick. The claimant refers to this in paragraph 40 of her witness statement. This deals with Mr Matthews informing the claimant that she should be reporting her sickness absence to her manager Ms Jones but it does not say that the claimant told Mr Matthews she was planning to lodge a grievance. The claimant relies upon Mr Matthews saying to her "*I'm getting the impression that there is an issue with your manager*" or words to that effect.

71. The claimant also relies upon a conversation with Mr Matthews on 19 August 2014 at an informal meeting. At that meeting, she told Mr Matthews that she felt that the behaviour of her manager and her senior manager had caused her work-related stress. She admits in paragraph 43 of her witness statement that she was informed that her employer would be unable to address the situation without her providing a written grievance.

72. We saw the note of that meeting at page 447 of the bundle which supports our finding in this respect. At that meeting the claimant confirmed that she had not yet made such a complaint or grievance. She told Mr Matthews that she had consulted with a union representative and "also been to see her solicitor" because of the behaviour of management and senior management. At that meeting the claimant was seeking a settlement agreement.

73. We find that the respondent was not obliged to consider that the claimant had lodged a grievance until she did so on 31 December 2014. Employees have every right and often do change their minds about whether they wish to lodge a formal grievance. We find that it would not have been right for the respondent to start investigating when the grievance and the precise nature of it had not been set out. The claimant has also had the benefit of union representation and legal advice.

74. The grievance once lodged on 31 December 2014, did not name names. She referred to "her manager" and "the senior manager" and "management".

75. The claimant's grievance was acknowledged by Ms Baldwin by email on 2 January 2015 (page 506). The claimant replied on 7 January saying: "*That's great thanks Gemma. Can I just check if I should be forwarding this to Andy Winter as well? I don't wish to confuse things further but I am aware that there is an overlap with whistleblowing. Also do we need to meet to discuss it or should I just wait to hear from the investigating officer?"*

76. On 8 January (page 526) Ms Baldwin sent an email to the claimant saying "*Hi Alyson, Mhairi Miller (our new Head of HR) is meeting with*

Andy [the Chief Executive] about your grievance this morning and to agree the investigating officer, as soon as this is confirmed I will let you know, the next stage will be the investigating officer will arrange a date and time with you direct to meet."

77. In a later email on 8 January (page 529) Ms Baldwin said: "*We discussed whether you would be comfortable with your grievance being disclosed to Mandy Jones and Roland Williams, and if so whether there were any parts/points of the document you would like us to remove before disclosing, as agreed you will consider this and discuss it with Unison*".

78. Ms Nikki Homewood was appointed as the investigating officer on 8 January 2017.

79. The respondent's case is that they were not in a position to commence a grievance investigation until the claimant had given more information. On 16 January 2015 (pages 532-533) Ms Baldwin sent an email to the claimant asking for information as to who was being identified in the grievance, clear key points, sharing of content and her ideal outcomes. Ms Baldwin said that she had met with Ms Miller, the Head of HR, and they had jointly reviewed the grievance document. She said that on reflection they felt that it was not the role of the investigating officer to identify the key points that they considered were lacking within the 18-page grievance document. She said "*so we'd like to address these points prior to the investigation commencing*".

80. The claimant replied on 18 January 2015 saying "*to clarify the management I referred to in the grievance of the senior manager Roland Williams and my current manager Mandy Jones. Whilst I have mentioned a previous manager (Liz) within the grievance this was necessary in order to illustrate matters that arose following the appointment of Roland which had not previously been there….*" (page 532).

81. It was therefore quite clear to the respondent from this email that the claimant's grievance was against Mr Williams and Ms Jones. The respondent already knew this because in her second email of 8 January (page 529) Ms Baldwin asked the claimant whether she was comfortable with her grievance being disclosed to Ms Jones and Mr Williams. Ms Baldwin had made an offer to the claimant (email page 533) to help her restructure her grievance and the claimant picked up on this saying "*perhaps we could arrange to meet this week for an hour?"* Ms Baldwin did not follow up on this.

82. Ms Baldwin replied on 22 January 2015 saying that she had discussed the matter with Ms Miller. Ms Baldwin thanked the claimant for confirming who was being identified in the grievance. She then asked the claimant to be clear by inserting initials as to whether it was RW or

MJ she was referring to in each example. Ms Baldwin said that once the above had been dealt with, she would ask Ms Homewood to commence the investigation. She attached with that email details of the respondent's Employee Assistance Scheme.

83. Ms Baldwin also told the claimant in a further email on 22 January 2015 (page 535) that the respondent would be referring her to occupational health. HR Manager Mr Matthews had previously raised with Ms Miller the need to make an OH referral (email dated 12 November 2014, page 490).

84. At the material time there was an update to the respondent's grievance procedure and there was some dispute between the parties as to which procedure applied. The old and new procedures were not materially different. The policy originally sent to the claimant was approved in October 2011 and was at page 146. The updated procedure was approved in October 2014 and was at page 149.

The relevant procedure

85. The relevant procedure to which the respondent was working in early 2015 was the procedure dated October 2014 commencing at page 149. This procedure had been agreed with the relevant union. It said:

> *The investigation will include a formal meeting with the person declaring the grievance, those against whom grievances are declared, any relevant witness, and a review of any relevant paperwork.*

86. We find that the respondent made the grievance process unduly complex. The respondent knew the identity of those against whom the complaints were made. To the extent that they needed more information this could easily have been ascertained by Ms Homewood in a promptly held meeting with the claimant in early to mid-January 2015 or by Ms Baldwin following up once the claimant expressed interest in the offer to meet for an hour in the week of 8 January. The respondent was aware that the claimant was off sick with a stress related condition and we find that requiring the claimant to do more work on her grievance caused unnecessary and unreasonable delay. We find that the delay was in breach of the ACAS Code on Disciplinary and Grievance Procedures (2015) paragraph 33 as the delay in arranging a formal meeting was unreasonable.

The delay in the grievance process

87. On 27 January 2015 Ms Baldwin chased up with the claimant to check whether she had received her email of 22 January 2015. The claimant replied on 28 of January saying that her response "got stuck in drafts". The claimant said she was trying to clarify the grievance document but asked whether the investigation could begin looking at patterns of behaviour in the meantime (page 544) as she understood that others

had made similar complaints. Ms Baldwin replied that it was difficult for Ms Homewood to commence her investigation until the grievance was clarified and completed (page 544). We do not agree.

88. As set out above the claimant's occupational health appointment took place on 12 February 2015 and the respondent continued to manage the sickness absence. The redundancy business case was sent to the claimant on 18 February 2015.

89. On 26 February 2015 at the first redundancy consultation meeting, at which the claimant was represented by her union representative Ms Diana Leach, the matter of her grievance was discussed. Ms Baldwin confirmed that Ms Homewood was to be the investigating officer (this had been known since 8 January) and said that they were awaiting clarification from the claimant on which sections of her grievance could be shared with "the accused" and initials of who she was referring to when she used phrases like "management". As we have found above, the respondent made the process unnecessarily complex and difficult for the claimant. The notes of the meeting (page 568) state "*We all agreed that Alyson will review the document and resend through to HR next week*."

90. The claimant did so, by sending through an amended grievance document on 3 March 2015 (page 572). In her covering email she said that she had inserted names as requested and had deleted what she felt to be personal information marked with "XXXXXXX". The claimant asked for an indication of timing and the process.

91. A period of two months had been lost because of the respondent's insistence that the claimant give "more clarity" to her grievance. We have found above that they knew the identities of those against whom the complaints were made and anything more could easily have been ascertained in a promptly arranged meeting with the investigating officer or Ms Baldwin. We find that this two-month delay was attributable to the respondent.

92. By email on 12 March 2015 the claimant's union representative Ms Leach asked whether the respondent would be willing to pay the claimant's full-time salary from the date she submitted her grievance on 31 December 2014. As set out above, the respondent was not willing to do so.

93. On 19 March 2015 Ms Baldwin sent an email to the claimant (page 614) seeking to set up a grievance investigation meeting between the claimant and Ms Homewood. A selection of dates were suggested in late March and early April.

<u>The commencement of the investigation</u>

94. The first and only investigation meeting between the claimant and Ms Homewood took place on 1 April 2015 at Brighton Town Hall. The claimant was accompanied by Ms Lynch and Ms Homewood was accompanied by HR Advisor Ms Tess Hill. We saw the notes of that meeting commencing at page 648, annotated in the claimant's handwriting.

95. It was not until the day after that meeting that the grievance was disclosed to those against whom the claimant complained (email to Mr Williams at page 660). Had the initial investigation meeting taken place earlier, the disclosure to those involved could have taken place earlier.

96. During that meeting Ms Homewood asked the claimant who else she thought Ms Homewood should speak to in connection with the investigation. The notes show that the claimant said "JB, ST, RG" and the claimant has written in handwriting on those notes (page 655) "+ RB" the initials stand for Judith Bradshaw, Sarah Tolley, Rachel Greenan and Rachel Burrows.

97. Ms Homewood carried out an investigatory meeting with Mr Williams on 15 April 2015 and with Ms Jones on 22 and 28 April 2015. Ms Homewood also met with Ms Tolley, Ms Bradshaw and Ms Greenan. She did not meet with Ms Burrows. Ms Homewood did not agree that the claimant had suggested she speak with Ms Burrows. Ms Homewood's evidence was that she asked the claimant at the meeting on 1 April whether there was anyone from the Private Rented Sector team with whom she would like Ms Homewood to meet. Ms Burrows was not a member of that team.

98. Ms Homewood said that if the claimant had requested she meet with Ms Burrows this would not have been possible as she left her employment with the respondent on 31 March 2015 prior to the grievance investigation meeting. It was unfortunate that the investigation meeting with the claimant did not take place until the day after Ms Burrows' employment had terminated. As we have found above, the 2-month delay was attributable to the respondent and the inability to carry out an investigatory meeting with Ms Burrows' was also therefore attributable to the respondent. This highlights one of the reasons why it is necessary to act upon and deal with grievances promptly.

99. The claimant complains as an act of direct disability discrimination that the respondent did not allow her to speak on behalf of Rachel Burrows in relation to Ms Burrows' grievance. We find as a fact that although both Ms Burrows and the claimant were willing to participate in the investigations of one another's grievances, the respondent did not speak to Ms Burrows about the claimant's grievance and the respondent did not speak to the claimant about Ms Burrows grievance.

<u>The grievance outcome</u>

100. The notes of the claimant's meeting with Ms Homewood were not sent to her until 6 May 2015 (page 714), a period of five weeks later. On 7 May Ms Baldwin emailed the claimant to say that once the claimant had made her amendments and additions, Ms Homewood could them "*complete and issue her report".* There was no explanation for the five-week delay, yet there was a requirement that the claimant respond within five working days.

101. Ms Homewood also reviewed relevant emails and the timeline from Ms Jones commencing in post as manager and this showed her that the claimant and Ms Jones were working in the project together for a total of 29 days. Ms Homewood's evidence in her witness statement was that the claimant's grievance was lengthy and she "*spent a lot of time carrying out [her] investigation*". She also said that preparing the report took her a lot of time because she wanted to ensure that she was thorough.

102. It took Ms Homewood until 13 July 2015 to produce a grievance outcome which was at pages 848-898 of the bundle. Ms Homewood conducted the last of her investigatory meetings on 28 April 2015. It took her the whole of May and June and half of July 2015 to produce the grievance outcome. Ms Homewood said that she had completed the report by 6 July 2015 as this is the date upon the document (page 890) and she did not know why it took a further week for it to be sent to the claimant. We do not dispute that it is a detailed document and there were 40 allegations to be dealt with and it was a 42 page report. Ms Homewood's evidence was that the time it took to complete the investigation and provide the outcome was "*certainly caused by having to investigate historic events*".

103. It is inevitable that grievances involve looking at historic events. The period in question was from about the autumn of 2013 until the claimant went off sick in early July 2014. It was not a particularly historic complaint when it was lodged at the end of 2014.

104. Both versions of the respondent's grievance procedure which we were shown, provided that at the line manager shall investigate the grievance and will respond within 20 working days in writing. We do not accept the respondent's submission that the claimant had a response within 20 days because it had been acknowledged within that timescale. The policy clearly envisages a substantive outcome response within 20 days and not merely an acknowledgement.

105. Ms Homewood did not give us a particularly satisfactory explanation for the 2.5 month delay in producing the grievance outcome after completing the investigatory meetings. She did not, for example, say that she was constrained by pressure of work, ill-health or other absence from work. We find that the respondent unreasonably delayed

communicating to the claimant the grievance decision and that this was in breach of the ACAS Code paragraph 40.

The grievance appeal

106. The respondent's grievance procedure provides that an appeal should be lodged within five working days of receipt of the decision reached. The claimant received the grievance outcome on 13 July 2015 and was informed by Ms Baldwin that she had until 12 noon on 21 July 2015 to appeal. The claimant replied at 10:30am on 21 July 2015 asking for an extension of time due to ill health. She suggested an extension of "*a week friday*". Ms Baldwin replied on 23 July giving the claimant until 12 noon on Friday 31 July 2015 to submit her grounds of appeal.

107. At 17:17 hours on Friday, 31 July 2015 the claimant set out her grounds of appeal in an email to Ms Baldwin, copied to her union representative Ms Leach. Ms Baldwin replied on 31 July refusing to accept the appeal on the basis that it was after the extended deadline expiring at 12 noon.

108. Having agreed to deal with a grievance appeal post-termination of employment, we find that this was surprisingly picky and pedantic on behalf of the respondent who had taken over six months to deal with the claimant's grievance.

The redundancy procedure

109. On 13 February 2015 just after 7pm, Ms Baldwin sent an email to the claimant asking if it was possible to meet with her for 30 minutes to an hour on the following Wednesday, 18 February 2015. The email did not set out the reason for the meeting. Ms Baldwin said "*Apologies to cause any undue anxiety in inviting you to this meeting it is something we need to discuss face-to-face and relates to your role at START*" (bundle page 549).

110. The claimant was very anxious about this email as it was received after-hours on a Friday evening and she did not have the opportunity to find out anything about it over the weekend. Ms Baldwin apologised for this again in evidence.

111. The claimant replied on 17 February 2015 (page 552) saying that she could not meet on Wednesday 18 February because her union representative was not available. The claimant also said she did not wish to come to the respondent's premises for the meeting and said that her union representative had offered her office at Brighton Town Hall. The claimant asked for an overview of what the meeting would address.

112. Ms Baldwin replied on 18 February 2015 informing the claimant that the reason for the meeting was to inform her that due to funding cuts the

START project would be decommissioned from 31 May 2015 and as a result, this put the claimant's post at risk of redundancy. Ms Baldwin attached the business case which we saw in the bundle at page 553-554.

113. The business case said as follows:

> *Brighton and Hove City Council is required to reduce spending by over £100 million during the next Parliament. A £26 million reduction in spending is being made over 2015/16. This includes a cut of c£2 million in the housing related support budget. BHT has been advised that a number of our existing Housing Related Support funded services will be decommissioned from April 2015 onwards. This includes the START contract, which will be terminated on 31st May, 2015. This contract currently employs 1.5 full-time equivalent (FTE) posts both of which will need to be made redundant as a result of this decommissioning and loss of funding.*
> *The Council will not be commissioning a replacement service; however, BHT will receive additional funding to the tenancy support service…. This additional income will fund 0.5 FTE post and will stay within the existing PRS solutions team and current line management structure.*
> *The two existing post holders with START (ie 1.5 FTE) will be subject to BHT's redundancy and redeployment policy……. Where there is more than one person for a particular post, a selection process will be followed to fill such vacancies…..*

114. The document said that the respondent would commence consultation on 18 February 2015 which would close on 17 March 2015. The two post-holders within START were the claimant holding the full-time position and her colleague Ms Sarah Tolley who held the 0.5 position.

Consultation

115. The claimant had two redundancy consultation meetings, the first on 26 February 2015 and the second on 11 March 2015. She had union representation at both meetings. There was a group consultation meeting at the respondent's premises on 26 February 2015. The claimant was not told about this meeting. Ms Baldwin explained that the reason the claimant was not invited to this meeting was because it took place at the respondent's premises which the claimant did not feel well enough to attend. Ms Baldwin explained and we find that the same matters covered at the group meeting were covered with the claimant in her individual consultation meeting of that same date.

116. The claimant did not dispute that there was a genuine redundancy situation. She did not dispute that the funding had been removed by the local authority. We find that there was a genuine redundancy situation as a result of the termination of the funding for the project.

The Redundancy Working Group

117. The respondent's redundancy procedure which commenced at page 118 of the bundle, provided for a Redundancy Working Group to be set up to decide upon selection criteria and the selection pool (page 140). The Redundancy Working Group was to consist of 4 to 5 employees

selected by the Personnel and Governance Committee. The Redundancy Working Group was to include a minimum of one member of the Corporate Management Team and the HR Manager. It was to be chaired by the HR Manager. The group was to consult with Unison / employee representatives when agreeing the selection criteria and the selection pool.

118. The Redundancy Working Group included Ms Nikki Homewood as the member from the Corporate Management Team and Ms Baldwin, the HR Manager. It also included Mr Roland Williams against whom the claimant had brought her grievance. The claimant took issue with Mr Williams' and Ms Homewood's involvement in that Group because they were both involved in her grievance.

119. We find that although the claimant's concern about the involvement of Mr Williams and Ms Homewood in the working group was understandable, it made no difference to the situation. The role of the Working Group was to decide upon selection criteria and the selection pool. This was a situation where the funding for the START project was coming to an end and both post-holders were at risk of redundancy. The claimant was not identified for inclusion within a pool nor was she measured against redundancy selection criteria. We find that the involvement of Mr Williams and Ms Homewood made no difference.

Alternative employment

120. The claimant does not dispute that during the redundancy consultation process the respondent sent her details of seven available vacancies, including the new 0.5 post referred to in the business case. She was also sent the job description for that role (page 563 – 564).

121. Each time the claimant was sent vacancies, she was given a date by which to state an expression of interest. The claimant also accepts that she did not express interest in any of the vacancies. The claimant's repeated evidence was that she felt "disadvantaged" within the process.

122. At all times during the redundancy process the claimant had union representation. She did not, for example, state an expression of interest subject to the resolution of her grievance and/or to a condition that she did not report to any of those about whom she had complained, or that she needed reasonable adjustments within the application or interview process.

123. The claimant told the tribunal that she discussed one of the roles with her union representative, namely the 0.5 post referred to in the redundancy business case. The claimant and her union representative took the view that because it was part-time and at a lower grade with less responsibility, it was not suitable. This was a reasonable conclusion. No interest was expressed in any other post.

124. Whilst the claimant told Ms Baldwin in the consultation meeting on 11 March 2015 and in an email of 20 March 2015 (page 615-616) that she felt "disadvantaged" in the redeployment process, she did not express an interest in any of the roles offered, in the meantime. She said she had lost confidence in the respondent (page 593).

125. By way of example, Ms Baldwin notified the claimant of three vacancies in an email dated 18 February 2015 (page 557). The claimant said in evidence that the first two job roles, of Floating Support Officer and Project Worker were related to her existing role but the third vacancy that of Community Fundraiser was not because she has no experience in fundraising.

126. The claimant did not give detail as to the way in which she considered she was "disadvantaged" in the process, despite stating this on a number of occasions in evidence. We find that it was open to the claimant, who had the benefit of union representation and access to legal advice, to express interest in a post and then ask the respondent to make reasonable adjustments for her within that process.

127. By not expressing any interest in any alternative role, the claimant ran the risk that her employment would terminate by reason of redundancy and this is exactly what happened. Even by expressing interest in a post, this would not have required her return to work until she was fit enough to do so. The claimant said that because her pay had reduced to nil, it would not have cost the respondent anything to have continued with her employment. This may be so, but she failed to express any interest in a role to open the door for her employment to continue.

<u>Termination of employment</u>

128. Ms Baldwin wrote to the claimant on 27 April 2015 terminating her employment by reason of redundancy (page 691). Notice was given so that the termination date was 29 May 2015.

129. The claimant appealed against her dismissal by email dated 6 May 2015 (page 711). The appeal was heard by the Chief Executive Mr Andy Winter on 29 May 2015. Once again the claimant was represented by Ms Leach. The appeal outcome was by letter of 29 June 2015 - pages 829-831. Mr Winter said that even if he felt the claimant was disadvantaged by Mr Williams and Ms Homewood, there were various vacancies where neither of them were involved. Mr Winter accepted that it was not ideal that Mr Williams and Ms Homewood were members of the Redundancy Working Group but said that the claimant was included in the redundancy pool because the funding had been cut for her post. In other words she was not selected from members of a wider pool or subject to selection criteria. Her post was at risk because the funding for the service was coming to an end.

130. Although the claimant would have wished the question of alternative employment to have been delayed until her grievance process had been concluded, the redundancy situation had to be dealt in had to be with in a timely manner because there was a finite date for the termination of the funding, namely 31 May 2015. The appeal was not upheld.

131. When sending the claimant the appeal outcome letter, the HR Adviser Ms Hill, erroneously told the claimant that she had another right of appeal to the Chief Executive Andy Winter (page 832). The claimant said that she wished to exercise that right of appeal (email 7 July 2015 page 833). On 23 July 2015 Ms Baldwin corrected that error and apologised to the claimant (page 907) confirming that she had only one right of appeal and that had already been exercised.

132. We are unanimous in our view, based on the above findings, that the reason for dismissal was redundancy.

The disclosures

133. The list of issues at pages 75-80 of the bundle set out the protected disclosures relied upon by the claimant. They were not put in any detail as to exactly what words were relied upon. On day one of the hearing (when the claimant was represented by Mr Ennis) we informed the claimant that it was necessary for her to identify the words upon which she relied. We also referred to the parties to the ***Blackbay*** case (below) and to the guidance given by the EAT (by way of numbered points) in that case, to try to assist the claimant in understanding what was required.

134. On day two the claimant produced further particulars which we included at in the bundle at pages 80a to 80e. This identified the relevant disclosures as follows:

135. Disclosures in the grievance: In relation to her grievance of 31 December 2014 the claimant said her disclosures were:

I raised concerns around whistleblowing with regard to the Equalities Act re flexi working time considerations for staff with childcare requirements. This was not being granted/overruled by the senior manager Roland Williams and was at odds with BHT internal policy as well. The person I mentioned in my grievance was never spoken to about this matter and to my knowledge no review of this was ever made nor was there a policy review.

I raised concerns that I had witnessed Rachel Greenan who had a known mental health condition being treated in an aggressive and intimidating manner by Mandy Jones (the manager) as well as regularly

being called on different telephone lines within the office by both Mandy Jones and Roland Williams simply to check that she was answering the phone. I felt this was active bullying and intimidation of Rachel Greenan; I was seriously concerned about the impact this was having on Rachel Greenan given her mental health condition.

I flagged up the lack of any anti-bullying policy being in place and stated that I did not believe that BHT was following their stress management policy and subsequent HSE guidance; I went on to list the impact of the failure to do so had had on me.

136. In a further effort to understand the disclosures relied upon by the claimant we asked her about the part of her grievance upon which she relied and she identified two paragraphs on page 861 of the bundle. This was the grievance investigation outcome report which quoted from the claimant's grievance at page 578. The words relied upon were as follows:

Around March 2014 I agreed set flexi-time working hours around childcare for the new p/time START worker who I also supervised. She had been informed by the previous manager [Liz Duff] that this would be ok. I agreed hours which involved coming in at 8:15 one day, and checked with the interim managers who also ok'd it and informed staff member. However, the senior manager [Roland Williams] overrode this and to my knowledge the reason being was that we could not be sure they were working if coming in earlier. The member of staff XXXXX had recently done the introduction to HR training where emphasis was on BHT being an equal opportunity employer, and this seemed to be at odds with this. She did not wish to raise this issue formally and instead rearranged childcare arrangements at greater cost to herself.
I felt this was unfair treatment of people with childcare responsibilities and unable to pursue this any further, which I found concerning and a further indication of a more oppressive working environment and suspicious and untrusting approach. I am also aware that another part-time worker within the team had the possibility of extra hours turned down as it would have involved some flexi-hours, turned down for similar reasons.

137. Disclosures in March 2015 and 6 May 2015: The claimant did not detail these disclosures in her Particulars of 14 August 2017 and did not say what words she relied upon. In the list of issues it referred to "raising issues surrounding the redundancy process" but we were no nearer to understanding what issues were relied upon and in particular what was said and relied upon as a protected disclosure in the public interest.

138. Disclosures in July 2015 and August 2015 appealing the grievance outcome: The claimant did not identify the words she relied upon.

139. The list of issues also showed that the claimant relied upon disclosures

in March 2014 and July 2015 relevant to the Health and Well-being Surveys and in August 2013, July 2014 and October 2014 relevant to other parties' grievances. Once again in her Further Particulars 14 August 2017 the claimant did not tell us the words upon which she relied as being protected disclosures. The other difficulty for the claimant was that the answers to the Health and Well-being Surveys at page 398-399 came from a number of anonymous participants within the organisation and were therefore not necessarily disclosures made by the claimant herself.

140. We were not told which legal obligation(s) the claimant said her disclosures tended to show breach nor any details of whose health and safety the disclosures said were endangered.

The protected acts

141. We also asked the claimant to confirm the details of the protected acts relied upon for the purposes of her victimisation claim under section 27 Equality Act. She relied, as set out in the list of issues on two matters, (a) on her raising of a grievance and (b) "raising complaints regarding being disadvantaged for considering redeployment because of sickness absence".

142. From the further particulars provided by the claimant on day 2 of the hearing, when we asked for details of the words relied upon for the protected disclosures and protected acts, we understood the protected acts relied upon to be those relating to the grievance and set out on page 80(b) of the bundle as follows:

> *I raised concerns around whistleblowing with regard to the Equalities act re flexi working time considerations for staff with childcare requirements. This was not being granted/overruled by the senior manager Roland Williams and was at odds with BHT internal policy as well. The person I mentioned in my grievance was never spoken to about this matter and to my knowledge no review of this was ever made nor was there a policy review.*
>
> *I raised concerns that I had witnessed Rachel Greenan who had a known mental health condition being treated in an aggressive and intimidating manner by Mandy Jones (the manager) as well as regularly being called on different telephone lines within the office by both Mandy Jones and Roland Williams simply to check that she was answering the phone. I felt this was active bullying and intimidation of Rachel Greenan; I was seriously concerned about the impact this was having on Rachel Greenan given her mental health condition.*
>
> *I flagged up the lack of any anti-bullying policy being in place and stated that I did not believe that BHT was following their stress*

management policy and subsequent HSE guidance; I went on to list the impact of the failure to do so had had on me.

143. Although the claimant did not particularise the date of the second protected act relied upon, we have found above that at the second redundancy consultation meeting on 11 March 2015 she told Ms Baldwin and Ms Miller that she felt disadvantaged in competing for roles against others in the redundancy pool due to her absence from work and the impact this had had on her confidence and her lack of recent work experience (page 593).

Reasonable adjustments

144. We have considered whether, under section 20(3) of the Equality Act, the respondent applied the provisions, criteria or practices (PCPs) relied upon by the claimant.

145. The first PCP relied upon is that of "not following the advice of occupational health".

146. We did not hear evidence as to the respondent's practices in relation to OH advice other than in relation to the claimant. In the Occupational Health report of 16 February 2015, page 551 of the bundle, the OH nurse adviser made a number of recommendations to enable the claimant to attend workplace meetings. These were:

- allowing her to be accompanied by a suitable person
- allowing comfort breaks to enable her to regain composure, absorb/process content etc
- considering holding the meeting in a neutral location
- providing sufficient notice for any meeting
- providing an agenda in advance

147. Occupational Health also recommended that once the claimant was able to return to work, she would benefit from a phased return to work. At no point was the claimant signed fit for work by her GP therefore it was not possible for the respondent to put a phased return to work into practice.

148. At paragraph 42 of her witness statement Ms Baldwin commented that the OH report did not recommend moving the claimant and that had that recommendation been made they "*would certainly have considered this".*

149. We find that the respondent did not apply a PCP of not following the advice of HR. Ms Baldwin said that if there had been a recommendation to move the claimant they would have considered it. We find that on a balance of probabilities it is unlikely that the respondent would go to the trouble of commissioning an OH report simply to ignore its recommendations. The respondent is not bound to

follow each and every recommendation but we find that they do not apply a PCP of not following the advice of OH.

150. The second PCP relied upon is that of not dealing with employee complaints/grievances relevant to bullying and harassment. In this case we find that the respondent did deal with the claimant's grievance. They dealt with it slowly and as we have found above, they made the process unduly complex for the claimant by seeking clarity on matters which would have been easy for them to ascertain.

151. We find that they did not apply a PCP of not dealing with employee complaints or grievances of bullying and harassment. They dealt with the complaint made by the claimant (see for example the grievance outcome at the bottom of page 889 where Ms Homewood concludes that the acts relied upon did not constitute bullying, harassment or victimisation). Th3 complaint was dealt with but not in a timely manner.

152. The third PCP relied upon is that of not extending a period of consultation and/or notice periods when investigating grievances/grievances appeals. We find that the respondent did apply this PCP in circumstances where the consultation and/or notice was for redundancy and it was time critical in that it related to termination of funding upon a finite date. In the claimant's case the finite date was 31 May 2015.

153. Having found that the third PCP was applied, we have gone on to consider whether the respondent failed in its duty to make reasonable adjustments.

154. We have considered whether the application of this PCP placed the claimant at a substantial disadvantage in comparison with persons who do not share her disability. The substantial disadvantages relied upon were (1) causing her to become "very unwell" and/or (2) being "disadvantaged" in relation to considering redeployment options?

155. We find that the failure to extend the consultation or notice period did not put the claimant at a substantial disadvantage. We are not able to make a finding that the failure to extend notice or consultation caused the claimant to become "very unwell" without a medical report on the question of causation. We find that the failure to extend notice or consultation did not place the claimant at a substantial disadvantage in comparison to those who are not disabled because the claimant was offered 7 job roles and she failed to express even an interest in any of the roles, subject for example, to conditions such as her reporting line. The claimant had the assistance of a union representative.

156. In her appeal against her redundancy dismissal (pages 711-712) the claimant did not say that an extension of the notice or consultation would have allowed her to express interest in any of the vacancies. She

did not say this subsequently in her emails of 26 and 28 May 2016 to the respondent. What the claimant needed to do in order to protect her position in the redeployment process was to express an interest in a role and tell the respondent what assistance she then needed within any selection process for that role. She did not do so and we find that the extension of consultation and/or notice would not have made any difference to this and was therefore not a reasonable adjustment.

157. Furthermore it was not a reasonable adjustment to extend notice or consultation when the reason for the redundancy situation was the cessation of funding and the termination of the role and the decommissioning of the service on a finite date.

Disability harassment

158. We have considered firstly, whether as a question of fact the respondent engaged in the unwanted conduct relied upon and secondly whether this was related to the claimant's disability. For the benefit of the claimant, we record that it is not enough for us to simply find that there has been harassment. To succeed in this claim under the Equality Act, the claimant must satisfy us that any such proven harassment was related to her disability. The claimant relies on six acts of disability harassment which we deal with in turn.

159. The first is that of "hassling her whilst off sick" with regards to amending her grievance. We have found above that the claimant was not placed under "pressure" to "amend" the grievance, she was asked to provide details where names and dates were missing and asking for initials and details of what outcome she wanted. Amending the grievance involves changing the substance of the grievance and we find that the respondent was not asking the claimant to change the substance of her grievance.

160. The second is that of not accepting her first drafted grievance. We have also found above that the respondent did not fail to accept her grievance of 31 December 2014. They accepted it and sought more clarity on it. We find as a fact that they accepted it. They did not reject it.

161. The third is not taking her grievance seriously. We find that the respondent did not fail to take the grievance seriously. They took it seriously by investigating it and producing a lengthy grievance outcome. Although we are critical of the amount of time taken by the respondent to deal with it, we do not agree with the claimant and we do not find that they failed to take it "seriously".

162. The fourth is taking a lengthy period before investigating the grievance. Based on our findings made above, we have found that the respondent took a lengthy period before investigating the grievance. The delay was from early January 2015 until Ms Homewood held her first grievance investigation meeting with the claimant on 1 April 2015. Our finding

above is that the delay between early January and early March 2015 was attributable to the respondent and was unnecessary.

163. A meeting could have taken place with the claimant in January 2015 to obtain the clarity that they wanted. The claimant had made clear by email that the manager and the senior manager referred to were Ms Jones and Mr Williams. Where more clarity or dates were needed this could have been dealt with in a face to face investigatory meeting with Ms Homewood rather than insisting that the claimant, who was off sick with a stress related illness, do more work on her grievance which she found difficult.

164. The claimant's evidence was that the length of time taken with the process was causing her additional distress and injury to feeling and she felt penalised for putting in the grievance in good faith.

165. The fifth is that of inviting the claimant to a meeting with no confirmed agenda of what it related to in March 2015. The invitation to the meeting which gave no agenda was in Ms Baldwin's email of 13 February 2015 (page 556). We have made findings about this email under the heading "Redundancy procedure" above. In addition to stating that the meeting related to the claimant's "*role at START*" it also said what it was not about, by saying "*this is not related to your sickness absence or your grievance".*

166. The claimant was therefore not told expressly and in detail what the meeting was about, she knew it was about her job role and that it was not about her grievance or her sickness absence. In the documents before us, which amounted to about 1,000 pages, we did not see the respondent as being in the practice of sending or setting agendas every time they invited employees to meetings. The claimant was told in an email on 18 February the reason for the meeting. This was just over a week prior to the meeting taking place on 26 February 2015. It is correct and we find that the claimant was not sent an agenda in respect of this meeting.

167. Ms Baldwin also apologised in the email apologised for any anxiety in inviting the claimant to that meeting.

168. The sixth is inviting the claimant to a meeting at which her manager was present whom she had cited in her grievance in November 2014? We understand the claimant to be referring to an invitation to a meeting set out in a letter dated 3 November 2014 – her witness statement paragraph 47 and letter at page 485. The letter of 3 November 2014 invited her to a stress risk assessment meeting at which Ms Baldwin, Mr Matthews and her senior line manager Mr Williams would be present. On 3 November 2014 the claimant had not lodged a grievance against Mr Williams and we can therefore find nothing inappropriate about the invitation to this meeting. Following this letter the claimant ultimately did

not attend any meeting at which Mr Williams was present.

The whistleblowing claim

169. We have made a finding above that the reason for dismissal was redundancy. That finding means that we do not find the reason for dismissal to be because of any disclosure made.

170. We have therefore considered this in relation to the whistleblowing detriment claim.

171. The claimant relied upon seven whistleblowing detriments. Before analysing her disclosures, we have considered as a question of fact whether these detriments happened.

172. The first is put as the respondent not addressing the grievance in a timely and appropriate manner. We have found that the respondent did not deal with the claimant's grievance in a timely manner.

173. The second is put as not addressing the grievance before redundancy. It is not in dispute that the respondent did not conclude the grievance prior to terminating her employment by reason of redundancy. Our finding is that the redundancy situation was time critical in that it related to cessation of funding and the cessation of the service upon a finite date, namely 31 May 2015. We have therefore considered whether the failure to complete the grievance process before the claimant's redundancy dismissal was because of any of the disclosures made. We find that it was not. The reason for not addressing the grievance before the redundancy process concluded was because of the cessation of funding and the fact that the service was being decommissioned from 31 May 2015.

174. The third is put as not accepting the first grievance. Our finding above is that the respondent did not fail to accept the grievance of 31 December 2014. They accepted it and sought more clarity on it. We find as a fact that they accepted it. They did not reject it.

175. The fourth is put as being placed under pressure to amend the grievance. It is our finding that the claimant was not placed under pressure to amend the grievance, she was asked to provide details where names and dates were missing. Whilst we have found that this could have been done more easily by the respondent holding a much earlier grievance meeting with Ms Homewood. We find that being asked to give these details was not "pressure to amend" but the respondent wishing to be detailed and precise about what they were investigating. The respondent was not asking the claimant to change the substance of the grievance she had already lodged.

176. The fifth is put as the selection of parties to investigate the grievance.

We understand from this that the claimant complains about the investigation of her grievance being carried out with Ms Bradshaw, Ms Tolley and Ms Greenan but without an interview with Ms Burrows. The delay in commencing the grievance investigation meant that by the time Ms Homewood commenced the investigation and held her investigatory meeting with the claimant on 1 April 2015, Ms Burrows' employment had come to an end the previous day, 31 March 2015 and thus she was not interviewed in connection with the grievance. We find that this goes to the same issue as the delay and the respondent not addressing the grievance in a timely and appropriate manner

177. The sixth is put as not allowing the claimant to appeal the grievance outcome. As we have found above, the claimant was given a right of appeal against the grievance outcome. She was also given an extension of time to appeal the outcome. This extension was until 12:00 noon on Friday 31 July 2015 and her appeal was emailed at 17:17 hours on that day. The respondent, as we have found above, decided that having given a right of appeal and an extension, the appeal was out of time and they would not take it forward.

178. We have also found that having agreed to accept a grievance appeal post-termination of employment, this was a picky and pedantic approach when the respondent had taken over six months to arrive at a grievance outcome. Nevertheless we are not aware of any authority requiring a respondent to hear a grievance appeal post-termination of employment.

179. We have found as a fact that the respondent did allow the claimant to appeal, as they gave her a right of appeal and an extension of time for that appeal. The reason they did not go ahead to convene an appeal hearing was because the grounds of appeal were out of time by just over 5 hours and not because of anything the claimant had disclosed within the grievance itself. We find on a balance of probabilities that if the claimant had lodged her appeal by midday on 31 July 2015 or earlier, the respondent would have gone ahead with the appeal, having agreed to do so.

180. The seventh is the dismissal on 29 May 2015. A whistleblowing dismissal is a separate complaint to a detriment claim so does not fall under whistleblowing detriment in any event. We have found above that the reason for dismissal was redundancy. It was not because of any proven protected disclosures.

181. The claimant has therefore established the first and fifth detriments and they are related. The first is not addressing the grievance in a timely and appropriate manner and the fifth is the selection of witnesses who were interviewed in connection with that grievance. The failure to address the grievance in a timely and appropriate manner meant that Ms Burrows could not be interviewed as her employment had come to an end.

182. We have considered whether the failure to address the grievance in a timely manner was because of any of the disclosures made and we address this in our conclusions below.

The law

183. Redundancy is a potentially fair reason for dismissal under section 98(2)(c) of the Employment Rights Act 1996. Under section 98(4) where the employer has established a potentially fair reason for dismissal, the determination of whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) depends upon 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 shall be determined in accordance with equity and the substantial merits of the case.

184. The leading case of ***Williams v Compair Maxam Ltd 1982 IRLR 83*** establishes the principles for a fair redundancy dismissal and the and these are:

a. Whether selection criteria for redundancy were objectively chosen and fairly applied.

b. Whether the claimant was warned and consulted about the impending redundancy and whether there was consultation with any recognised trade union. It is not in dispute that the union was consulted in this case.

c. Whether instead of dismissing the claimant, the respondent offered any suitable alternative employment.

185. Section 13 of the Equality Act 2010 provides that 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.

186. Section 23 of the Equality Act provides that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

187. The Court of Appeal held in ***Gallop v Newport City Council 2014 IRLR 211***, that it essential for a reasonable employer to consider whether an employee is disabled, and form their own judgment. Ordinarily an employer will be able to rely on suitable expert advice, but this does not displace their own duty to consider whether the employee is disabled, and it is impermissible for that employer simply to rubber stamp a proffered opinion.

188. The duty to make reasonable adjustments is found under section 20

Equality Act 2010.

> *(3) The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.*

189. The respondent relied upon the decision of the EAT in ***Royal Bank of Scotland v Ashton 2011 ICR*** 632 which held that in relation to the disadvantage, the tribunal has to be satisfied that there is a PCP that places the disabled person not simply at some disadvantage viewed generally, but at a disadvantage that was substantial viewed in comparison with persons who were not disabled; that focus was on the practical result of the measures that could be taken and not on the process of reasoning leading to the making or failure to make a reasonable adjustment. This case was more recently considered by the Court of Appeal in ***Griffiths v Secretary of State for Work and Pensions 2015 EWCA Civ 1265*** on the comparison issue. Elias LJ held that it is wrong to hold that the section 20 duty is not engaged because a policy is applied to equally to everyone. The duty arises once there is evidence that the arrangements placed the disabled person at a disadvantage because of her disability.

190. Under section 21 of the Equality Act a failure to comply with section 20 is a failure to make reasonable adjustments. Section 21(2) provides that "*A discriminates against a disabled person if A fails to comply with that duty in relation to that disabled person".*

191. In deciding whether an employer has failed to make reasonable adjustments, as set out by the EAT in ***Environment Agency v Rowan 2007 IRLR 20,*** the tribunal must identify:

> *(a) the provision, criterion or practice applied by or on behalf of an employer, or;*
>
> *(b) the physical feature of premises occupied by the employer;*
>
> *(c) the identity of non-disabled comparators (where appropriate); and*
>
> *(d) the nature and extent of the substantial disadvantage suffered by the claimant.*

192. We are required to take into account any part of the Equality and Human Rights Commission Statutory Code of Practice on Employment (2011) that appears to us to be relevant to any questions arising in proceedings. Paragraph 6:28 states in relation to reasonable adjustments:

> *"he following are some of the factors which might be taken into account when deciding what is a reasonable step for an employer to have to take:*

- *whether taking any particular steps would be effective in preventing the substantial disadvantage;*
- *the practicability of the step;*
- *the financial and other costs of making the adjustment and the extent of any disruption caused;*
- *the extent of the employer's financial or other resources;*
- *the availability to the employer of financial or other assistance to help make an adjustment (such as advice through Access to Work); and*
- *the type and size of the employer.*

193. In relation to knowledge of disability and reasonable adjustments Schedule 8 paragraph 20(1)(b) of the Equality Act provides:

> *(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 - …..that an interested disabled person has a disability and is likely to be placed at the disadvantage referred to in the first, second or third requirement.*

194. Section 136 of the Equality Act deals with the burden of proof and provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

195. Section 26 of the Equality Act provides that:

> *(1) A person (A) harasses another person (B) if —*
> *(a) A engages in unwanted conduct related to a relevant protected characteristic, and*
> *(b) the conduct has the purpose or effect of –*
> *(i) violating B's dignity, or*
> *(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*

196. Section 27 provides that a person victimises another person if they subject that person to a detriment because the person has done a protected act. A protected act is defined in section 27(2) and includes the making of an allegation (whether or not express) that there has been a contravention of the Equality Act.

197. Section 123 of the Equality Act provides that:

> *(1) ……proceedings on a complaint within section 120 may not be brought after the end of—*
>
> *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
>
> *(b) such other period as the employment tribunal thinks just and equitable.*

198. Section 136 of the Equality Act 2010 provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

Protected disclosures

199. Under section 48A of the Employment Rights Act 1996, a "protected disclosure" is defined as a "qualifying disclosure" which is disclosed in accordance with sections 43C to 43H of that Act.

200. Section 43B(1) of the Employment Rights Act 1996 defines a qualifying disclosure:

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(b) the information disclosed tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject."

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

201. The claimant relied upon section 43B(1)(b) and 43B(1)(d) as set out above, in relation to the information the disclosures tended to show.

202. Section 43C ERA provides that a qualifying disclosure is made in accordance with this section if the worker makes the disclosure to his employer.

203. Section 47B provides 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.

204. For the purposes of automatically unfair dismissal Section 103A ERA 1996 provides that an employee who is dismissed shall be regarded……. as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

205. The time limit for bringing a detriment claim under section 47B is set out in section 48(3) of the Employment Rights Act 1996. It is the "reasonably practicable" test. An employment tribunal shall not consider a complaint unless it is presented—

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

206. In ***Cavendish Munro Professional Risks Management Ltd v Geduld 2010 ICR 325*** the EAT said that in order for a communication to constitute a qualifying disclosure under section 43Bm, it must involve the disclosure of information as opposed to the mere making of an allegation or statement of position. Slade J at paragraph 24 said "*Further, the ordinary meaning of "information" is conveying facts…..Communicating "information" would be: 'The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around'. Contrasted with that would be a statement that: 'You are not complying with health and safety requirements.' In our view this would be an allegation not information".*

207. In ***Western Union Payment Services Ltd v Anastasiou EAT/0135/13*** the EAT reviewed the earlier authorities including ***Cavendish Munro.*** Eady J said that section 43B of the ERA required the disclosure to be one of "information", not merely the making of an allegation or a statement of position. The distinction can be a fine one to draw and will always be fact sensitive. The disclosure of information must further identify, albeit not in strict legal language, the breach of legal obligation relied on.

208. Some doubt has been cast on the decision in ***Cavendish Munro*** by the recent decision of the EAT in ***Kilraine v London Borough of Wandsworth***. ***EAT/0260/15*** which considered the distinction between an allegation and information. Langstaff P said "*I would caution some care in the application of the principle arising out of* ***Cavendish Munro****……. The dichotomy between "information" and "allegation" is not one that is made by the statute itself. It would be a pity if Tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggest that very often information and allegation are intertwined. The decision is not decided by whether a given phrase or paragraph is one or rather the other, but is to be determined in the light of the statute itself. The question is simply whether it is a disclosure of information. If it is also an allegation, that is nothing to the point*".

209. In July 2017 the Court of Appeal handed down judgment in the case of ***Chesterton Global Ltd v Nurmohamed 2017 EWCA Civ 979*** dealing with the question of the public interest test. The worker's belief that the disclosure was made in the public interest must be objectively reasonable. The words "in the public interest" were introduced prevent a worker from relying on a breach of his or her own contract of employment where the breach is of a personal nature and there are no wider public interest implications.

210. In ***Chesterton*** whilst the employee was most concerned about himself (in relation to bonus payments) the tribunal was satisfied that he did have other office managers in mind and concluded that a section of the public was affected. Potentially about 100 senior managers were affected by the matters disclosed. Mr Nurmohamed believed that his

employer was exaggerating expenses to depress profits and thus reducing commission payments in total by about £2-3million.

211. The Court of Appeal held that the mere fact something is in the worker's private interests does not prevent it also being in the public interest. It will be heavily fact-dependent. Underhill LJ noted four relevant factors:

a. The numbers in the group whose interests the disclosure served
b. the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed
c. the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people
d. the identity of the alleged wrongdoer – the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest although this should not be taken too far.

212. The Court of Appeal also sounded a note of caution (judgment paragraph 36) stating that the public interest test did not lend itself to absolute rules. The broad intent behind the amendment to the law in July 2013 introducing the public interest test, is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers, even where more than one worker is involved.

213. In ***Blackbay Ventures Ltd v Gahir 2014 ICR 747*** the EAT summarised the case law in relation to public interest disclosures as set out below. We drew this case and the guidance set out below to the attention of the parties on day 1 of the hearing when we asked the claimant to particularise the disclosures that she relied upon.

1. Each disclosure should be identified by reference to date and content.

2. The alleged failure or likely failure to comply with a legal obligation, or matter giving rise to the health and safety of an individual having been or likely to be endangered or as the case may be should be identified.

3. The basis upon which the disclosure is said to be protected and qualifying should be addressed.

4. Each failure or likely failure should be separately identified.

5. Save in obvious cases if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation. It is not sufficient as here for the employment tribunal to simply lump together a number of complaints, some of which may be culpable, but others of which may simply have been references to a check list of legal requirements or do not amount to disclosure of information tending to show

breaches of legal obligations. Unless the employment tribunal undertakes this exercise it is impossible to know which failures or likely failures were regarded as culpable and which attracted the act or omission said to be the detriment suffered. If the employment tribunal adopts a rolled up approach it may not be possible to identify the date when the act or deliberate failure to act occurred as logically that date could not be earlier than the latest of act or deliberate failure to act relied upon and it will not be possible for the Appeal Tribunal to understand whether, how or why the detriment suffered was as a result of any particular disclosure; it is of course proper for an employment tribunal to have regard to the cumulative effect of a no of complaints providing always have been identified as protected disclosures.

6. The employment tribunal should then determine whether or not the claimant had the reasonable belief referred to in s.43B(1) and under the 'old law' whether each disclosure was made in good faith; and under the 'new' law whether it was made in the public interest.

214. In ***Shamoon v Chief Constable of the RUC 2003 IRLR 285*** the House of Lords said in relation to "detriment", that the tribunal must find that by reason of the act complained of a reasonable worker would or might take the view that he had been disadvantaged in the circumstances in which he had thereafter to work. An unjustified sense of grievance cannot amount to "detriment". However it is not necessary to demonstrate some physical or economic consequence.

Conclusions

Disability

215. We have considered whether the claimant was a disabled person under section 6 of the Equality Act 2010. We are aware that the occupational health report states that in the opinion of the occupational health nurse, the claimant did not meet the definition. The respondent accepts as a matter of law (***Gallop*** above) that this is a decision for the tribunal and not for the OH practitioner.

216. We heard detailed evidence from the claimant as to the effect upon her of her condition of stress, on her ability to carry out normal day-to-day activities. The claimant had days when she could not even get out of bed and did not get dressed during the day. She had difficulty going out and about in Brighton, she was very anxious to go anywhere near the respondent's premises and barely went out other than to post her medical certificates or to attend her counselling sessions by bus, because of the benefit that was likely to bring.

217. She was not able to prepare her own food and relied upon takeaways. She was not dealing with her laundry which simply piled up. We find that her condition did have a substantial adverse effect on her ability to carry out normal day-to-day activities such as going out and about from her home, preparing food and attending to laundry.

218. We have considered the Guidance on Matters to be Taken into Account

in Determining Questions Relating to the Definition of Disability (2011). Paragraph D16 says that normal day-to-day activities include activities that are required to maintain personal well-being and this includes whether the person neglects basic functions such as eating, sleeping and/or personal hygiene.

219. We have also considered whether the claimant's condition was long-term. The Act says that a long-term effect of an impairment is one which lasted at least 12 months or where the total period for which it lasts, from the time of first onset, is likely to be at least 12 months. As we have found above, by the effective date of termination the claimant had been off sick with the condition for almost a year.

220. The OH report of 16 February 2015 said that the claimant had been "*quite significantly unwell*" for the past six months and that the claimant was not going to be in a position to return to work until the workplace issues were resolved and this included the resolution of her grievance. This, as we have found above was not attended to by the respondent in a prompt or timely manner and this added length to the period of sickness absence necessitated for the claimant. The claimant was signed off sick and unfit for work throughout the period of her absence.

221. We have taken account of the reason stated in the OH report for Nurse Hepworth's view that the claimant's condition did not fall under the terms of the Equality Act 2010. She said, as we have found above, "*No; not in my professional opinion. Stress is not a recognised medical condition as such and it is anticipated that Alyson will make a full recovery."* The provision originally set out in the Disability Discrimination Act 1995 for a mental impairment to be a clinically well-recognised condition, was removed as from 5 December 2005 and we find that the reference to stress not being a "recognised medical condition" is an out of date legal test which we find had a bearing on the OH adviser's opinion.

222. We find that the condition was therefore long-term and that the claimant's condition of stress met the definition of disability and the claimant was a disabled person at the material time within the meaning of section 6.

<u>Knowledge of disability</u>

223. We have considered whether the respondent knew or could reasonably be expected to have known that the claimant had a disability. As stated in the ***Gallop*** case, the responsible employer has to make its own judgment as to whether the employee is or is not disabled. In making that judgment it will rightly want assistance from OH professionals or other medical advisers but it cannot simply rubber stamp the adviser's opinion.

224. As we have found above there was a discrepancy between the OH report suggesting that the claimant was fit for some work and the GP certificates signing the claimant as unfit for work. Ms Baldwin said that the respondent preferred the GP's view as the clinician actively monitoring the claimant's condition and that the claimant was more unwell than the OH nurse had indicated.

225. We find that the respondent had knowledge of the claimant's disability. They knew, to quote Ms Baldwin's evidence, just how unwell she was.

Unfair dismissal

226. We have found above that the reason for dismissal was redundancy. The respondent gave the claimant advance notice of the redundancy situation and they held two consultation meetings with her at which she had union representation. They offered seven roles by way of offers of suitable alternative employment. The claimant did not apply for any such role and did not express interest in any of the roles subject to conditions such as the reporting line or the resolution of her grievance.

227. We find that there was a fair reason for dismissal namely redundancy and that the respondent followed a fair procedure prior to making the decision to dismiss.

228. The claim for unfair dismissal fails and is dismissed.

Direct disability discrimination

229. We have found above that the claimant accepted that her comparator on the issue of sick pay, Ms Lugowski, was in a completely different situation in that she was suspended from work under the terms of the disciplinary procedure. This was the reason why Ms Lugowski continued to be paid.

230. The claim was expressly framed as one of direct disability discrimination and based on the claimant's concession that her comparator was in a different situation we are obliged to find under section 23 Equality Act that there was a material difference between the circumstances of the claimant's case, namely sick leave and the circumstances of her comparator's case, namely a disciplinary suspension.

231. In relation to Ms Burrows we find that there was no direct discrimination in relation to the claimant being placed on half pay in November 2014. There was a material difference in Ms Burrows' circumstances. She had a greater entitlement due to her length of service and had a period of four weeks work so that she did not exhaust her full pay entitlement prior to termination of employment.

232. In relation to the claim for direct discrimination in relation to sick pay, the

must fail.

233. The claimant relies on a failure to make reasonable adjustments as part of her direct disability discrimination claim. We deal with this under the heading of reasonable adjustments. The claimant also relies as direct discrimination on "not giving consideration to transferring her to another project" and names Ms Burrows as her comparator.

234. In relation to transferring the claimant to another project we have found above that there was a material difference between the claimant circumstances and those of Ms Burrows in that at no point was the claimant signed by her GP as fit for work.

235. We have found as a fact above that the claimant was informed in November 2014 and not as late as the spring of 2015 about the Employee Assistance Scheme.

236. The claimant also complains that it was an act of direct disability discrimination that the respondent did not allow her to speak on behalf of Ms Burrows in relation to Ms Burrows grievance. We have found above that there was no less favourable treatment of the claimant because Ms Burrows was not interviewed in connection with the claimant's grievance. We therefore that there was no less favourable treatment of the claimant as she was treated in the same way as Ms Burrows. Neither of them was interviewed in connection with the other's grievance.

237. The claim for direct disability discrimination therefore fails.

<u>Victimisation</u>

238. The respondent submitted that raising a grievance "could be considered a protected act" – closing submission page 4.

239. We have considered whether the three matters identified from the claimant's grievance (page 80(b) of the bundle) amounted to protected acts. The first is:

> *I raised concerns around whistleblowing with regard to the Equalitys act re flexi working time considerations for staff with childcare requirements. This was not being granted/overruled by the senior manager Roland Williams and was at odds with BHT internal policy as well. The person I mentioned in my grievance was never spoken to about this matter and to my knowledge no review of this was ever made nor was there a policy review.*

240. The claimant clarified that she also relied upon the following wording:

> *Around March 2014 I agreed set flexi time working hours around childcare for the new p/time START worker who I also supervised. She had been informed by the previous manager [Liz Duff] that this would be okay. I agreed hours which involved coming in at 815 one day, and checked with the interim managers who*

> *also okayed it and informed staff member. However, the senior manager [Roland Williams] overrode this and to my knowledge the reason being was that we could not be sure they were working if coming in earlier. The member of staff XXXXX had recently done the introduction to HR training where emphasis was on BHT being an equal opportunity employer, and this seemed to be at odds with this. She did not wish to raise this issue formally and instead rearranged childcare arrangements at greater cost to herself.*
> *I felt this was unfair treatment of people with childcare responsibilities and unable to pursue this any further, which I found concerning and a further indication of a more oppressive working environment and suspicious and a trusting approach. I am also aware that another part-time work within the team had the possibility of extra hours turned down as it would have involved some flexi hours, turned down for similar reasons.*

241. We find that there is enough in the above wording of the grievance for us to find that she was making an allegation that the respondent had contravened the Equality Act with her reference to the respondent as an equal opportunity employer and her reference to the "Equalitys act". We find that this was a protected act.

242. The second matter relied upon was:

> *I raised concerns that I had witnessed Rachel Greenan who had a known mental health condition being treated in an aggressive and intimidating manner by Mandy Jones (the manager) as well as regularly being called on different telephone lines within the office by both Mandy Jones and Roland Williams simply to check that she was answering the phone. I felt this was active bullying and intimidation of Rachel Greenan; I was seriously concerned about the impact this was having on Rachel Greenan given her mental health condition.*

243. We find that there is not enough in this wording to amount to an allegation that the respondent has contravened the Equality Act. The wording does not identify Ms Greenan as a disabled person and does not allege disability discrimination. It speaks of Ms Greenan being treated in an aggressive and intimidating manner but we consider it is a step too far for us to read this as a complaint of a contravention of the Equality Act without the claimant saying more. A contravention of the Equality Act has to pertain to a protected characteristic. The claimant does not say in this wording that Ms Greenan is a disabled person with her mental health condition and we cannot and do not jump to that conclusion.

244. The third matter relied upon was:

> *I flagged up the lack of any anti-bullying policy being in place and stated that I did not believe that BHT was following their stress management policy and subsequent HSE guidance; I went on to list the impact of the failure to do so had had on me.*

245. There is no requirement under the Equality Act for an employer to have an anti-bullying policy in place, although it is of course good practice to do so. "Flagging up" the lack of an anti-bullying policy is not an allegation of a contravention of the Equality Act. The references to a

stress policy and HSE Guidance again is not an allegation of a contravention of the Equality Act. We find that the third matter is not a protected act.

246. We find that the claimant stating that she felt disadvantaged in competing for roles against others in the redundancy pool due to her absence from work and the impact this had had on her confidence and her lack of recent work experience – is not a protected act. It does not fall within any of the sub-paragraphs of section 27(2) of the Equality Act. The redundancy and dismissal process falls under the Employment Rights Act 1996 and not the Equality Act. The claimant does not go as far as to allege a breach of the Equality Act in the wording upon which we understand her to be relying. We find that this was not a protected act under section 27.

247. In summary the only protected act is the first one relied upon in the grievance of 31 December 2014.

248. We have considered whether any of the seven acts of victimisation relied upon were because of the allegation in relation to the respondent breaching equal opportunities legislation under the Equality Act in relation to flexible working arrangements for staff with childcare arrangements.

249. We are unable to find that the respondent failed to address her grievance in a timely and appropriate manner because of this protected act. We are unable to find that Ms Baldwin and/or Ms Homewood failed to address the grievance in a timely and appropriate manner because of this particular part of the grievance. We can find no causal link.

250. We have made a finding of fact that the redundancy situation was time critical because of the cessation of the funding with effect from 31 May 2015. We have made findings above as to the slow progress of the grievance but we find that it was not in any way caused by this protected act.

251. The claimant relies as an act of victimisation upon the respondent "not accepting" the first grievance. The respondent did not fail to accept the grievance. They sought an undue amount of clarification upon it. We therefore find that the act of victimisation relied upon, namely not accepting the first grievance, is not proven. Even if we are wrong about this we find no causal link with the protected act.

252. The same applies to the allegation of being placed under pressure to amend the grievance. We find that the claimant was not placed under pressure to amend the grievance, she was asked to provide details where names and dates were missing. We find that the act of victimisation relied upon, namely being placed under pressure to amend the grievance, is not proven. Even if we are wrong about that

we find no causal link with the protected act.

253. The claimant relies as an act of victimisation on "the selection of parties to investigate the grievance". We understood this to mean that Ms Burrows not interviewed in connection with the claimant's grievance and we rely on our findings made in relation the whistleblowing detriment claim (fifth detriment). Our finding is that this was not an act of victimisation because the claimant raised the matters in her grievance. The failure to interview Ms Burrows was because the respondent failed to address the grievance in a timely manner and not because of any protected act.

254. The claimant also relies upon her dismissal. We have made a finding of fact above that the reason for dismissal was redundancy. It was not because of the protected act.

255. The claimant relies upon not being allowed to appeal the grievance outcome. The claimant was permitted to appeal the grievance outcome, she had a right of appeal and an extension of time. The reason the respondent did not allow the grievance appeal to go ahead was because the claimant had missed the extended deadline of 12 noon on Friday, 31 July 2015. It was not because of any protected act. We therefore find no causal link between the protected act and the respondent's decision to treat the appeal as out of time.

256. The claim for victimisation therefore fails.

Reasonable adjustments

257. We have found that the only PCP applied by the respondent was the third PCP relied upon which was that of not extending the period of consultation and/or notice periods when investigating grievances/grievances appeals. We found above that it did not place the claimant at a substantial disadvantage.

258. If we are wrong about the substantial disadvantage we have considered whether extending the consultation period and/or the claimant's notice period would have been a reasonable adjustment. The claimant contends that as she was on nil pay it would not have cost the respondent to have continued her employment.

259. We found above that it would not have been a reasonable adjustment to extend consultation or notice. What the claimant needed to do in order to protect her position in the redeployment process was to express an interest in a role and tell the respondent what assistance she then needed within any selection process for that role. She did not do so and we find that the extension of consultation and/or notice would not have made any difference to this and was therefore not a reasonable adjustment. The claimant chose not to engage with the process.

260. We also find that it would not have been a reasonable adjustment to extend notice or consultation where the reason for the redundancy situation was the cessation of funding which resulted in the termination of the particular service. There was no basis upon which the employment in the particular role could have continued.

261. The claim for failure to make reasonable adjustments fails.

Disability harassment

262. We have found above that the acts four, five and six relied upon as disability harassment took place as a question of fact. We have considered whether under section 26(1)(a) this was unwanted conduct related to the relevant protected characteristic of disability.

263. To succeed the claimant has to show, before we go on to consider whether the test in section 26(1)(b) is met, whether the unwanted conduct was disability related.

264. We find that on taking a lengthy period to investigate the grievance, this unwanted conduct related to the claimant's disability. She did not want the grievance to be delayed. The reason for the delay was the respondent's insistence on further particulars and detail which we have found above was unnecessary and the delay could have been avoided by an early investigatory meeting in January 2015. The insistence upon that detail and the delay was related to the claimant's disability because she had difficulty, due to her health condition, in providing the amount of detail requested.

265. The claimant was invited to a meeting with no formal agenda, but she knew it was about her job role and that it was not about her grievance or her sickness absence. We did not find evidence that it was the respondent's general practice to issue formal agenda's when inviting staff to individual meetings. We find that the lack of an agenda was not disability related.

266. The claimant was invited to a meeting with Mr Williams in November 2014. She relies on this as an act of disability harassment because she had cited him in her grievance. As we have found above, she did not lodge her grievance until 31 December 2014.

267. We have considered whether taking a lengthy period before investigating the grievance, was unwanted conduct which had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. The taking of the lengthy period was not done with the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for her. We have considered

carefully whether it had that effect and based on the claimant's evidence we are unable to find that it had such an effect. The claimant felt upset but we are unable to find that the test in section 26 is met.

268. Even if we are wrong about this, we would have found that this act of alleged harassment was out of time in any event. The investigation commenced in April 2015 and the delay in commencing the investigation ends at that point. The claim was not presented until 4 November 2016.

269. We find that the lack of an agenda for the meeting in February 2015 and the letter inviting her to a meeting in November 2014 (prior to the lodging of the grievance) also do not meet the test in section 26(1)(b).

270. Even if we are wrong about this, we would have found that these acts of alleged harassment were out of time in any event. The failure to send the agenda related to an email of 13 February 2015 and the letter inviting the claimant to a meeting with Mr Williams present was 3 November 2014. Even if the claimant showed a continuing act with the delay in commencing the investigation she would still have been significantly out of time. The claim was not presented until 4 November 2016. We have found above that she had the benefit of union representation and legal advice

271. The claim for disability harassment therefore fails.

Protected disclosures (whistleblowing detriment)

272. Of the seven whistleblowing detriments relied upon, we have found as a fact that the first and fifth took place. In relation to dismissal, this is a separate claim under section 103A Employment Rights Act 1996 (not a detriment claim under section 47B) and our finding is that the reason for dismissal was redundancy.

273. We find that the reason the respondent did not address the grievance in a timely manner or interview Ms Burrows was not because of anything the claimant had raised within the grievance or any of the other matters upon which she relies as protected disclosures. We find that they did not address it in a timely manner because they initially wanted further particulars (although we have found this was unnecessary) and because of the volume of the complaints which took Ms Homewood a great deal of time to deal with and produce her 42 page report.

274. Whilst accepting that the claimant was a litigant in person, we noted that no positive case was put by the claimant to any of the respondent's witnesses, linking the treatment of her to any disclosures made. The claimant has had the benefit of union representation and has consulted solicitors as she referred to this in her meeting with Mr Matthews on 19 August 2014. It was not put to Ms Homewood for example, that the reason she took the time she did to produce her grievance outcome was

because of disclosures made, or the reason she did not interview Ms Burrows was because of disclosures made.

275. We cannot therefore find a causal link between any disclosures relied upon and the delay in the grievance process and/or the lack of an interview with Ms Burrows, which goes to the same point. As we can find no causal link, we have not found it necessary to carry out any further analysis of the disclosures relied upon to make findings as to whether they met the statutory definition of a qualifying and protected disclosure.

276. The whistleblowing case therefore fails.

Concluding comments

277. Ultimately this claim has failed. However, we wish to comment that this is not because we considered that the respondent acted in an exemplary manner. We find they did not. It was very poor practice to take six months to deal with the grievance in these particular circumstances.

278. We have to carry out a detailed factual and legal analysis based on the agreed list of issues and having carried out that analysis the claims have ultimately failed.

Listing a provisional remedies hearing

279. The parties having had an opportunity to check their availability, we listed a provisional remedies hearing for 15 January 2018 for one day commencing at 10am.

280. We ordered that on or before 18 December 2017 there shall be disclosure of any additional remedies documentation, an updated schedule of loss and exchange (or if there is only to be a statement from the claimant) service, of a remedies witness statement.

281. As the claimant is in person we ordered that the respondent prepare the remedies bundle with sufficient copies to be brought to the hearing.

282. In the light of the above findings the remedies hearing date and the above orders are vacated.

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Employment Judge Elliott
Date: 1 September 2017