Case no. 2358072/2012

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT**
MEMBERS: **MS S DENGATE**
MS B BROWN

BETWEEN:

Mr P Mefful

Claimant

AND

Merton and Lambeth Citizens' Advice Bureau

Respondent

ON: **17, 18, 19 and 20 October 2017**
(Day 4 In Chambers)

Appearances:
For the Claimant: **In person**
For the Respondent: **Ms Y Montaz, consultant**

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. Because of a concession from the respondent, the claim for ordinary unfair dismissal succeeds.
2. There shall be no reduction in compensation for contributory fault or under *Polkey.*
3. The remaining claims fail and are dismissed.

REASONS

1. The claim form in this matter was presented on 13 November 2012. The claimant brings claims of unfair dismissal, disability discrimination and breach of contract. The issue of whether the claimant was a disabled person was determined by the tribunal as a preliminary issue and has been the subject of an appeal to the EAT in case number EAT/0127/16. The claimant has two impairments, a hearing impairment and an impediment to his left shoulder.

2. Following the decision of the EAT it has been determined that the shoulder condition amounts to a disability.

3. The respondent is part of the Citizens' Advice Bureau which operates like a franchise. The respondent has three branches, in Morden, Mitcham and Streatham.

The issues

4. The issues were identified at a telephone case management hearing before Employment Judge Spencer on 22 February 2017. We spent the first hour and twenty minutes of the hearing identifying the issues with the parties and dealing with matters such as witness availability, time tabling and identifying the applications the parties wished to make prior to the commencement of the hearing.

5. We identified and confirmed the issues based on Judge Spencer's Order, as follows:

6. What was the principal reason for the claimant's dismissal? Was it because of a protected disclosure, a protected act or for redundancy? The claimant's case is that he should have been offered the position of business manager and/or other more junior positions.

7. The respondent accepts that the claimant should have been offered the position of Business Manager and accepts that for that reason, the dismissal was unfair. However the respondent's case is that had he been offered the position he would not have remained in post beyond 12 weeks and that Polkey deductions should be made to any compensation awarded. Ordinary unfair dismissal was therefore conceded by the respondent.

8. There is a claim for automatically unfair dismissal under section 103A. It is the claimant's case that he complained to the Trustee Board that he was being bullied and sexually harassed by the Chief Executive and this 5 to was set out in his grievance letter of 21 September 2011 and in the subsequent hearing on 17 November 2011. The claimant says that this is information which tended to show a breach of a legal obligation.

9. At the start of this hearing the claimant withdrew his reliance upon his grievance of 21 September 2011 as a protected act or protected disclosure.

10. The claimant's disclosure was that on 17 November 2011 he explained to the Trustees of the respondent that his line manager, the Chief Executive, was bullying and harassing him related to sex and that he also outlined instances of examples where he thought that she had bullied him in the past. There is a dispute of fact as to whether this was

said by the claimant.

11. The claimant also brings a victimisation claim relying on the same disclosure as a protected act under section 27 Equality Act 2010.

12. The claimant's case is that the respondent decided to "push him out" when he told them he had become disabled because of his shoulder and hearing conditions and that they treated him less favourably than they treated all would have treated a nondisabled person because of his disability.

13. The claimant confirmed before Employment Judge Spencer that he was not pursuing claims for breach of contract or a reasonable adjustments complaint.

14. At a telephone hearing before me on 26 July 2017, the claimant was given leave to amend to include a claim for discrimination arising from disability under section 15 Equality Act 2010. The claimant relies on the unfavourable treatment as being his dismissal or in the alternative his selection for redundancy. What arose from his disability is said to be his disability-related absence and all the medical appointments (treatments) associated with his disabilities.

15. It is an issue for the tribunal as to whether the respondent dismissed the claimant because he had done a protected act or because he made a protected disclosure.

16. If the claimant succeeds, what is the loss flowing from his dismissal? How long would the claimant have remained employed had the respondent offered him the role of business manager? Should the respondent have offered the claimant more junior roles? If so how does that affect the award of compensation?

17. If the claimant is successful in respect of his victimisation and whistleblowing complaints, what award should be made for injury to feelings?

18. In summary therefore the issues are:

    a. What was the reason for dismissal, was it because the claimant made a protected disclosure or was it for redundancy?
    b. Was the claimant victimised by being dismissed because he had done a protected act, namely his complaint of being bullied and sexually harassed.
    c. Was the claimant dismissed because of his disability (direct discrimination) or because of something arising from his disability (section 15 claim).

19. The parties agreed that these were the issues for our determination. We also recapped the issues with the parties during the afternoon of day 1.

The parties' applications

20. The claimant sought leave to add his email of 31 October 2011 as a protected disclosure and a protected act. This had not been identified as such prior to the first day of the hearing. It had not been identified as such in the Case Management Order of 22 February 2017. The claimant had an amendment hearing before me on 26 July 2017 and it was not raised. The claimant said he had raised it in his witness statement at paragraph 17. We read this paragraph and although the claimant made reference to the email, he did not in any way indicate that he regarded it as a protected disclosure.

21. The respondent had not prepared evidence to deal with it. The proceedings are five years old. The claimant has had plenty of opportunity to raise it before today. Although he is a litigant in person he has plenty of past experience of proceedings in this tribunal and the EAT. He is aware of what is required in employment tribunal litigation. We were unanimous in refusing leave for him to include his email of 31 October 2011 as a protected act or protected disclosure. We said that the claimant could of course refer to the email in evidence.

22. On the morning of the hearing the claimant wished to renew an application to strike out the response to the claim on grounds of the respondent's unreasonable behaviour (Rule 37(1)(b)). He had made previous such applications, the first in June 2013 which was refused by Regional Judge Hildebrand. There appeared to have been a long ongoing dispute in these lengthy proceedings over the inclusion of documents in the bundle. The claimant also wished to apply to introduce new documents and this was linked to his strike out application.

23. The claimant had 12 pages of documents that he wished to introduce and to which the respondent objected. It amounted to email correspondence between the respondent and their adviser from Peninsula dated in 2012. The respondent said that the documents attracted litigation privilege as they were emails between the respondent and their Peninsula adviser.

24. The claimant said that the respondent was acting unreasonably not allowing documents in the bundle and this has been going on for the last four or five years. The bundle showed printed page numbers in the bottom right hand corner and the claimant said that these documents had already been put in his previous tribunal proceedings and therefore any privilege had been waived. The claimant said that the documents had gone into the public domain in evidence in his previous proceedings. The respondent could not confirm or deny whether these documents had been in front of the tribunal in previous proceedings. We asked the claimant to check and inform us as to when these documents had previously been before the tribunal.

25. On day 2 the claimant took us to a letter from Regional Judge Hildebrand dated 25 June 2013 in which Judge Hildebrand said in relation to these documents that the issue of privilege would be resolved at the hearing and that the claimant was to bring the disputed documents and copies to the hearing. The full merits hearing was due to take place starting on 1 July 2013. For reasons we need not go in to, the full merits hearing was converted into a Preliminary Hearing on the issue of disability. Judge Hildebrand did not know when he gave the instructions for the letter of 25 June 2013, that the full merits hearing would need to be converted to a Preliminary Hearing.

26. The Preliminary Hearing of 1 July 2013 took place before Employment Judge Hall-Smith and from our consideration of subsequent Orders made by a number of judges in the period from 2013 to date, there has been no decision or ruling on the question of these disputed documents and therefore the decision fell to us.

27. We did not admit these documents as they attract litigation privilege. The claimant accepts that the documents all amount to correspondence between the respondent and their advisers Peninsula.

28. Strike out is a draconian penalty. The case was otherwise prepared for hearing. We considered that it was not in the interests of justice to strike out the response without a hearing of the evidence when it was otherwise ready for hearing. We declined to strike out the response and proceeded to hear the case.

29. Our decisions on these preliminary issues were given orally.

Witnesses and documents

30. The tribunal heard from the claimant.

31. For the respondent the tribunal heard from two witnesses: (1) Mr Stuart Davidson, Interim Chief Executive gave his evidence by Skype. This was arranged by the respondent as he lives in the Outer Hebrides and at the date of the hearing was on the mainland of Scotland attending to his mother who was unwell. The tribunal also heard from (2) Ms Tina Harris who was a Trustee of the respondent.

32. There were witness statements for Ms Pauline Dawkins and Mr Anthony Nicholas both former Trustees of the respondent, Ms Dawkins from 2001 to 2012 and Mr Nicholas from July 2011 to June 2015. The claimant informed the tribunal at the outset of the hearing on the morning of day 1 that he had no questions in cross-examination for Ms Dawkins and Mr Nicholas. Mr Nicholas was present in the tribunal on the morning of day 1. We said that as this evidence was not challenged, we would read the statements and we would note that the claimant did not challenge the evidence. It was not therefore necessary

for Mr Nicholas to remain at the tribunal and he was released.

33. The respondent also gave the tribunal a statement from Trustee Ms Maggie Bartlett. It was unsigned, undated and the witness was not called.

Second supplementary statement Ms Tina Harris

34. The respondent wished to introduce a second supplementary witness statement for Ms Harris which was served on the claimant on or about 29 September 2017. The respondent said the statement was served late because the judgment in the claimant's other proceedings in case number 2302831/2015 had been sent to the parties on 2 May 2017 and other advisers acted for the respondent in that case.

35. The claimant told the respondent that he wanted to rely in these proceedings upon the judgment in case number 2302831/2015. The respondent considered whether they wished to appeal in that case and a decision was made not to appeal. Ms Harris's supplementary statement gave her comments on the judgment in the other case, in which she did not give evidence. There were documents attached to the statement to which the claimant also objected.

36. We did not agree to the introduction of this second supplementary statement. There has been a substantial delay in serving it, in effect just over two weeks before the start of this hearing. The respondent made a decision not to appeal the decision in case number 2302813/2015 and now wishes Ms Harris to make her comments including her disagreement with the findings of fact of that Tribunal. This is not appropriate and we do not admit the supplementary statement of Ms Harris or the documents attached to it. The claimant is entitled to rely on the findings of fact made by the tribunal in case number 2302813/2015 as it is a document of public record.

37. As to order of witnesses, normally the claimant would go first in a discrimination claim. The respondent had some difficulties in the availability of their witnesses who were no longer in the respondent's employment. The claimant objected to the respondent's witnesses going first. After discussion with both parties, the respondent explaining the availability issues and the claimant stating that he had no cross examination for Mr Nicholas and Ms Dawkins, we were able to call the claimant first followed by the two witnesses for the respondent.

Bundle and chronology

38. We had a bundle of documents of over 600 pages. There was a draft chronology from the respondent which was not agreed by the claimant. It included a short cast list.

Written submissions

39. We had detailed written submissions from both parties to which they spoke. These submissions have been fully considered even if not expressly referred to below, together with the authorities relied upon.

A supervision document from August 2011

40. The respondent introduced on day 2 an important letter from the Chief Executive to the claimant dated 19 September 2011. We had requested this. The respondent also sought to introduce on day 2 with that letter, a supervision document in respect of the claimant from August 2011. The claimant objected to its introduction. The respondent had tried to give this document to the claimant on day 1 but he had not agreed to accept it. The respondent said it was a highly relevant document.

41. We took the unanimous view that if this was such a relevant document that had been in existence since August 2011 it should have been included when the bundle was originally prepared and not introduced on day 2 of the hearing. The respondent did not say that they had just located the document but that it was an oversight. We did not agree to the respondent introducing this document so late but the respondent could of course cross-examine the claimant about his performance if they considered it relevant.

Findings of fact

42. The claimant worked for the respondent Citizens Advice Bureau from 19 January 2004 to 15 August 2012 as a Specialist Service Manager. He managed a specialised team of caseworkers and the respondent's Legal Services Commission contracts.

43. As a Specialist Services Manager he was one of three members of the Senior Management Team, the other two being the Operations Manager and the Chief Executive.

44. The background to this case is that in 2003 the claimant had a romantic relationship with Ms FP who later became the Chief Executive of the respondent. Neither the claimant nor Ms FP were employed by the respondent at the time of their relationship. It was the claimant who brought their relationship to an end in 2004. The claimant said that a reference in the documents to him distancing himself from the relationship in 2006 was a typing error. It was 2004. The claimant's case was that Ms FP treated him unfavourably in a number of different ways because of the ending of their affair.

45. The claimant's evidence was that in 2005 the Chief Executive blocked his salary increase to the next spine point within the salary scale and that he was the only person to have been treated in this manner. The claimant said he threatened to raise this matter with the Board of

Trustees and that as a result the Chief Executive changed her mind. We saw at page 229e of the bundle a letter from Ms FP to the claimant referring to meetings on 14 and 19 April 2005 and confirming that his salary would rise by one incremental point with effect from 1 April 2005.

46. The letter refers to the Chief Executive's earlier decision not to increase the claimant's pay. She said "*Please accept my apologies for the distress caused by my initial decision and my failure to take into account problems with your induction, difficult staffing issues and other factors which impacted on your ability to meet targets. You are a valued member of the service and my intention was not to belittle the significant contributions you have make (sic)….".* It is clear to us therefore that this was not a routine letter confirming an incremental salary increase.

47. The claimant also complained that on 5 July 2006 he had to raise a grievance with the Chief Executive relating to pay for additional work he had undertaken. His grievance letter was page 229h and 229i.

48. This grievance was not dealt with promptly and the claimant chased this up five months later. On 30 January 2007 Ms FP wrote to the claimant apologising for the "oversight" in failing to get back to him and setting up a grievance hearing on 12 March 2007. The claimant was ultimately awarded £500 as an ex gratia payment.

49. The claimant was upset to discover in 2008 that the Finance Officer had been given a significant pay increase of about £4,000 when he was not (page 229s).

50. In July 2008 the claimant was asked to take up extra duties when his counterpart Service Manager resigned. The claimant saw the Finance Officer's salary increase between 2008 and 2010 significantly more than his own salary, which he considered unjustified and less favourable treatment of himself. He does not challenge the increments to the Finance Officer's salary but highlighted that his own salary was not given the same consideration or treatment, notwithstanding that he took on additional responsibilities.

<u>The claimant's grievance</u>

51. The claimant did not attend work on 30 August 2011 and he does not dispute that he did not attend work in the period from 30 August to 19 September 2011.

52. On 30 August 2011 the claimant had childcare issues and problems with his shoulder condition. His childminder did not turn up on 30 August and the claimant was adamant in his evidence that he telephoned Ms FP as his line manager to explain the situation. He suggested taking the day as annual leave and Ms FP told him that he could not take annual leave so "abruptly".

53. The claimant's wife had an employment tribunal hearing on 12, 13 and 14 September 2011. The claimant represented his wife at that hearing and we saw the judgment of Employment Judge Houghton at page 551 of the bundle. The claimant had pre-arranged holiday for the three days of the tribunal hearing so that he could represent his wife.

54. On 19 September 2011 FP wrote to the claimant stating that he had been absent without authorisation since 30 August 2011. The letter (introduced on day 2 of the hearing at page 239D) said:

> *Dear Paul*
> *You have been absent from work since 30 August 2011. However, you have not been in touch with me to explain your continued absence.*
> *You should therefore contact me to discuss your current absence as a matter of urgency; otherwise I will have no option but to commence disciplinary proceedings.*

55. The letter was "pp'd" and not signed personally by FP. As FP did not give evidence to the tribunal we do not know if she approved the letter before it was "pp'd" on her behalf and sent to the claimant.

56. The claimant replied on 21 September 2011 disputing the content of that letter (page 240) by saying:

> *I am now in receipt of your letter of 19 September 2011; the letter, to me, is vexatious and I am very aggrieved by it.*
> *On 30th August I had contacted central office to notify the service of my absence from work and the reason behind that absence. Later on that day I had a telephone conversation with you and further explained in details the childcare problems I was having and to request emergency leave…… As I expressed in my email of 19th September, I am shocked and utterly surprised to have received an email from you on that same day alleging "unexplained absence from work."*

57. The claimant made reference to a possible claim for constructive dismissal in the tribunal and he asked Ms FP to retract her accusations and that if she did not he would notify the Trustees to look into the matter as a grievance issue.

58. The claimant was adamant in his evidence that he spoke to FP personally on 30 August 2011 and this is confirmed by the statement in his email sent three weeks later on 21st September. Ms Tina Harris, in her evidence, said that FP commented to her that FP did not speak to the claimant on 30 August because she (FP) was off sick at the time.

59. Ms Harris was not a first-hand witness of fact on this issue. The claimant's evidence was that when he phoned on the morning of 30 August, FP was not present at work but that he spoke to her later in the day. We find as a fact based on the claimant's first-hand evidence, bearing in mind that FP did not give evidence to the tribunal and the words in the claimant's email of 21 September 2011, that he did speak personally to FP on 30 August 2011 and this was why he was

especially aggrieved by the content of her letter of 19 September 2011.

60. The claimant followed this up with an email on 27 October 2011, page 243, again asking if Ms FP would rescind her letter of 19 September or whether the issue had been placed before the Trustees as a grievance. Ms FP replied on 28 October 2011 (page 246) setting out reasons why she had not had time to deal with the matter and saying that she had informed the Trustees of his grievance but she had not yet forwarded it to them. She said she would pass it on to the Chair of the Trustees and the Chair of the Personnel Sub-Committee.

61. The claimant replied on 31 October 2011 (also page 246). He said that he considered he was being victimised and that this was a blatant abuse of her position. He said "*On another note, I have come to believe that your attempts to ostracise me and manage me out of the service might not be unconnected to my personal relationship and history with you……. Of course anything I bring to the attention of the trustees will be backed up with graphic evidence."* It was put to the claimant in cross examination that the reference to "*graphic evidence*" was a threat to Ms FP. The claimant said that if he was disbelieved about his affair with the Chief Executive he would want to show text messages to the Trustees to provide evidence.

62. We find that the claimant was saying nothing more than he could prove the fact of the affair. It was perhaps a poor choice of wording but we find that he did not mean anything other than he could prove that the relationship took place. In any event Ms FP did not deny the relationship and Ms Harris confirmed that FP admitted it to her.

<u>The grievance hearing of 17 November 2011</u>

63. The claimant was invited to a grievance hearing on 17 November 2011. This was heard by two of the Trustees Ms Maggie Bartlett and Ms Pauline Dawkins. The claimant attended with a workplace colleague, Mr Kelvin Makanza.

64. There were two versions of the notes of this hearing, one commencing at page 252 and one at page 256. The claimant said that he had an issue with the accuracy of these notes. They were not sent to him until a few days before the Preliminary Hearing on 1 July 2013 before Employment Judge Hall-Smith. The respondent accepted in closing submissions that at this grievance hearing the claimant <u>did</u> make a complaint of bullying and harassment on the part of the Chief Executive. During cross-examination the respondent originally sought to challenge the claimant on this point, putting to him that there was no mention of this matter in the notes. We saw a large number of examples in the notes of the claimant raising the issue of bullying and harassment on the part of FP. Based on the notes we find that there was no probing on the part of Ms Bartlett and Ms Dawkins as to the extent or nature of this. We find this surprising given the seriousness of

the allegation.

65. At the hearing the claimant showed the Trustees (Ms Bartlett and Ms Dawkins) an email dated 12 February 2010 which was at page 229t of the bundle complaining to Ms FP that she had raised her voice towards him during conversations and had rubbished or dismissed his contributions to dialogue. He also informed those Trustees that in 2005 the CEO had blocked his salary at progression because she wanted to "arouse his attention".

66. At page 252 the notes show that after the process had been outlined to the claimant, the very first thing he mentioned was his complaint that he had been bullied and harassed and that he perceived this in relation to FP. The claimant told the trustees about his past relationship with FP and said he thought that she had a personal vendetta against him and he thought it might be a form of sexual harassment (his witness statement paragraph 19). He told the Trustees that he also felt that the letter of 19 September 2011 from FP indicating that he might face disciplinary action was an example of such bullying behaviour (notes page 256).

67. We saw the witness statement of one of the Trustees Ms Dawkins, whose evidence the claimant had chosen not to cross-examine. She said in paragraph 2 of her statement, "*I can confirm that he did not disclose he previously had a sexual relationship with the Chief Executive or that he was being harassed or victimised as a result of the relationship."* This statement was signed and dated on 19 August 2013.

68. Although the claimant chose not to challenge Ms Dawkins statement on this point, it contradicts the concession made by the respondent in submissions, that the claimant did complain at the 17 November 2011 hearing that he had been bullied and harassed by FP and we accept the claimant's evidence that not only did he complain about bullying and harassment by FP but that he made the link between that bullying and his past sexual relationship with FP. We also find that he said (paragraph 19 of his statement) that it might be a form of sexual harassment.

69. The respondent also submitted to the tribunal a witness statement of Ms Bartlett which was unsigned and undated and they did not call her to give evidence. This statement says at paragraph 11 that Ms Bartlett was not aware of a sexual relationship between the claimant and FP until after his dismissal. We can attach no weight to this evidence as it was unsigned, undated and the witness was not called. Our finding is therefore that the claimant complained about bullying and harassment and that he made the link between that bullying and his past relationship of a sexual nature with FP.

<u>The financial position of the respondent</u>

70. The respondent was an organisation in difficulty. In December 2010 all staff were put at risk of redundancy (page 235) but this redundancy exercise did not go through. Staff remained at risk of redundancy for over a year and this must have been demoralising for everyone.

71. In late 2011 the respondent had failed two out of three key audits and it was in crisis in its financial situation. The audits they failed were the general advice audit and the quality audit. They passed the LSC audit. The respondent was facing imminent administration or insolvency if it did not implement changes to its budget and carry out a restructure to address the multiple organisational failings. The respondent was facing suspension and even termination of its membership of Citizens Advice following the failure of the quality of advice and organisational audits. This would have prevented the respondent from tendering for new commissions and we find that this was likely to result in many more redundancies. The respondent was in the bottom 3% of CAB's in the UK.

72. In December 2011 the respondent engaged Mr Stuart Davidson as Interim Chief Executive to implement a restructure to ensure greater compliance, accountability and efficiency. Mr Davidson remained in that role until the end of June 2012. The substantive CEO, Ms FP, went on sick leave on 16 December 2011. She did not return until 11 June 2012. On Ms Harris's evidence, even when FP returned she was not working at full capacity and she eventually left the respondent's employment on 31 December 2012.

<u>The claimant's request for a pay rise</u>

73. Shortly after his arrival, Mr Davidson saw an email from the claimant to the Trustees of the respondent requesting a temporary salary increase on the grounds that he had become responsible for managing the generalist advice team since the Operations Manager had left. He was also managing the central control staff as the substantive Chief Executive Ms FP was off sick.

74. The claimant's request was considered in a meeting of the respondent's Personnel Sub-Committee on 9 January 2012 (the notes of which were at page 272). The members of the subcommittee discussed the claimant's request and they observed that another member of staff had been given a salary uplift but that this had been done prior to the current difficult financial situation. Mr Davidson wrote to the claimant on 2 March 2012 to inform him that his request had been discussed by the trustees and to invite him to an informal meeting on 12 March 2012 in order to finalise a decision.

<u>The restructure proposal</u>

75. On 10 February 2012 Mr Davidson wrote to the claimant (page 277)

informing him of the propose restructure. The letter enclosed the restructuring document proposal and a question and answer document to help set the context. Feedback was sought on the proposals by 24 February 2012 and the claimant was informed that feedback would be provided at a face-to-face meeting on the evening of Monday, 27 February 2012. The letter explained that at this meeting Mr Davidson would present an overview and there would be an opportunity to raise further questions. The letter said in bold, that all staff and volunteers were invited to the meeting.

76. The claimant did not attend this meeting on 27 February 2012 which was held between 6pm and 7:55pm (notes page 282-288). He said it was because all staff were there that he had to "hold the fort" and answer the telephone. Mr Davidson said that the meeting had deliberately been arranged after business hours so that all staff could attend and Ms Harris's evidence was that unusually all three branches of the respondent CAB were closed to allow this important meeting to take place with all staff.

77. The claimant also said that he did not attend because he already knew about the proposals and the meeting would not tell him anything he did not already know. Ms Harris's evidence was that it was important for him to attend to hear what others said and potentially to answer questions from the members of staff who reported to him. We prefer the respondent's evidence as Mr Davidson and Ms Harris corroborated one another and the meeting was held outside business hours. We find that it was the claimant's choice not to attend the meeting; all staff were invited and arrangements were made to allow them to attend and had he wished to attend, he was not prevented from doing so.

78. On 9 March 2012 the Trustee Board Chair Mr Mark Nelson wrote to all staff including the claimant regarding the restructure. The letter enclosed a briefing following the meeting on 27 February 2012. Mr Nelson informed the staff that they would be proceeding with a restructure as they believed it would deliver the benefits necessary to secure the future of the respondent. Mr Nelson said that the Board had decided that they would not implement a formal redundancy process in 2012 but they would restructure to implement a more robust and sustainable business structure. The letter was signed by Mr Davidson. On the same date, Mr Nelson sent a letter to the claimant refusing his request for a salary uplift. The letter was emailed to the claimant by Mr Davidson.

<u>Consultation process</u>

79. The claimant was invited to a meeting on 12 March 2012. By way of consultation in that meeting, the claimant suggested that he should either be assimilated into the newly created post of Business Manager or the more junior post of Volunteer Development Manager. The claimant considered that the newly created post of Business Manager

was suitable alternative employment because it was an amalgamation of his post of Specialist Services Manager and that of Operations Manager. The claimant considered it unfair and unreasonable that he should have to undergo competitive selection for the Business Manager's role.

80. The claimant was on leave in March and went off sick in April 2012. He did not return until 9 July 2012.

81. On 16 March 2012 the claimant appealed the decision not to increase his salary (299). The appeal was considered by Mr Nelson who wrote to the claimant on 14 April 2012, again the letter was signed by Mr Davidson. The salary increase was refused because the view was the claimant had failed to provide hard evidence that he had been fulfilling the Operation Manager's role (page 328a).

82. On 23 March 2012 Mr Davidson wrote to the claimant inviting him for an interview for the role of business manager to take place on 4 April 2012. The claimant maintained his position that he should not be required to undergo competitive selection for this role but said nevertheless, given his health condition, he was willing to submit to a telephone interview (email 30 March 2012 page 322-324).

83. On 18 April 2012 Mr Davidson wrote to the claimant to confirm that his post was at risk of redundancy. Mr Davidson said that over the next three weeks he would meet with the claimant and consult with him to discuss alternatives so that his employment could be protected. Mr Davidson said "*I wish to assure you that this is no reflection on your ability or commitment to the company*".

84. On 22 May 2012 Mr Davidson sent an email to Trustee Ms Harris copying the other Trustees saying "*PM has 9 lives and delay is costing us £££'s."* In evidence Mr Davidson said he was referring to the attempts the respondent had been making to bring the claimant to an interview for the Business Manager's role or to engage him within the process. Mr Davidson said that by May 2012 he considered they had made at least 9 attempts to do so.

85. By a letter dated 23 May 2012 (page 366) from Mr Davidson, the claimant was informed that he had not been shortlisted for interview for the posts of Business Manager and Volunteer Development Manager. Mr Davidson said that as a senior manager the claimant had failed to respond to requests for direct feedback during the consultation process and had not taken any opportunity to engage in the restructuring process. Mr Davidson considered that the claimant had isolated himself from opportunities to contribute to the business review or discussions on his potential redundancy.

86. The claimant replied on 25 May 2012 by email (page 368) saying that he considered that his redundancy dismissal was a foregone conclusion.

The decision to dismiss

87. On 28 May 2012 there was a Redundancy Panel Discussion. The participants were Trustees Mr Geoff Chapman, Mr Jason Gold and Ms Pauline Dawkins. Mr Davidson attended as a notetaker. The notes of this meeting were at page 374-375. They considered that the Business Manager role and the Volunteer Development Manager role were not comparable to the claimant's role as Specialist Services Manager. They concluded that the respondent had made reasonable attempts to bring the claimant to interview. They considered that the claimant had not demonstrated that he could fulfil the Business Manager or Volunteer Development Manager roles within a period of three months of redeployment. They concluded that they were able to make reasonable adjustments and that the claimant's employment should be terminated.

88. The rationale for the decision came at the end of the meeting under point 6 in the notes, in answer to the question, whether the employment contract of the claimant should be terminated on grounds of redundancy. The Trustees found that the claimant had failed to supply evidence to defend the retention of his role or evidence to support his appointment to the two alternative roles. The note of the meeting said: "*The panel noted that PM was clearly attempting to intimidate by his behaviour toward the business in both email communication and general lack of engagement and that the threat to the business would not diminish by further attempts to sustain his employment while seeking his engagement in [the respondent's] redeployment and redundancy procedures. The panel considered they had no option but to dismiss the [claimant] from his employment….by way of redundancy and provide him with contractual notice from Monday 28th May 12".*

Suspending the decision to dismiss

89. On 31 May 2012 the claimant emailed Mr Davidson to say that he anticipated being well enough to return to work on 1 July 2012 and hoped he would be able to participate in interviews. We noted an email at page 377k dated 31 May 2012 from Trustee Ms Maggie Bartlett to Peninsula (in respect of which privilege had been waived as it was in the joint bundle) saying "*Paul seems to be outlining that he has a disability*". We find that this goes to the issue of knowledge of disability.

90. On 1 June 2012 Mr Davidson wrote to the claimant (page 378) acknowledging his email of 31st May notifying of a prospective return to work. He said that the redundancy panel convened on 28 May but the implementation of their decision had been suspended to 2 July to allow the claimant a final opportunity to present himself or evidence to support his position within a redundancy interview. The last sentence of that letter (page 379) said "*If you have not engaged with the process before or on that date then the panel will need to reach its decision on the potential redundancy".*

The claimant's return to work

91. On 9 July 2012 the claimant returned to work from sick leave. He met with Mr Anthony Nicolas who was a Trustee of the respondent from July 2011 until June 2015. The first part of the meeting dealt with the claimant's return to work and a discussion about his shoulder condition. The meeting then moved on to a consultation meeting within the redundancy and restructure process. The notes of the meeting were at page 393. Ms FP was present at the meeting as a notetaker. The claimant told Mr Nicholas that his health was still "very impaired" and that he was still seeking treatment for his shoulder. He told Mr Nicholas that he could not lift his hand above his shoulder and he was having physiotherapy.

92. Mr Nicholas went on to ask the claimant why he had not participated in the restructure process or applied for the Business Manager's role. The claimant said he did not think it was fair that he should have to compete for the role and the respondent has subsequently conceded that the claimant should have been offered this role on a trial basis for three months. At that meeting Mr Nicholas said that no decision had been made at that stage to make the claimant redundant. This was not correct because the decision had been made at the Redundancy Panel Meeting on 28 May 2012 and had been suspended when the claimant said he would be returning to work.

93. On 25 July 2012 the claimant attended the interview for the role of Business Manager and was unsuccessful. We make no further finding in relation to that interview or its outcome in the light of the respondent's concession that the role should have been offered to the claimant on a trial basis. The claimant was informed of the decision by letter from Ms Dawkins and Mr Nicholas dated 1 August 2012 (page 414).

94. It took from 23 March to 25 July 2012 to bring the claimant to an interview for the Business Manager role, a period of four months. This coupled with the claimant's non-attendance at the all-staff meeting on 27 February 2012 and his lack of expression of interest in other roles (such as the Volunteer Development Manger role) led the respondent to the view that the claimant was deliberately failing to engage with the restructure and redundancy process. During the majority of the four-month period, the claimant was off sick with a disability-related illness. It was also his view, correctly, based on the respondent's concession in these proceedings, that he should not have to undergo competitive selection for the Business Manager role.

95. The claimant was issued with notice of redundancy on 14 August 2012 (page 416-417). His termination date was given as 15 August 2012. The claimant was paid a statutory redundancy payment. He brings no claim for notice pay.

The appeal against dismissal

96. The claimant was given a right of appeal against dismissal to Ms Tina Harris a Trustee. He exercised that right of appeal by email dated 21 September 2012, page 438. He complained of victimisation for initiating a bullying and harassment grievance against the chief executive and said he thought his dismissal was motivated by his past relationship with the chief executive. He considered the dismissal unfair and an act of disability discrimination. He did not mention whistleblowing within this appeal email.

97. The tribunal heard evidence from the appeal officer Ms Harris. She told the tribunal that she carried out an investigation in connection with the appeal but she was very unclear as to what she had actually done within that investigation. She said she spoke to the relevant individuals but the only person she could name was the Finance Officer and we were not told the outcome of any discussion with him. As Ms Harris could not tell the tribunal what she had actually done within this investigation and there was a complete absence of paperwork to support it, we find that no such investigation took place.

98. We also asked Ms Harris if she knew who made the decision to dismiss. She could only assume and she did not know who made the decision to dismiss. The claimant considered that the decision was made by Ms FP as she had sent the dismissal letter on 14 August 2012. We find that the decision was made by the redundancy panel on 28 May 2012. That decision was postponed to see whether the claimant would be successful in the interview for Business Manager.

99. We were not told by the respondent how they arrived at the final decision to dismiss, after the claimant had been unsuccessful at the Business Manager interview. We were not told whether it was the interviewers for that role, the Chief Executive who sent the dismissal letter or whether it reverted by to the decision makers of 28 May 2012. In any event we find that it was an inevitable outcome of the failure to secure the Business Manager's role. The appeal outcome letter said on page 476 that Ms Harris was confirming the decision taken by the Redundancy Panel, although Ms Harris was not able to tell the tribunal this in evidence. There was no evidence of the panel being reconvened after the interview on 26 July 2012.

100. We find that the appeal process was lacking in many respects. The appeal officer did not know whose decision she was reviewing nor could she remember any documents she considered in carrying out that review. We have found that she did not carry out any investigation. There was no paperwork to support anything that she did within the appeal process other than the outcome letter.

101. Surprisingly there were 2 versions of the appeal outcome letter in the

bundle, one starting on page 460 dated 4 December 2012 and one on page 470 dated 7 December 2012. The claimant said he received the longer letter of 7 December starting at page 470 and this was confirmed by Ms Harris.

102. Ms Harris sent her lengthy appeal outcome letter to the claimant on 7 December 2012 (page 470-476). The claimant did not attend the appeal hearing so Ms Harris considered a written document from him. One of the reasons for the length of the outcome letter was that it included the claimant's representations followed by Ms Harris's responses. The letter was "pp'd" on Ms Harris's behalf.

The claimant's ill-health absence

103. On 10 January 2012 the claimant sent an email to Mr Davidson informing him of a hospital appointment to treat his left shoulder. He said (page 273) "*You may not be aware, but since May of last year I have had a constant unbearable discomfort that is constantly shooting pain from my neck into my left arm and shoulder setting; I'm currently taking medication for this but the pain is constant and sometimes unbearable*."

104. This email alerted Mr Davidson to the fact that the shoulder condition had persisted at that stage for eight months and that the claimant was in considerable discomfort and taking medication for the pain which was sometimes on bearable.

105. In relation to the claimant's sickness absence, we adopt the findings of the tribunal in the case between the same parties, case number 2302813/2015, paragraph 5. The claimant had two significant periods of absence during his employment, the first being in 2010 for a period from 9 November 2009 to 10 January 2010. The second period was in 2012 due to pain with his shoulder and subsequently due to a hearing impairment. The tribunal in case number 2302813/2015 found that in 2012 the claimant was off sick for 63 working days due to his disability from 4 April to 8 July 2012. By the date of the claimant's dismissal in August 2012, the shoulder condition had lasted for more than 12 months. We saw his sick notes in the bundle from pages 30 to 32.

The claimant's performance

106. The respondent sought to criticise the claimant's work performance. The claimant managed two Legal Services Commission (LSC) Caseworkers, Ms Adeoye and Ms Nguru. The LSC casework was not underperforming. The claimant also managed two Money Advice Caseworkers, Ms Walker and Ms Tsivanidis, and this service was underperforming. The difficulty for the respondent, which seeks to argue that the claimant would have been dismissed in any event for poor performance, is that they were not carrying out any performance management. By 2012 the claimant had been employed by the

respondent for eight years. He had never been performance managed. Neither had he performance managed any members of his team. The lack of poor performance management was one of the reasons the respondent failed its quality audit.

107. In paragraph 14 of Mr Davidson's first witness statement he said that whilst there had been complaints about the claimant's management of his duties, they considered that this would not be looked into until after the redundancy process. We find that the respondent made a conscious decision not to performance manage pending the outcome of the restructure/redundancy exercise.

108. It was put to the claimant in cross-examination that an aspect of his job role was to manage and quality assure a minimum of two initiatives, one of which was social policy (claimant's job description page 75). One of the respondent's audit failures was the lack of a social policy plan. No such document could be located by the auditors although the claimant alleged that it "resided with the Chief Executive". Had the document been with the Chief Executive we find on a balance of probabilities that the auditors would have located it and we find it implausible that there was no draft and no more than one copy of it in existence. We find on a balance of probabilities that the claimant had not prepared it. There was however no management of the claimant to ensure that he achieved the objectives of his job description.

<u>The redundancy situation</u>

109. We heard evidence from Mr Davidson as to the extremely difficult financial situation faced by the respondent. We saw the respondent's financial reserves analysis for 2012/2013 and this factored in a redundancy cost for the claimant (page 304). We saw notes of a Trustee Board Meeting held on 26 March 2012 when the budget position was discussed. Reserves were due to drop to £80,000 for that year and Trustee Mr Jason Gold said that if reserves went under £100,000 the respondent was at risk (page 314). We find that this means at risk of closure.

110. We asked the claimant whether he accepted that there was a genuine redundancy situation at the respondent. He said he did not accept this. He said in his oral submissions that he accepted that there needed to be a restructuring exercise and that his role should be deleted because the LSC had stopped funding the organisation within the charity business. What he did not accept that was that there was no role for him to move in to.

111. We find based both on the evidence from Mr Davidson of the respondent's dire financial situation and on the claimant's own acceptance that there needed to be a restructure and his role should be deleted, that there was a genuine redundancy situation. We also find based on the respondent's concession that there was a role for the

claimant to move into and this was the Business Manager role.

Special leave

112. It was put to the claimant that he had abused the respondent's Special Leave policy in August/September 2011 and that this could have resulted in is dismissal for gross misconduct. In Ms Harris's witness statement she made the point that the claimant had taken an extraordinary amount of special leave. On 6 January 2012 Mr Davidson retrospectively approved the claimant's special leave for August/September 2011 (page 270). The respondent produced no evidence to support the assertion that the claimant had abused the Special Leave policy (the policy was at page 134 of the bundle).

113. The claimant said he had not abused the Special Leave policy but agreed in principle that if an employee abused any policy, that was a matter that would need to be dealt with. Once again the difficulty for the respondent was the lack of any performance management in relation to the claimant's absences.

The reason for dismissal

114. We have considered our finding of fact as to the reason for dismissal. We find that the reason for dismissal was redundancy. Although the claimant did not accept that there was a genuine redundancy situation, in oral submissions he accepted that there needed to be a restructuring exercise and that his role should be deleted.

115. The claimant did not accept that was that there was no role for him to move in to. We find that the situation facing the respondent with audit failures and severe financial difficulties meant that the restructure was essential to its survival. The claimant accepts that his role should be deleted and we agree and find that there was a genuine redundancy situation. The fact that the respondent concedes that they should have redeployed the claimant into the Business Manager's role does not go to the issue of whether there was a genuine redundancy situation. It goes to the fairness of the redundancy process and the requirement to offer suitable alternative employment.

116. Given the respondent's concession, we have not considered it necessary to explore whether there were any other roles which the respondent should have offered to the claimant.

The law

117. 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.

118. In relation to the *Polkey* issue the claimant drew to the tribunal's attention the decision of the EAT (McMullen J) in the case of ***Evans v Capio Healthcare (UK) Ltd EAT/0143/04/*** which held that the employment tribunal had wrongly used the *Polkey* principle following an unfair dismissal finding going to the heart of the unfairness, and after a finding that respondent's attempt to find alternative work was a sham.

119. 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.

120. 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.

121. 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.

122. One of the leading authorities on the burden of proof in discrimination cases is ***Igen v Wong 2005 IRLR 258***. That case makes clear that at the first stage the Tribunal is to assume that there is no explanation for the facts proved by the claimant. Where such facts are proved, the burden passes to the respondent to prove that it did not discriminate.

123. Lord Nicholls in ***Shamoon v Chief Constable of the RUC 2003 IRLR 285*** said that sometimes the less favourable treatment issues cannot be resolved without at the same time deciding the reason-why issue. He suggested that Tribunals might avoid arid and confusing disputes about identification of the appropriate comparator by concentrating on why the claimant was treated as he was, and postponing the less favourable treatment question until after they have decided why the treatment was afforded.

124. In ***Madarassy v Nomura International plc 2007 IRLR 246*** it was held that the burden doers not shift to the respondent simply on the claimant establishing a different in status or a difference in treatment. Such acts only indicate the possibility of discrimination. The phrase "could conclude" means that "a reasonable tribunal could properly conclude from all the evidence before it that there may have been discrimination".

125. In ***Hewage v Grampian Health Board 2012 IRLR 870*** the Supreme Court endorsed the approach of the Court of Appeal in ***Igen Ltd v Wong*** and ***Madarassy v Nomura International plc***. *The judgment of Lord Hope in* ***Hewage*** *shows that* it is important not to make too much of the role of the burden of proof provisions. They require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

126. Showing that conduct is unreasonable or unfair is not, of itself, enough to transfer the burden of proof - ***Bahl v Law Society 2003 IRLR 640 (EAT).***

127. The courts have given guidance on the drawing of inferences in discrimination cases. The Court of Appeal in ***Igen v Wong*** approved the principles set out by the EAT in ***Barton v Investec Securities Ltd 2003 IRLR 332*** and that approach was further endorsed by the Supreme Court in ***Hewage*****.** The guidance includes the principle that it is important to bear in mind in deciding whether the claimant has proved facts necessary to establish a prima facie case of discrimination, that it is unusual to find direct evidence of discrimination.

128. 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.

129. 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.*

130. The Court of Appeal held in ***Gallop v Newport City Council 2014 IRLR 211***, that it is 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.

<u>Protected disclosures</u>

131. 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.

132. Section 43B(1) of the Employment Rights Act 1996 defined a qualifying disclosure at the relevant time as follows:

> *(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure 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."*

133. The public interest test was not introduced until 25 June 2013 and as such is not applicable to this case. At the material time in these proceedings, for a disclosure to attract the statutory protection, it had to be made in good faith. This requirement was also repealed on 25 June 2013.

134. 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.

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

136. 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.

137. 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".*

138. 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.

139. 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*".

Conclusions

Protected disclosure

140. We have found above that the claimant made a disclosure in the 17 November 2011 grievance hearing that he had been bullied by Ms FP and that he linked this to their past sexual relationship and that he considered it a form of sexual harassment. The claimant relies upon this as an act of whistleblowing and the old law (pre 25 June 2013) applies. The claimant therefore does not have to satisfy a public interest test.

141. Under the old law set out in ***Parkins v Sodhexo 2002 IRLR 109*** the claimant can rely on a breach of his own contract of employment. The claimant relies upon this disclosure as information tending to show that a person, namely the respondent, had failed to comply with a legal obligation, this being the legal obligation to protect him from bullying, harassment and including harassment of a sexual nature or related to sex. The complaint made by the claimant was that he was being bullied and harassed by the Chief Executive and that this was related to a past sexual relationship. We find that the disclosure did tend to show such a failure to comply with a legal obligation.

142. Under the old law there was also a requirement that the disclosure should be made in good faith and this was challenged by the respondent. The respondent submitted that it was not made in good faith because the claimant was using it as a means of persuading FP to retract her letter of 19 September 2011 and that he had no reasonable belief in the bullying and harassment allegations because there were only two such allegations in the notes of the 17 November meeting.

143. We have found above that the claimant spoke to FP on 30 August 2011, the first day of a period of absence and that this was the reason he was especially aggrieved to receive her letter of 19 September 2011 set out above. We find that in saying that if she did not retract the letter he would "humbly request" that she notify the Trustees to look into it as a grievance issues, he was not acting in bad faith.

144. The claimant was entitled to take the position that if that of 19 September 2011 letter stood, he wished his email to be considered as a grievance. Employees have a right both under the terms of the respondent's grievance procedure and under an implied term within the contract of employment, to raise a grievance if they are aggrieved about a matter. It is not bad faith to say that if there is an issue that cannot be resolved, the claimant would like it dealt with as a grievance. This was a perfectly proper route for the claimant to take.

145. We find that the claimant made his disclosure on 17 November 2011 in good faith.

Protected act

146. The respondent submitted that the claimant did not say that he was being subjected to sexual harassment by Ms FP and that as such, his disclosure at the 27 November 2011 grievance hearing cannot amount to a protected act under section 27(2)(d) of the Equality Act. Our finding above is that the claimant complained about bullying and harassment and that he made the link between that bullying and his past relationship of a sexual nature with FP. We also found that the claimant said at the grievance hearing that the bullying and harassment might be a form of sexual harassment because of the past relationship. This is enough on our finding to amount to an allegation that FP had contravened the Equality Act 2010 and we find that the claimant did a protected act on 27 November 2011.

Knowledge of disability

147. The respondent submitted that the respondent did not know and could not be reasonably expected to know that the claimant had an impairment which met the legal definition of disability. The respondent's submission was that by the end of May 2012 and during the redundancy panel discussions in May 2012 his Tinnitus condition appeared to be the main problem.

148. In submissions paragraph 15, bullet point 5, the respondent said "*However, if the ET holds that the test is knowledge that C suffered from an impairment, regardless of whether the impairment met the legal definition of disability, such knowledge is admitted*."

149. We agree with this submission. The employer does not have to have the word "disabled" spelt out to them. The claimant had made his symptoms clear to Mr Davidson and to Mr Nicholas in the return to work meeting on 9 July 2012. It was clear that he had a significant impairment in his shoulder that caused significant pain and which required treatment and medication. It resulted in long term sickness absence supported by sick notes. We find that the respondent either knew or ought reasonably to have known that the claimant was a disabled person because of his shoulder condition and therefore they

had knowledge of the disability at the date of the claimant's redundancy dismissal.

150. We are supported in our finding by the email from Ms Bartlett dated 31 May 2012 in which she acknowledged that the claimant appeared to be saying that he had a disability. The respondent was on sufficient notice of the facts of the claimant's condition to have knowledge of disability.

<u>The reason for dismissal and the discrimination and whistleblowing claims</u>

151. We have found above that the reason for dismissal was redundancy.

152. We have considered whether the claimant was dismissed as an act of victimisation for raising at the grievance hearing his bullying and harassment complaint against FP.

153. The claimant chose not to cross-examine Ms Dawkins who was a witness who was both at the grievance hearing of 17 November 2011 and on the Redundancy Panel which made the initial decision to dismiss on 28 May 2012. The allegation that the dismissal was because of the protected act was not put to any of the respondent's witnesses.

154. We have otherwise found no evidence to connect the protected act and the dismissal. Our finding is that the reason for dismissal was redundancy. The claimant accepted that there was a need for his post to be deleted and a need for a restructure. We find that in those circumstances the burden of proof did not pass to the respondent.

155. We have considered whether the claimant was dismissed because of his disability. The claimant did not put to any of the respondent's witnesses that they dismissed him because of his disability or as a result of something arising from his disability, namely his lengthy sickness absences and the need for time off for treatment.

156. We find that had the respondent wished to dismiss the claimant because of his lengthy sickness absences, they had plenty of opportunity to manage the claimant within a capability process. Instead of this, they suspended the decision to dismiss, initially made on 28 May 2012, to allow the claimant time to undergo the interview for the Business Manager's role to see whether they could retain him in employment. Our finding is that had they wished to dismiss him because of his disability or because of his disability related absences, there was no need to afford him that opportunity. Just because the claimant has a disability and was dismissed does not automatically mean that there was disability discrimination and he has not discharged the initial stage of the burden of proof.

157. We have considered whether the respondent dismissed the claimant because he made a protected disclosure. We find that they did not, for

the same reasons as we have set out in relation to his protected act.

Polkey issue

158. The claimant asserts, and we agree and find that the respondent is not in a position to say that they would have dismissed the claimant for poor performance in any event, when they had not brought any poor performance to his attention in a formal manner and given him an opportunity to improve.

159. It is far too speculative to say that had the claimant been placed in performance management, he would have failed. Any *Polkey* reduction has to be on the basis of a fair dismissal. A proper performance management process should give the employee the support and/or any training he needs and provide an opportunity for improvement. We are unable to find that the claimant would not have improved and we make no *Polkey* reduction in this respect.

160. The respondent also asserts that the basis upon which they would and should have deployed the claimant into the Business Manager's role, was on a three-month trial basis and that he would have failed the trial.

161. A statutory trial period is four weeks and not three months. The claimant had sufficient continuity of employment such that if he was not performing well in the role after three months, the respondent would be required to performance manage him before they could carry out a fair dismissal. Again we find that it is too speculative to say that he would have failed in the Business Manager's role without him even having started in that role. We also had no evidence or explanation to show why the respondent had chosen a period of three months.

162. We have also found above, based on Mr Davidson's evidence, that the respondent had made a conscious decision not to performance manage the claimant pending the redundancy exercise. We find that having made this decision, it is not open to the respondent to rely upon poor performance as a means of seeking to reduce compensation payable to the claimant.

163. The respondent also seeks to rely on the possibility that they may have dismissed the claimant for gross misconduct, for example for alleged abuse of the Special Leave Policy. The claimant rightly accepted that an employee who "abused" a policy should have this addressed with him or her. It requires a proper disciplinary procedure with properly formulated disciplinary charges and with sufficient particulars to enable the claimant to answer the case against him. There was no clear evidence or records as to the special leave, other than Mr Davidson retrospectively granting special leave with this email of 6 January 2012.

164. We are unable to find that had a disciplinary case been put to the claimant in relation to special leave, that he would have been dismissed

for gross misconduct. The claimant would no doubt have wished to explain his position on the leave that he took and we cannot find that dismissal would have been the inevitable outcome.

165. We decline to make any *Polkey* reduction for the claimant.

Contributory fault

166. The respondent seeks to rely on the claimant's failure to engage with the restructure/redundancy process and a failure to engage with the audit failures as warranting a reduction in compensation for contributory fault. Alternatively or additionally the respondent relied on what was said to be an aggressive tone taken by the claimant in his emails with the Chief Executive (FP).

167. An award for contributory fault applies if the tribunal finds that there was action on the part of the claimant which was culpable or blameworthy, that it actually caused or contributed to the dismissal and that it is just and equitable to reduce the award by any proportion specified.

168. The reason for dismissal was redundancy. This was the respondent's own case and we have found in their favour on this. The claimant did not cause the redundancy situation. He may have played a part in the audit failure but this was an across the organisation issue and not individual to the claimant. The claimant was not responsible for the organisation's financial situation. His emails to the Chief Executive were not causative of his dismissal, even on the respondent's case.

169. The respondent has made a great deal out of the claimant's failure to engage with the process, yet they accept that they should have redeployed him into the Business Manager's role. A delay of four months from March to July 2012 could have been avoided if they had done this.

170. We find that the claimant did not contribute to his redundancy dismissal by his own culpable or blameworthy conduct and it is not just and equitable to make any such reduction. We also highlight that in respect of any performance failings by the claimant, the respondent had made a conscious decision not to performance manage him pending the redundancy exercise so that it is not open to them to rely on any issues of underperformance. They had not drawn this to the claimant's attention or given him an opportunity to improve.

Remedy hearing

171. As the claim for unfair dismissal succeeds (on the respondent's concession) we discussed with the parties, at the conclusion of the liability hearing, the need to fix a date for a remedy hearing. After some discussion with the parties and an exploration of non-availability dates with the parties we said that the administration would identify a date

and the parties would be notified.

172. The parties shall give consideration to how they say the issue of remedy should be dealt with in the light of the tribunal's judgment in case number 2302831/2015. We were told that a remedy hearing had not yet been fixed in that case.

_____

Employment Judge Elliott
Date: 20 October 2017