Case Number: 2501191/2016

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mrs C Shield	**AND**	**Newcastle City Council**

Heard at: North Shields

On: **20,21,23,24,29,30 November, 1,4 ,5 and 6 December 2017**

Deliberations : **24 January 2018**

Before: **Employment Judge Shepherd**

Members: Mr R Dobson
Mr M Ratcliffe

Appearances

For the Claimant: **Ms Hall (The claimant's sister-in-law)**
For the Respondent: **Mr Stubbs**

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claims of disability discrimination are not well-founded and are dismissed.

2. The claim of detriment on the ground that the claimant has made a protected disclosure pursuant to section 47B of the Employment Rights Act 1996 is not well-founded and is dismissed.

REASONS

1. The claimant initially represented herself but then requested that she be represented by Ms Hall, her sister-in-law. The respondent was represented by Mr Stubbs.

2. The first day of this hearing was a reading day. The respondent had provided the Tribunal with a chronology, reading list, the agreed issues and cast list by email on 15 November 2017. The claimant indicated that she had had no part in preparing the suggested reading list. It was indicated to the claimant that this was a suggested reading list and that other documents would be referred to during the course of the hearing and, if she required the Tribunal to consider any specific document, then she should ensure that the Tribunal was referred to the relevant document.

3. The Tribunal had sight of a bundle of documents consisting of three lever arch files and, together with documents added during the course of the hearing, was numbered up to page 1858. The Tribunal considered those documents to which it was referred by the parties.

4. The Tribunal heard evidence from:

Christine Shield, the claimant;
Paul Gilroy, Unison representative;
Jane Whiteley, HR Adviser:
Frank McEnaney, Senior Manager;
Angela Jamson, Social Care Commissioner;
Rachel Baillie, Assistant Director;
Helen Purdon, Human Resources Adviser;
Julie Scotland, Service Manager;
Jackie Lowes, Operational HR Lead Specialist;
Alison McDowell, Assistant Director.

The issues

5. The issues to be determined by the Tribunal had been agreed by Mr Stubbs and Mr Horan, counsel previously instructed by the claimant, and were annexed to the case management orders provided at a preliminary hearing on 10 November 2017. These issues were discussed at the start of this hearing. It was agreed that those were the issues to be determined by the Tribunal. The agreed issues were as follows:

AGREED LIST OF ISSUES (and dispute)

Reasonable Adjustment Claim s20/21

1. Did R impose a PCP of requiring C to work from the office in afternoons/a requirement to return to the office following afternoon appointments?
2. Was C placed at a substantial disadvantage as a result of the PCP in comparison with employees who were not disabled?
3. Did R know or ought R to have reasonably known that C was disabled and her disability placed her at a substantial disadvantage at the time?
4. Did R fail to make reasonable adjustments in failing to allow C to work from home on afternoons following home visits?

In the alternative – s15 claim:

5. Was there a change in the home working arrangement in relation to C upon her return to work post phased return from 7 May 2015?
6. If so has R treated C unfavourably because of this because of something arising in consequence of C's disability?
7. If so, can R show that alleged treatment is a proportionate means of achieving a legitmate aim?

Protected Acts/Alleged Protected Disclosures – s47B ERA and 27 Eq Act

8. It is admitted that:
   a. C raised home working in the afternoons with OH on 14th April 2015 and at a meeting with Frank McEnaney ("FMcE") on 24th April 2015;
   b. That C repeated this request through her TU Rep Mr Gilroy on 1st June 2015 (denied that FMcE said "in a nutshell I do not think that there is anything wrong with her")
   c. C raised a formal grievance against FMcE on or about 2nd December 2015 raising C's request for reasonable adjustment and other matters;
   d. C appealed against the outcome of the grievance on 11th February 2016; and
   e. Within the contents of the papers provided for the disciplinary hearing by C she indicated that she would commence a claim for disability discrimination in the ET and raised concerns regarding alleged denial of documents as well as alleged breaches of the Data Protection Act and Employment Practices Data Protection Code.

9. It is denied and/or C is put to proof on the matter and so it is in issue whether:
   a. C told FMcE that due to his alleged continued refusal to consider C's request for adjustments re home working she would submit a formal grievance on or about 3rd July 2015?
   b. C emailed Ewen Weir on 29th February 2016 with further information highlighting a failure to comply with the Equality Act 2010 and policies and guidance of R?

10. Do the above at 8 and 9 (if proven) constitute protected acts in that they were:

   a. C doing something for the purposes of or in connection with the Equality Act 2010? Or

   b. C making an allegation that FMcE or R or another employee of R had contravened the Equality Act 2010?

11. In relation to the above at 8 and 9 (if proven):

a. Do those matters communicate information sufficient to mean they could qualify as protected disclosures?

b. Did C have a reasonable belief that the information disclosed tended to show:

i. That R or one of its officers had failed, was failing or was likely to fail to comply with an obligation under the Equality Act 2010?

ii. That the health and safety of C was being endangered? or

iii. That information tending to show any matter falling within i or ii above had been or was likely to be deliberately concealed?

c. Was the alleged disclosure made in the public interest?

d. Was the alleged disclosure made in good faith?

12. If the above constitute protected acts and/or protected disclosures did they (a) cause or (b) have a material influence on:

a. C being suspended?

b. The instigation of the investigation into the alleged misconduct of C and/or the making of allegations against her?

c. The widening of the allegations faced by C?

d. The recommendation to proceed to a disciplinary hearing?

e. The original dismissal of C? (only victimisation claim)

f. The failure to hear C's grievance appeal prior to the decision to dismiss her?

Alternative s15 Claims to victimisation/PIDA claims

13. Alternatively to 12 above did the alleged detriments amount to unfavourable treatment because of something arising in consequence of C's disabilities?

14. If so, can R show that the alleged detriments were a proportionate means of achieving a legitimate aim, namely the investigation and sanctioning of misconduct?

Alternative Harassment Claim – s26 Equality Act to Victimisation/PIDA claims

15. Did the alleged detriments at 12, taking into account C's perception, the circumstances of the case and the whether it is reasonable for the conduct to have that effect, constitute unwanted conduct which had the purpose or effect of:

a. violating C's dignity; or

b. creating an intimidating, hostile, degrading, humiliating or offensive environment for C?

16. If so was that conduct related to C's disabilities?

Dismissal – s15 and 26 Equality Act (for s27 claim see above at 12 e.)

17. Did the dismissal arise because of something in consequence of C's disabilities:

a. Can C prove that the dismissal:

i. Arose due to her requests for reasonable adjustments?

ii. Arose due to R's failure to make reasonable adjustments?

iii. Arose due to R's desire to avoid dealing with C's grievance which raised the failure to make reasonable adjustments?

iv. Arose as C had a target on her back due to her disabilities?

b. If so was that dismissal due to something arising in consequence of C's disabilities?

18. If so, can R show that the alleged detriments were a proportionate means of achieving a legitimate aim, namely the investigation and sanctioning of misconduct?

19. Did the dismissal, taking into account C's perception, the circumstances of the case and whether it is reasonable for the conduct to have that effect, constitute unwanted conduct which had the purpose or effect of:

a. violating C's dignity; or

b. creating an intimidating, hostile, degrading, humiliating or offensive environment for C?

20. If so was that conduct related to C's disabilities?

6. Having considered all the evidence, both oral and documentary, the Tribunal makes the following findings of fact on the balance of probabilities. These written findings are not intended to cover every point of evidence given. These findings are a summary of the principal findings the Tribunal made from which it drew its conclusions:

6.1. The claimant was employed by the respondent as a Welfare Rights Officer from 24 September 2007.

6.2. The claimant had a complex medical history and it was accepted by the respondent that the claimant had the following disabilities:

Diabetes – this was a declared disability at the commencement of the claimant's employment with the respondent;
Chronic Atypical Migraine – April 2015;
IBS and Overactive bladder – the respondent accepts it had knowledge of this in April 2015;
Depression and Anxiety – throughout the claimant's employment with the respondent.

The respondent also admitted that the claimant suffered from the following conditions but it was stated that it did not have enough evidence to accept that they amounted to a disability:

Cervical spondylosis;
Morton's Neuromas;
Tachycardia;
Fatty Liver disease;
Bilateral Carpal Tunnel Syndrome.

6.3. The claimant says that she was granted reasonable adjustments including the permission to work from home following afternoon visits in or around April 2013. The evidence of Frank McEnaney was that the claimant would ask and, if possible, Mr McEnaney would grant a request to work from home. There was evidence within the documents of requests from the claimant to work from home as a result of health problems in May 2014, July 2014 and April 2015 when this was granted. There was no evidence of any specific request to work from home due to health issues arising from her disability that had been refused. The Tribunal is satisfied that the claimant was permitted to work from home when it was requested if there was work to be done and it was operationally viable.

6.4. The claimant was absent from work from 3 July 2014 until 23 March 2015. The reason for this absence was stated to be headache in the fit notes provided by the claimant's GP. The claimant had undergone investigations by a neurologist and a cardiologist. The claimant returned to work on 23 March 2015. She was provided with a four-week phased return to work which included the claimant being allowed to end the working day from home following home visits.

6.5. On 14 April 2015 an Occupational Health report was provided by Amanda Scott in which it was stated:

> "Ms Shield reports that she returned to work on 23.03. 2015. She experienced some stress on return to work as she realised that she was upset about her colleague's lack of contact during her extended absence. She indicates she has now reconciled to this. However with this anxiety and in combination with her prescribed medication it had

> exacerbated the side-effects (tachycardia and excessive perspiration) which has also flared up her irritable bowel. Ms Shield indicates she has been feeling tired and requests whether she could work flexibly over the next couple of weeks – if she could work from home following her visits in an afternoon this would be preferable. It would probably benefit her in the long term if she were able to work from home following her visits on a more permanent basis but this would need to be considered if it were feasible against service delivery requirements."

6.6. The claimant's phased return to work was extended for a further two weeks. On 24 April 2015 Frank McEnaney wrote to the claimant following an informal attendance meeting. In that letter it was stated:

> "You had raised with OH working from home following home visits on a more permanent basis. As above-mentioned, this has been agreed as part of a phased return and operationally I could not accept this as an option. We discussed striving to find a balance that was suitable for you in relation to your 2 appointments/home visits which would allow you to feel comfortable. We also discussed that you should not sit at your desk for prolonged periods in order to prevent pain and stiffness. If you decide to end your working day after a home visit then, as applies to all colleagues, an adjustment should be sent via Zeus to record this."

6.7. On 1 June 2015 Paul Gilroy, claimant's Trade Union representative, met with Frank McEnaney. At that meeting there were two issues discussed, the recording of the claimant's sickness absence, and whether it should be covered by Disability Related Special Leave, and the question of managing the claimant's disability through working from home in the afternoons. With regard to the Disability Related Special Leave, Mr McEnaney said that this was not applicable in this case as the absence had been recorded as headaches. Paul Gilroy said that Mr McEnaney informed him that he was not aware of the other conditions to which Paul Gilroy was referring, which were diabetes and IBS and that he didn't really believe the claimant was ill. Frank McEnaney said that he explained that, in respect of working from home, Paul

Gilroy had said that the claimant needed to be close to a toilet. Mr McEnaney said that he explained that the toilets were in close proximity to the claimant's workstation. Paul Gilroy said that the claimant felt that she was now unable to eat at work for fear of needing the toilet. Mr McEnaney said that, as he sat at the next desk to the claimant, this was "observationally untrue". Frank McEnaney also said that he explained to Paul Gilroy

> "…the service's reduced capacity in staff, our requirement to be a front facing service, for the requirement for officers to undertake triage and emergency duties. I also said that, if an officer wishes to request to work from home this would be decided upon the reasoning and the nature of the work."

6.8. On 3 July 2015 Frank McEnaney met with the claimant on a scheduled 1:1 meeting. The claimant said that Paul Gilroy had informed her after the meeting on 1 June 2015 that Mr McEnaney did not believe that she was ill. The claimant said, during an investigatory meeting on 12 November 2015 with Frank McEnaney, that:

> "Sometime after this conversation you approached me and said that the working from home did not have to be a formal arrangement, it could be agreed as a 1–2–1 thing between you and I like I had done before"

Frank McEnaney placed no importance on this meeting as it was not a new agreement and he had allowed the claimant to work from home on a case-by-case basis with prior authority as he had done in the past. This ensured that operational requirements were met but would also aid the claimant should she be particularly unwell. This arrangement worked well from April 2015 to September 2015. He said he did not regard the conversation on 3 July 2015 to be of any significance and the claimant did not raise the question of working from home on a permanent basis again.

6.9. The claimant told the Tribunal that everything had gone well since 3 July 2015 and her previously harmonious working relationship with Frank

McEnaney returned to how it had been. She considered the issue to be resolved and there was no longer a need to submit a grievance. The claimant said that she altered her pattern of work following this. The flexi-working records showed that she had worked from home on substantially more days on the occasions that Frank McEnaney was away on annual leave.

6.10. On Frank McEnaney's return to work on 1 September 2015 following a period of leave, he was informed by Gary Webb, Welfare Rights Manager, that he had been concerned about the claimant's movements. Gary Webb had said that there had been a number of occasions when the claimant's whereabouts were unknown. Mr McEnaney said that he had planned to raise the concerns with the claimant in his next 1:1 meeting with her. He also decided to wait for the claimant to put some outstanding adjustments through the system in order to see if there were any concerns about those.

6.11. The claimant went on annual leave on 9 September 2015. She was due to return to work on 30 September 2015. On 29 September 2015 the claimant was asked not to attend her place of work but to attend a meeting.

6.12. On 30 September 2015 the claimant attended a meeting with Frank McEnaney together with Paul Gilroy, her Trade Union representative. Questions were put to the claimant relating to the flexible working policy and car mileage claims system.

6.13. On 1 October 2015 Frank McEnaney wrote to the claimant indicating that she was suspended from duty whilst investigations were carried out. It was indicated that he had reports that there were suspected abuse of the respondent's flexible working policy and car mileage policy and a failure to follow instructions not to work from home.

6.14. The claimant attended an investigatory interview on 12 November 2015. The claimant was accompanied by Paul Gilroy and Jane Whitely, HR adviser, also attended. Following this meeting Frank McEnaney carried out further

investigations into the records with regard to the claimant's mileage claims and flexible working claims and interviewed other members of staff.

6.15. Further investigatory meetings were held with the claimant on 26 November 2015 and 2 December 2015. She was accompanied at each of these meetings by Paul Gilroy. At these meetings Frank McEnaney raised issues with regard to the claimant receiving a gift and whether this was in breach of the respondent's policies. Mr McEnaney also raised issues with regard to a number of emails related to personal matters. During his investigations he had gained access to the claimant's email account which he said was carried out following her assertions that this could demonstrate that she worked from home on the date in question. The claimant indicated that she had a folder marked personal in her outlook account in order to keep them safe.

6.16. On 2 December 2015 the claimant submitted a grievance against Frank McEnaney in relation to his failure to consider reasonable adjustments and the suspension and investigation. The disciplinary investigation was suspended.

6.17. Angela Jamson, Social Care Commissioner was appointed to deal with the grievance. A grievance meeting took place on 6 January 2016. The claimant was accompanied by Paul Gilroy.

6.18. On 4 February 2016 Angela Jamson wrote to the claimant providing the outcome of her grievance. The grievance was not upheld and Angela Jamson stated within that letter:

> "Although I have not upheld your grievance I have noted that one of the outcomes you requested was that your informal agreement to work from home be made formal. While I have not found that you had any informal agreement in place I am of the opinion that my investigation has highlighted some issues, noted above, in relation to the management of your long-term conditions, which need to be considered and responded to by your manager."

6.19. On 11 February 2016 the claimant submitted an appeal against the grievance decision.

6.20. It was decided to continue with the investigation. Jane Whiteley said that it was hoped that the investigation was drawing to a close and given that the grievance had not been upheld and, due to the length of time the investigation had already taken, it was decided that Frank McEnaney would remain the investigating officer.

6.21. On 24 February 2016 Frank McEnaney wrote to the claimant indicating that it had been agreed with the claimant's Trade Union representative that he would send the claimant questions in writing.

6.22. On 11 March 2016 the claimant provided a response to the questions which related to the email policy and personal documents which had been stored on the claimant's computer.

6.23. On 15 March 2016 Frank McEnaney wrote to the claimant indicating that the investigation had been concluded and he decided that the matter was to proceed to a disciplinary hearing.

6.24. On 17 March 2016 Rachel Baillie, Assistant Director of Commissioning and Procurement, wrote to the claimant indicating that she had considered the claimant's comments in relation to the outcome of the grievance and had decided to exercise her discretion to 'call in' the outcome of the process for review prior to presentation to the appeals panel.

6.25. On 13 April 2016 the claimant was written to and required to attend a formal disciplinary hearing. It was stated:

> "The purpose of the hearing is to enable you to respond to the allegation(s) that you have:

- Breached the council's flexi scheme by falsely accruing flexi credits on 49 occasions over an 18 week period.
- Abused the Council's travel expenses procedure by making false car mileage claims.
- Breached the Council email and messaging policy by using the systems for non-business purposes and continued to act on emails whilst clocked in for work.
- Breached the Councils Code of Conduct for Employees covered in section 6 and 12 (f).

1. Carried out private work relating to the Council without permission from your Director in order to gain benefits for herself, her family or her friends
2. Undertaken work relating to private interests during normal working hours
3. Used Council facilities and equipment for private matters
4. Borrowed property from a client that you provided a service to.

- By your actions have fundamentally breached the mutual trust and confidence between employer and employee.

This hearing will be held under Stage Three of the formal disciplinary procedure. As such, consideration will be given to the termination of your employment."

6.26. On 17 May 2016 Rachel Baillie sent the claimant the 'call in of grievance outcome' the summary of her findings was as follows:

- "I uphold your claim that the original grievance investigation was based on a more limited scope than the terms of your grievance as submitted. The findings of this review will therefore take precedence over the original findings.
- I am unable from the documentary evidence to establish whether or not your conditions should be regarded as

relevant under the Act, but equally I can find no evidence that you yourself made a formal and specific declaration of disability to the Council as your employer in relation to any particular condition. I do not agree that the consideration given to your request for homeworking was limited to consideration of its relevance to a limited range of your health needs. The decision made by Mr McEnaney to decline your request for permanent homeworking was based on the operational needs of the service. You were free to use the flexible working arrangements in relation to any or all of your health-related requirements. I am therefore unable to uphold your claim that your request was considered in relation to only one or some of your health needs.

- I do not agree that there is any conflict between Mr McEnaney's clear indication to you that the service was unable to support permanent homeworking arrangements, and your ongoing use, with Mr McEnaney's knowledge, of the Councils flexible working policy and ad hoc arrangements to work from home. I am therefore unable to uphold your claim that Mr McEnaney either deliberately or inadvertently prevented you from perceiving the need for or submitting a grievance in relation to your request for homeworking of April 2015."

6.27. A stage three disciplinary hearing commenced on 14 July 2016. The hearing was chaired by Julie Scotland, Services Manager advised by Helen Purdon, HR adviser. The claimant was present and represented by Paul Gilroy of Unison. The management case was presented by Frank McEnaney together with support from Jackie Lowes, HR Operational Lead. The hearing was adjourned and reconvened on 18 July 2016.

6.28. On 25 July 2016 Julie Scotland wrote to the claimant providing the outcome of the hearing. This letter went through the allegations against the claimant and set out the conclusions reached. It was stated:

> "On the balance of probabilities the allegations were substantiated. The mitigation presented prior to, and throughout the hearing was not sufficient to justify your actions.
>
> Having taken this into account I have decided that you should be dismissed on the grounds of gross misconduct."

6.29. On 2 August 2016 the claimant appealed against the decision to dismiss. Her letter of appeal went through each of the allegations and concluded:

> "I do not agree with the decisions made "on balance" and certainly do not agree that any one allegation in isolation warrants a dismissal on grounds of gross misconduct. An aggregation of allegations which warrant a lesser sanction for each one should not result in an overall decision of gross misconduct and dismissal without notice which has effectively deprived me of my grievance appeal being heard by a panel to include an elected member."

6.30. On 27 October 2016 the claimant presented a claim to the Employment Tribunal for unfair dismissal and disability discrimination.

6.31. On 28 November 2016 the claimant's appeal against dismissal was heard by a panel consisting of two elected members and a Director, Alison McDowell advised by Jackie Lowes, Operational HR. The claimant was represented by Paul Gilroy. The management statement of case was presented by Julie Scotland.

6.32. On 13 December 2016 Councillor Rob Higgins wrote to the claimant confirming the decision. This was set out as follows:

> "The panel took the view that a fair and thorough investigation had been undertaken and that the investigation had been

> undertaken in line with the Council's Disciplinary Procedure. However, decided that the management decision to dismiss on grounds of gross misconduct was not proportionate in the circumstances and that your appeal should be upheld. The Panel decided that you should, instead, be issued with a Stage 2 Final Written Warning. It must be stressed that any repetition of similar or of different offences which constitute misconduct will result in consideration being given to more serious disciplinary action.
>
> This warning will remain on your personal file for 12 months.
>
> In arriving at this decision the Panel are in no way belittling the seriousness of your actions and were concerned at the poor judgment you demonstrated across the breadth of your practice as a Welfare Rights Officer."

6.33. At a Preliminary Hearing on 17 February 2017 the claimant accepted that her claim of unfair dismissal should be dismissed and it was so dismissed.

6.34. The grievance appeal hearing took place on 5 June 2017 the hearing was chaired by Councillor Jacqui Robinson accompanied by Ewen Weir, Director of People, and Terry Welsh (GMB) supported by Alizon Carr Operational HR. The claimant was represented by Paul Gilroy. Rachel Baillie presented the management case accompanied by Angela Jamson.

6.35. On 16 June 2017 Councillor Robinson wrote to the claimant confirming that the panel had unanimously rejected the claimant's appeal. It was also stated that:

> "Having considered carefully the information put before the Appeal Panel, we were satisfied that the resolution you initially sought through the grievance process, and reconfirmed as

pertinent to the Appeal, which was to work from home in the afternoon, is now in place. Situated in a different service to operate as a Welfare Rights Officer, subject to review, and reporting to a different manager on a daily basis, you reported your satisfaction with the arrangement that has been in place since February 2017."

The law

7 **Discrimination arising from Disability**

Section 15 of the Equality Act 2010 states:

"(1) A person (A) discriminates against a disabled person (B) if –

(a) A treats B unfavourably because of something arises in consequences of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Sub-Section (1) does not apply if A shows that A did not now, and could not reasonably have been expected to know, that B had the disability.

Under section 15 of the Equality Act 2010 (discrimination arising from the consequence of a disability) there is no requirement for a claimant to identify a comparator. The question is whether there has been *unfavourable* treatment: the placing of a hurdle in front of, or creating a particular difficulty for, or disadvantaging a person; see Langstaff J in **Trustees of Swansea University Pension & Assurance Scheme & Anor v Williams UKEAT/0415/14** at paragraph 28. As the EAT continued in that case (see paragraph 29 of the Judgment), the determination of what is unfavourable will generally be a matter for the Employment Tribunal.

8 The starting point for a Tribunal in a section 15 claim has been said to require it to first identify the individuals said to be responsible and ask whether the matter complained of was motivated by a consequence of the Claimant's disability; see **IPC Media Ltd v Millar [2013] IRLR 707**: was it because of such a consequence?

9 The statute provides that there will be no discrimination where a respondent shows the treatment in question is a proportionate means of achieving a legitimate aim or that it did not know or could not reasonably have known the Claimant had that disability.

10 **Duty to Make Reasonable Adjustments**

Section 20 of the Equality Act 2010 states:

> "(1) Where this Act imposes a duty to make reasonable adjustments of a person, this Section, Sections 21 and 22 and the applicable schedule apply; and for those purposes a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements,
>
> (3) The first requirement is a requirement, where 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 take to avoid the disadvantage.
>
> (4) The second requirement is a requirement, where a physical feature 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.
>
> (5) The third requirement is a requirement, where the disabled person would, but for the provision of an auxiliary aid, be put 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 provide the auxiliary aid".

S 21 Failure to comply with duty

(1) A failure to comply with the first, second or third requirement is a failure to comply with a duty to make reasonable adjustments.

(2) A discriminates against a disabled person if A fails to comply with that duty in relation to that person.

(3) A provision of an applicable Schedule which imposes a duty to comply with the first, second or third requirement applies only for the purpose of establishing whether A has contravened this Act by virtue of subsection (2); a failure to comply is, accordingly, not actionable by virtue of another provision of this Act or otherwise.

11 Under sections 20 and 21, discrimination by reason of a failure to comply with an obligation to make reasonable adjustments, the approach to be adopted by the Tribunal was as set out in **Environment Agency v Rowan [2008] ICR 218,** where it was indicated that an Employment Tribunal must identify the provision, criterion or practice ("PCP") applied by or on behalf of the respondent and also the non-disabled comparator/s where appropriate, and must then go on to identify the nature and extent of the substantial disadvantage suffered by the claimant. Only then would it be in a position to know if any proposed adjustment would be reasonable.

12 **Harassment**

Section 26 of the Equality Act provides

(1) A person (A) harasses another (B) if--

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of--

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account--

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

13 **Victimisation**

Section 27 of the Equality Act provides as follows:-

(1) A person (A) victimises another person (B) if A subjects B to a detriment because--

(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act--

(a) Bringing proceedings under this Act;
(b) Giving evidence or information in connection with proceedings under this Act;
(c) Doing any other thing for the purposes of or in connection with this Act;

(d) Making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

14 **Burden of Proof**

Section 136 of the Equality Act 2010 states:

"(1) This Section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But sub-Section (2) does not apply if (A) shows that (A) did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or Rule.

(5) This Section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to –

(a) An Employment Tribunal."

15 Guidance has been given to Tribunals in a number of cases. In **Igen v Wong [2005] IRLR 258** (a sex discrimination case decided under the old law but which will apply to the new Equality Act) and approved again **in Madarassy v Normura International plc [2007] EWCA 33.**

16 To summarise, the claimant must prove, on the balance of probabilities, facts from which a Tribunal could conclude, in the absence of an adequate explanation that the respondent had discriminated against him. If the claimant does this, then the respondent must prove that it did not commit the act. This is known as the shifting burden of proof. Once the claimant has established a prima facie case (which will require the Tribunal to hear evidence from the claimant and the respondent, to see what proper inferences may be drawn), the burden of proof shifts to the respondent to disprove the allegations. This will require consideration of the subjective reasons that caused the employer to act as he did. The respondent will have to show a non-discriminatory reason for the difference in treatment. In the case of Madarassy the Court of Appeal made it clear that the bare facts of a difference in status and a difference in treatment indicate only a possibility of discrimination: "They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".

17 In **Tarbuck v Sainsbury's Supermarkets Limited [2006] IRLR 664** the EAT said that an employer's failure to make an assessment of a disabled employee is not of itself a failure to make areasonable adjustment. This was followed by the EAT in **Scottish & Southern Energy v Mackay UKEAT LL75/06**.

18 **Employment Rights Act 1996**

47B Protected disclosures

(1) 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.

43A Meaning of "protected disclosure"

In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

43B Disclosures qualifying for protection

(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--

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,

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

(e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere,

and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).

43C Disclosure to employer or other responsible person

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith--

(a) to his employer, or

(b) where the worker reasonably believes that the relevant failure relates solely or mainly to--

(i) the conduct of a person other than his employer, or

(ii) any other matter for which a person other than his employer has legal responsibility,

to that other person.

(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.

19 The definition of a qualifying disclosure breaks down into several elements which the Tribunal must consider in turn.

Disclosure

20. In **Cavendish Munro Professional Risks Management Limited – Geduld 2010 IRLR 37** Slade J stated:

> "That the Employment Rights Act 1996 recognises a distinction between "information" and an "allegation" is illustrated by the reference to both of these terms in S43F……It is instructive that those two terms are treated differently and can therefore be regarded as having been intended to have different meanings……the ordinary meaning of giving "information" is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. 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. In the employment context, an employee may be dissatisfied, as here, with the way he is being treated. He or his solicitor may complain to the employer that if they are not going to be treated better, they will resign and claim constructive dismissal. Assume that the employer, having received that outline of the employee's position from him or from his solicitor, then dismisses the employee. In our judgment, that dismissal does not follow from any disclosure of information. It follows a statement of the employee's position. In our judgment, that situation would not fall within the scope of the Employment Rights Act section 43 … The natural meaning of the word "disclose" is to

> reveal something to someone who does not know it already. However s43L(3) provides that ”disclosure” for the purpose of s 43 has the effect so that “bringing information to a person’s attention” albeit that he is aware of it already is a disclosure of that information. There would be no need for the extended definition of “disclosure” if it were intended by the legislature that “disclosure” should mean no more than “communication”.

Simply voicing a concern, raising an issue or setting out an objection is not the same as disclosing information. The Tribunal notes that a communication – whether written or oral – which conveys facts and makes an allegation can amount to a qualifying disclosure.

21. In **Kilraine –v- London Borough of Wandsworth UKEAT/0260/15** Langstaff J stated:

> “I would caution some care in the application of the principle arising out of **Cavendish Munro**. The particular purported disclosure that the Appeal Tribunal had to consider in that case is set out at paragraph 6. It was in a letter from the Claimant’s solicitors to her employer. On any fair reading there is nothing in it that could be taken as providing information. 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”.

22. In **Chesterton Global Ltd -v- Nurmohamed [2015] IRLR** Supperstone J stated:

> “I accept Ms Mayhew’s submission that applying the **Babula** approach to section 43B(1) as amended, the public interest test can be satisfied where the

basis of the public interest disclosure is wrong and/or there was no public interest in the disclosure being made provided that the worker's belief that the disclosure was made in the public interest was objectively reasonable. In my view the Tribunal properly asked itself the question whether the Respondent made the disclosures in the reasonable belief that they were in the public interest…… The objective of the protected disclosure provisions is to protect employees from unfair treatment for reasonably raising in a responsible way genuine concerns about wrongdoing in the workplace (see **ALM Medical Services Ltd v Bladon** at paragraph 16 above). It is clear from the parliamentary materials to which reference can be made pursuant to **Pepper (Inspector of Taxes) v Hart** [1993] AC 593 that the sole purpose of the amendment to section 43B(1) of the **1996 Act** by section 17 of the 2013 Act was to reverse the effect of **Parkins v Sodexho Ltd.** The words "in the public interest" were introduced to do no more than prevent a worker from relying upon a breach of his own contract of employment where the breach is of a personal nature and there are no wider public interest implications. As the Minister observed: "the clause in no way takes away rights from those who seek to blow the whistle on matters of genuine public interest" (see paragraph 19 above)…… I reject Mr Palmer's submission that the fact that a group of affected workers, in this case the 100 senior managers, may have a common characteristic of mutuality of obligations is relevant when considering the public interest test under section 43B(1). The words of the section provide no support for this contention……. In the present case the protected disclosures made by the Respondent concerned manipulation of the accounts by the First Appellant's management which potentially adversely affected the bonuses of 100 senior managers. Whilst recognising that the person the Respondent was most concerned about was himself, the tribunal was satisfied that he did have the other office managers in mind. He referred to the central London area and suggested to Ms Farley that she should be looking at other central London office accounts (paragraph 151). He believed that the First Appellant, a well-known firm of estate agents, was deliberately mis-stating £2-3million of actual costs and liabilities throughout the entire office and department network. All this led the Tribunal to conclude that a section of the public would be affected and the public interest test was satisfied".

23 The Tribunal has considered the judgment in the recent case of **Parsons v Airplus UKEAT/0111/17/JOJ** in which Eady J considered whether a disclosure was in the public interest in accordance with the Chesterton Global test and said :

> "Crucially, the ET made no finding that the Claimant's disclosure was in anything but her own interest; see paragraph 56. And, although I take Mr Grant's point that a failure to comply with the provisions of the Companies Act in respect of certain minute taking obligations could be a matter in the public interest, I am ,however, not concerned with a hypothetical case: here, neither the evidence nor the ET's findings go so far. On the Claimant's own evidence (having regard to the note provided by the Employment Judge in this respect), she was simply asking about minutes of compliance decisions. On the ET's finding, when she was asked why, she explained it was because she was concerned to make sure she was protected if any suggestion she had given was not followed. I am unable to see the basis for the contention that the ET ought properly to have found that the Claimant's desire to ensure her advice was recorded so she might not herself face criticism in the future was a matter of public interest."

Reasonable Belief

24. In **Darnton v University of Surrey** and **Babula v Waltham Forest College 2007 ICR 1026** it was confirmed that the worker making the disclosure does not have to be correct in the assertion he makes. His belief must be reasonable. In **Babula** Wall LJ said:-

> "… I agree with the EAT in **Darnton** that a belief may be reasonably held and yet be wrong… if a whistle blower reasonably believes that a criminal offence has been committed, is being committed or is likely to be committed. Provided that his belief (which is inevitably subjective) is held by the Tribunal to be objectively reasonable neither (i) the fact that the belief turns out to be wrong – nor (ii) the fact that the information which the claimant believed to be true (and may indeed be true) does not in law amount to a criminal offence – is in my judgment sufficient of itself to render the belief unreasonable and thus deprive

> the whistle blower of the protection afforded by the statute… An employment Tribunal hearing a claim for automatic unfair dismissal has to make three key findings. The first is whether or not the employee believes that the information he is disclosing meets the criteria set out in one or more of the subsections in the 1996 Act section 43B(1)(a) to (f). The second is to decide objectively whether or not that belief is reasonable. The third is to decide whether or not the disclosure is made in good faith".

Legal Obligation

25. A disclosure which in the reasonable belief of the employee making it tends to show that a breach of legal obligation has occurred (or is occurring or is likely to occur) amounts to a qualifying disclosure. It is necessary for the employee to identify the particular legal obligation which is alleged to have been breached. In **Fincham v HM Prison Service** EAT0925/01 and 0991/01 Elias J observed: *"There must in our view be some disclosure which actually identifies, albeit not in strict legal language, the breach of legal obligation on which the worker is relying."* In this regard the EAT was clearly referring to the provisions of section 43B(1)b of the 1996 Act.

26. The Tribunal has noted the criticism by the EAT in **Fincham** of the decision of the Employment Tribunal in that case that a statement made by the claimant to the effect "*I am under pressure and stress"* did not amount to a statement that the claimant's health and safety was being or at least was likely to be endangered.

27. In the case of **Eiger Securities LLP v Korshunova** UKEAT/0149/16/DM Slade J stated:

> "The identification of the obligation does not have to be detailed or precise but it must be more than a belief that certain actions are wrong. Actions may be considered to be wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation. However, in my judgement the ET failed to decide whether and if so what legal obligation the claimant believed to have been breached."

28. In **Goode –v- Marks and Spencer plc UKEAT/0042/09** Wilkie J stated the judgment of the EAT at paragraph 38 to be:

> "…the Tribunal was entitled to conclude that an expression of opinion about that proposal could not amount to the conveying of information which, even if contextualised by reference to the document of 11 July, could form the basis of any reasonable belief such as would make it a qualifying disclosure."

Method of Disclosure

29. The claimant in this case seeks to rely upon disclosure to the respondent and section 43C of the 1996 Act provides:-

> "A qualifying disclosure is made in accordance with this section if the worker makes the disclosure in good faith –
>
> (a) to his employer…..".

30. It is, in some cases, appropriate to distinguish between the disclosure of information and the manner of its disclosure but in so doing the Tribunal must be aware not to dilute the protection to be afforded to whistleblowers by the statutory provisions: **Panayiotou –v- Kernaghan 2014 IRLR 500.**

31. The Tribunal had the benefit of written submissions together with further oral submissions provided by the representatives. These were helpful. They are not set out in detail but both parties can be assured that the Tribunal has considered all the points made and all the authorities relied upon, even where no specific reference is made to them.

32. In her written submissions Mrs Hall referred to the following cases although she did not indicate the issue to which these were relevant save for BT v Pousson in relation to the implementation of Occupational Health advice, Barbulescu v Romania in relation to access to employees' emails, Cavendish Munro v Geduld and Kilraine v

London Borough of Wandsworth in relation to public interest disclosures. The Tribunal considered these authorities where relevant.

Carreras v United First Partners Research UKEAT/0266/15/RN
Nottingham City Transport Limited v Harvey UKEAT/0032/1
Griffiths v The Secretary of State for Work & Pensions [2015] EWCA Civ 12652/JOJ
Lamb v The Business Academy Bexley UKEAT/0226/15/JOJ
Cavendish Munro Professional Risks v Geduld EAT/0195/09/DM
Kilraine v London Borough of Wandsworth UKEAT/0260/15/JOJ
BT v Pousson EAT/0347/04
Barbulescu v Romania [**2017**] ECHR 754

33. Mr Stubbs referred to the cases of
Kilraine v London Borough of Wandsworth,
Cavendish Munro v Geduld,
Chesterton v Nurmohamed,
Chief Constable of West Yorkshire Police v Khan
Fecitt v NHS Manchester [2012] ICR 372.
Secretary of State for DWP v Alam [2010] ICR 665
The Tribunal considered these cases where relevant in their deliberations.

Conclusions

34. The Tribunal considered the agreed list of issues as follows:

> **1. Did the respondent impose a provision criterion or practice of requiring the claimant to work from the office in afternoons/a requirement to return to the office following afternoon appointments?**

35. Mrs Hall, on behalf of the claimant referred to the letter of 27 April 2015 which she said confirmed Frank McEnaney's refusal of an extension in respect of permission to work from home in afternoons following home visits after the phased return. Mr Stubbs, on behalf of the respondent submitted that the respondent did not

apply a provision criterion or practice of requiring the claimant to work from the office in afternoons/requirement to return to the office following afternoon appointments at all times. The PCP that was applied was that of requiring the claimant to work from the office in afternoons where it was operationally impractical to allow her to go home.

36. The Tribunal found the evidence of the Frank McEnaney to be clear and credible in this regard. He said that the claimant was able to work from home on a case-by-case basis with prior authority from himself and that she had done so on many occasions. There was documentary evidence of such requests having been granted. There was no evidence of any such request having been refused. The Tribunal is satisfied that the claimant and other employees were permitted to work from home when requested if there was work to be done and it was operationally viable.

2. Was the claimant placed at a substantial disadvantage as a result of the PCP in comparison with employees who were not disabled?

37. The claimant had been allowed to go home when she had made a request. The arrangement had worked in the past. The claimant referred to the effects of her IBS and diabetes being worse in the afternoon after eating and that the symptoms could be unpredictable and result in an urgent need to use the toilet. The claimant referred to being embarrassed to ask. Mr Stubbs submitted that this was not a substantial disadvantage and was something the claimant had managed in the past. He referred to Rachel Baillie's evidence that she had stated

> "My view was that whilst the claimant perceived and asked for a reasonable adjustment, these arrangements could be achieved from the arrangements already in place for all staff."

The Tribunal is not satisfied that the claimant was placed at a substantial disadvantage.

3. Did the respondent know or ought the respondent to have reasonably known that the claimant was disabled and her disability placed her at a substantial disadvantage at the time?

38. The respondent was aware that the claimant was disabled.
There was no evidence of the claimant being refused a specific request to work from home as a result of issues with her disability. The Occupational Health report referred to a probable benefit in the long term if the claimant was able to work from home following her visits on a more permanent basis if it was feasible against service delivery requirements. It was submitted by Mr Stubbs that the claimant's IBS was said to flareup, it was not constant and a blanket policy for something that flares up is not the appropriate way of dealing with it and dealing with it on a case-by-case basis is much more suited to alleviate any disadvantage suffered.

39. The Tribunal is not satisfied that the respondent knew or ought to have reasonably known that the claimant was placed at a substantial disadvantage.

4. Did the respondent fail to make reasonable adjustments in failing to allow the claimant to work from home on afternoons following home visits?

40. The claimant was allowed to work from home on a case-by-case basis when it was operationally viable. This arrangement had worked well from April 2015 to September 2015.

41. The role carried out by the claimant required her to carry out 'triage' and face-to-face meetings with service users. There had been significant reductions in the number of staff and there was credible evidence from Frank McEnaney that the claimant needed to be in the office in order to carry out the operational requirements and in order to cover triage and unexpected emergencies. A designated officer was agreed with the Trade union and staff in respect of triage and was expected to be in the office.

42. An adjustment which allowed the claimant to work from home every afternoon was not a reasonable adjustment.

43. The adjustment was provided that the claimant could work from home when she requested it and it was operationally viable was a reasonable adjustment.

5. Was there a change in the home working arrangement in relation to the claimant upon her return to work post phased return from 7 May 2015?

44. It was submitted by Mrs Hall that the claimant requested permission to work at home for any exceptional issues after May 2015. She also submitted that there was a definite change to the recording of hours after 3 July 2015.

45. Mr Stubbs submitted that there was no change other than the claimant going home without permission where there was no evidence of work being carried out.

46. The Tribunal is not satisfied that there was any change in the home working arrangement from 7 May 2015 following the claimant's phased return to work. The claimant continued to be allowed to work from home when requested and when operationally viable and permission had been given.

6. If so has the respondent treated the claimant unfavourably because of something arising in consequence of the claimant's disability?

47. It was submitted by Mrs Hall that the claimant believed that the catalyst for the disciplinary action to be taken against the claimant by Frank McEnaney was a request for a reasonable adjustment to work from home in the afternoon following home visits.

48. Mr Stubbs indicated that the respondent was unable to follow this claim and that the claimant's version of the new agreement reached on 3 July 2015 made no sense. The claimant did not change her practice.

49. The Tribunal had some difficulty with regard to the claimant's submissions on this issue. It was thought that the unfavourable treatment to be considered was the alleged change in working arrangements after the claimant's phased return to work. 50. However, for the sake of clarity, the Tribunal is not satisfied that it was shown that the disciplinary action taken against the claimant was as a result of her request for a

reasonable adjustment. The disciplinary action was by reason of concerns raised by another manager, Gary Webb, to Frank McEnaney in September 2015 with regard to the work patterns and the whereabouts of the claimant on a number of occasions. This was not established to be by reason of something arising in consequence of the claimant's disability.

7. If so, can the respondent show that alleged treatment is a proportionate means of achieving a legitmate aim?

50. Mr Stubbs submitted that, if necessary (although he said that this claim was not understood), the respondent's legitimate aim was having sufficient staff work to maintain an operationally viable service. The respondent's proportionate means of doing this was to look at requests on a case-by-case basis and, whenever possible, allowed them.

51. The Tribunal had some difficulty following the claimant's claim in this regard in view of the submission that the unfavourable treatment was disciplinary action, whereas the issue had been stated as an alternative to the reasonable adjustment claim and with regard to the alleged change in the home working arrangement following the phased return to work.

52. Once again, for the sake of clarity, the Tribunal is satisfied that, if it had been shown that there was unfavourable treatment by a change in working arrangements, then the respondent has shown that it was proportionate to allow the claimant to work from home following a request and when it was operationally viable, and the legitimate aim was that of having sufficient staff to maintain the service. If the unfavourable treatment was the instigation of and carrying out of the disciplinary action against the claimant then that had been shown that it was not by reason of the claimant's disability and, if so, it was a proportionate means of achieving the legitimate aim of the investigation and sanctioning of misconduct.

8. **It is admitted that:**

a. The claimant raised home working in the afternoons with Occupational Health on 14th April 2015 and at a meeting with Frank McEnaney ("FMcE") on 24th April 2015;

b. That Claimant repeated this request through her Trade Union Rep Mr Gilroy on 1st June 2015 (denied that FMcEnaney said "in a nutshell I do not think that there is anything wrong with her")

c. The claimant raised a formal grievance against FMcEnaney on or about 2nd December 2015 raising the claimant's request for reasonable adjustment and other matters;

d. The claimant appealed against the outcome of the grievance on 11th February 2016; and

e. Within the contents of the papers provided for the disciplinary hearing by the claimant she indicated that she would commence a claim for disability discrimination in the ET and raised concerns regarding alleged denial of documents as well as alleged breaches of the Data Protection Act and Employment Practices Data Protection Code.

9 It is denied and/or the claimant is put to proof on the matter and so it is in issue whether:

a. the claimant told FMcE that due to his alleged continued refusal to consider the claimant's request for adjustments re home working she would submit a formal grievance on or about 3rd July 2015?

b. The claimant emailed Ewen Weir on 29th February 2016 with further information highlighting a failure to comply with the Equality Act 2010 and policies and guidance of respondent?

53. It was submitted by Mr Stubbs that issues 8 and 9 only set out the alleged protected disclosures.

54. He said that the claimant had not advanced issues 8a or 9b as protected disclosures in her statement, which is the totality of evidence in chief that she is entitled to provide. They cannot therefore proceed.

55. It was not accepted that the claimant told Frank McEnaney that she would submit a formal grievance due to alleged failure to consider her request for reasonable adjustments on 3 July 2015. The issue therefore becomes issues 10 and 11 – whether issue 8b-e and 9a (if proven) constitute protected acts and/or protected disclosures.

10 Do the above at 8 and 9 (if proven) constitute protected acts in that they were:

a. The claimant doing something for the purposes of or in connection with the Equality Act 2010? Or

b. The claimant making an allegation that FMcE or the respondent or another employee of the respondent had contravened the Equality Act 2010?

56. It was accepted by the respondent that the issues 8c-e could constitute protected acts. With regard to issue 8b, it was submitted that this concerns a discussion between the claimant's Trade Union representative and Frank McEnaney, not the claimant and it is not a protected act by the claimant. The Tribunal accepts this submission.

57. The Tribunal has considered all of these alleged protected acts. In view of the respondent's admission in respect of a number of these issues that they accept could be protected acts, the Tribunal is satisfied that the claimant had made protected acts and has gone on to consider issue 11 and 12.

11 In relation to the above at 8 and 9 (if proven):

a. Do those matters communicate information sufficient to mean they could qualify as protected disclosures?

b. Did the claimant have a reasonable belief that the information disclosed tended to show:

i. That respondent or one of its officers had failed, was failing or was likely to fail to comply with an obligation under the Equality Act 2010?

ii. That the health and safety of the claimant was being endangered? or

iii. That information tending to show any matter falling within i or ii above had been or was likely to be deliberately concealed?

c. Was the alleged disclosure made in the public interest?

d. Was the alleged disclosure made in good faith?

58. It was submitted by Mrs Hall on behalf of the claimant that the disclosure was to provide evidence that there had been a systematic breach of statutory obligations under the Equality Act 2010 and that there had also been breaches of the internal sickness management policy. The grievance appeal highlighted a failure to fully address the grievance/protected disclosure.

59. With regard to whether the disclosure was made in the public interest, it was submitted on behalf of the claimant that the disclosure was made at the time of the budget setting exercise for the financial year. Government funding cutbacks were threatening the delivery of public services. The claimant had been, and still was, suspended from work on full pay as a result of actions taken relating to circumstances surrounding a request to support her disability. This meant that she was unproductive and the clients of the service, which included some the most disadvantaged and vulnerable residents of Newcastle, being unable to obtain benefits.

60. Mr Stubbs, on behalf of the respondent submitted that, for alleged protected disclosure to qualify it must be a disclosure of information in accordance with the legislation and an allegation alone is not sufficient. However, allegations can include sufficient to constitute a disclosure of information and he referred to the cases of Kilraine v London Borough of Wandsworth and Cavendish Monro v Geduld.

The claimant must have had a reasonable belief that the alleged disclosure was made in the public interest when she made it. Disclosure of a breach of a worker's contract or some other matter personal to the worker may reasonably be believed to be in the public interest if a sufficiently large number of employees share the same interest (Chesterton Global Limited v Nurmohamed).

61. It was submitted that the introduction of the public interest test was specifically to avoid the bolstering of claims with whistleblowing claims which concerned only the individual and alleged breaches relating to them.

62. It was submitted that only the claimant had the alleged interest concerned and there was therefore only one in the group concerned. The effect of the alleged failure, viewed properly, is simply that the claimant had to ask for permission to go home after a visit. There was no wrongdoing disclosed and the interest affected is at best only minimally affected.

63. The Tribunal is not satisfied that the disclosures were such as to qualify as protected disclosures. They were in the nature of allegations and not the disclosure of information. They were allegations that were purely in respect of the claimant's personal interest.

64. In this case, the Tribunal is not satisfied that any disclosure were made in the public interest. They were disclosures purely in relation to the claimant's personal position. They were not disclosures that could, in the reasonable belief of the claimant, have been in the public interest. It was clear that the disclosures were in respect of the claimant's personal concerns.

65. The Tribunal has gone on to consider the question of causation which is central to the claims of detriment in respect of protected acts or protected disclosures. In the circumstances, the submissions on behalf of the claimant and the respondent are set out below.

12 If the above constitute protected acts and/or protected disclosures did they (a) cause or (b) have a material influence on:

a. **The claimant being suspended?**
b. **The instigation of the investigation into the alleged misconduct of the claimant and/or the making of allegations against her?**
c. **The widening of the allegations faced by the claimant ?**
d. **The recommendation to proceed to a disciplinary hearing?**
e. **The original dismissal of the claimant? (only victimisation claim)**
f. **The failure to hear the claimant 's grievance appeal prior to the decision to dismiss her?**

66. The claimant was suspended and the investigation was instigated as a result of the concerns raised by Gary Webb. The widening of the allegations faced by the claimant arose because of issues that emerged during the investigation. The respondent/Frank McEnaney was duty bound to investigate those issues. Paul Gilroy agreed that was the case.

67. The recommendation to proceed to a disciplinary hearing was a result of the findings of the investigation. This was an inevitable result and entirely consistent with those results. The dismissal was on clear grounds of misconduct and the protected acts or protected disclosures did not cause or have a material influence on the dismissal.

68. The decision not to hear the claimant 's grievance appeal prior to the decision to dismiss her was on advice from the respondent's Human Resources department. It was a rational decision and not caused by or materially influenced by the protected acts or disclosures.

Alternative s15 Claims to victimisation/PIDA claims

13 Alternatively to 12 above did the alleged detriments amount to unfavourable treatment because of something arising in consequence of the claimant's disabilities?

69. The Tribunal is satisfied that there was no detriment or unfavourable treatment because of something arising consequence of the claimant's disabilities. The reasons for this conclusion are those set out above. Once again, causation is central to this issue and the reason for the respondent's actions was as a result of genuine and appropriate concerns which arose as a result of Gary Webb's queries and issues that arose during the investigation.

14. If so, can the respondent show that the alleged detriments were a proportionate means of achieving a legitimate aim, namely the investigation and sanctioning of misconduct?

70. The Tribunal is satisfied that the respondent has shown that the alleged detriments were a means of achieving the legitimate aim of investigation and sanctioning of misconduct and as a result of the reasons set out above they were proportionate means of achieving that legitimate aim.

<u>Alternative Harassment Claim – s26 Equality Act to Victimisation/PIDA claims</u>

15. Did the alleged detriments at 12, taking into account the claimant's perception, the circumstances of the case and the whether it is reasonable for the conduct to have that effect, constitute unwanted conduct which had the purpose or effect of:

- **g. violating the claimant's dignity; or**
- **h. creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?**

71. The Tribunal is satisfied that the alleged detriments did have the purpose or effect as set out in paragraphs a. and b. above. Once again, the central issue here is that of causation.

.

16. If so was that conduct related to the claimant 's disabilities?

72. The Tribunal is satisfied that the conduct was not related to the claimant's disability. It was related to the claimant's misconduct which was not related to her disability.

Dismissal – s15 and 26 Equality Act (for s27 claim see above at 12 e.)

17. Did the dismissal arise because of something in consequence of the claimant 's disabilities:

a. Can the claimant prove that the dismissal:

i. Arose due to her requests for reasonable adjustments?

ii. Arose due to the respondent's failure to make reasonable adjustments?

iii. Arose due to the respondent's desire to avoid dealing with the claimant's grievance which raised the failure to make reasonable adjustments?

iv. Arose as the claimant had a target on her back due to her disabilities?

b. If so was that dismissal due to something arising in consequence of the claimant 's disabilities?

73. For the reasons stated above, the Tribunal is satisfied that the claimant's dismissal did not arise because of something in consequence of her disabilities.

18. If so, can the respondent show that the alleged detriments were a proportionate means of achieving a legitimate aim, namely the investigation and sanctioning of misconduct?

74. For the reasons stated above, the Tribunal is satisfied that, if the dismissal had been due to something arising in consequence of her disabilities, the respondent's dismissal of the claimant was a proportionate means of achieving the legitimate aim.

19. Did the dismissal, taking into account the claimant's perception, the circumstances of the case and whether it is reasonable for the conduct to have that effect, constitute unwanted conduct which had the purpose or effect of:

a.violating the claimant's dignity; or

b.creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

20. If so was that conduct related to the claimant's disabilities?

75. The Tribunal is satisfied that the claimant's dismissal was not an act of harassment. It was not related to the claimant's disabilities and was on grounds of the claimant's misconduct.

76. In view of the nature of this case and the way in which the agreed issues have been framed, these conclusions are, of necessity, somewhat repetitive. The clear conclusion of the Tribunal is that the evidence given on behalf of the respondent was credible and consistent. There was no failure to make reasonable adjustments. The claimant was not placed at a substantial disadvantage and the claimant was allowed to work from home when necessary if it was operationally viable.

77. The investigation/disciplinary action and treatment of the claimant's grievance was not as a result of, or materially influenced by, the claimant's disability, request for reasonable adjustments or any protected acts or protected disclosures. These were as a result of the legitimate concerns raised by Gary Webb to Frank McEnaney and issues that arose during the course of the investigation and that the respondent was duty bound to investigate and the dismissal was wholly as a result of the findings of misconduct against the claimant.

78. In the circumstances, the claims are not well founded and are dismissed.

Employment Judge Shepherd

Date 24 January 2018