Case No: 2500613/2017
2500617/2017

EMPLOYMENT TRIBUNALS

Claimant: **Mr C. Stephenson (1)**
Mrs S. Kirk (2)

Respondent: **Northumberland County Council**

Heard at: North Shields Hearing Centre **On: 28 September–12 October2018**
12-14 November 2018

Before: **Employment Judge Johnson**
Members: Miss E. Jennings, Mr P. Curtis

Representation
Claimant: In person (First Claimant)
Mr H. Menon, Counsel (Second Claimant)

Respondent: Miss C. Millns, Counsel

RESERVED JUDGMENT

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

1. The First Claimant's complaint of unfair dismissal is not well-founded and is dismissed.

2. The First Claimant's complaint of unlawful indirect age discrimination is not well-founded and is dismissed.

3. The Second Claimant's complaint of unfair dismissal is not well-founded and is dismissed.

4. The Second Claimant's complaint of automatic unfair dismissal for making protected disclosures is not well-founded and is dismissed.

5. The Second Claimant's complaint of direct disability discrimination is not well-founded and is dismissed.

6. The Second Claimant's complaint of harassment related to her disability is not well-founded and is dismissed

7. The Second Claimant's complaint of victimisation because of a protected act on the grounds of her disability is not well-founded and is dismissed.

8. The Second Claimant's complaints of being subjected to detriments because she had made protected disclosures are not well-founded and are dismissed.

REASONS

1. Background

1.1 The First Claimant conducted his claims himself. He gave evidence himself but did not call any other witnesses. The Second Claimant was represented by Mr Menon of Counsel, who called to give evidence the Claimant herself and on her behalf Mr John Stenhouse (former HR Advisor), Ms. Angela Dyer (HR Consultant), and Miss Zelah Veronica Weedy, (swimming instructor).

1.2 The Respondent was represented by Miss Millns of Counsel, who called the following witnesses to give evidence: -

a. Mr Mark David McCarty (Deputy Chief Fire Officer)
b. Mr Liam Henry (Head of Legal)
c. Mr Stephen Crossland (HR Consultant)
d. Mr Philip Andrew Soderquest (Head of Housing & Public Protection)
e. Miss Catherine Ruth McEvoy (Director of Children's Services)
f. Miss Kelly Angus (Deputy Director of Human Resources)

There was an agreed bundle of documents comprising three A4 ring binders, containing 2,472 pages of documents. The claimants, their witnesses and all witnesses for the Respondent had prepared formal typed and signed witness statements which were taken "as read" by the Tribunal, subject to questions in cross-examination and questions from the Employment Tribunal.

1.3 The First Claimant is presently aged 53 years and worked for the Respondent for over 33 years until his dismissal in February 2017. The First Claimant worked as an HR Specialist. The Second Claimant is presently aged 46 years and worked for the Respondent for over 11 years as HR Business Lead. Both claimants were dismissed following a restructuring exercise within the Respondent's HR department, which involved the creation of a number of new posts, which number was less than the number of staff then employed in the Respondent`s HR department. Selection for the new posts was by way of a competitive interview process, with the successful candidates being allocated new roles and the unsuccessful candidates (including both claimants) being made redundant. Both claimants appealed against their selection for

redundancy and both raised grievances about their treatment. Those appeals and grievances were ultimately unsuccessful and as a result both claimants presented complaints to the Employment Tribunal.

2. The Pleadings

2.1 The First Claimant`s claim form was presented to the Employment Tribunal on the 15 June 2017. In that claim form, the First Claimant presented complaints as follows: -

a. Unfair dismissal (relating to his selection for redundancy)
b. Unlawful disability discrimination.
c. Unlawful sex discrimination
d. Unlawful direct age discrimination (relating to his selection for redundancy)
e. Automatic unfair dismissal for making protected disclosures.

The First Claimant subsequently withdrew the complaints of automatic unfair dismissal for making protected disclosures, unlawful disability discrimination and unlawful sex discrimination. As at the commencement of this final Hearing, the First Claimant`s remaining complaints were: -

i. Unfair dismissal (relating to the selection for redundancy).
ii. Indirect age discrimination (relating to the wording of an advertisement for a post within the Respondent's HR department.)

2.2 The Second Claimant`s claim was presented on the 22 June 2017. In that claim form, she brought the following complaints: -

i. Unfair dismissal.
ii. Automatic unfair dismissal for making protected disclosures.
iii. Being subjected to detriments for making protected disclosures.
iv. Direct disability discrimination.
v. Harassment on the grounds of disability.
vi. Victimisation on the grounds of disability.

All of those complaints were pursued at the final Hearing.

2.3 Both claimants have accepted throughout these proceedings that there was at the relevant time a genuine "redundancy situation" as defined in Section 139 of the Employment Rights 1996. Both claimants have also accepted throughout these proceedings that there was appropriate and reasonable consultation between the Respondent, the relevant trade unions and those persons who were affected by the redundancy proposals. Both claimants challenged the fairness of their dismissal for redundancy on the following grounds: -

i. The fairness of the criteria used for selection.
ii. The fairness of the application of that criteria
iii. The Respondent's failure to properly consider alternative employment.

2.4 The First Claimant`s original complaint of unlawful age discrimination was that within some two years of his dismissal he would have reached his 55th birthday and have been able to access his pension under the Local Government Pension Scheme. The First Claimant alleged that he was selected for redundancy and dismissed because the Respondent would thus be able to avoid paying him "a six-figure sum" and that this amounted to direct age discrimination. That allegation was subsequently withdrawn and replaced with an allegation of indirect age discrimination, namely that his post had been replaced with one designed and advertised in such a way as to deter persons in his age group and to encourage persons in a younger age group to apply.

2.5 In her original claim form, the Second Claimant alleges, "I raised 4 matters in the public interest". No further details were provided. At subsequent private preliminary hearings, case management orders were made on the 15 August 2017, 15 December 2017 and 22 February 2018. With regard to her allegations that she made protected disclosures, the Claimant was ordered to provide further information as follows: -

a. To whom the disclosure was made.
b. When the disclosure was made.
c. Where the disclosure was made.
d. Who else was present.
e. Exactly what was said and how that is said to amount to "information".
f. Which of the paragraphs (a-f) in Section 43B (1) of the Employment Rights Act 1996 was engaged.
g. If other than dismissal, what is the "detriment" to which the Claimant was subjected because she had made protected disclosures.

2.6 In response to the first of those Orders, the second claimant stated that, whilst she had raised four matters in the public interest, two of those were covered by the Respondent's internal whistleblowing policy. The first related to a disclosure made in or around December 2014/early 2015 and was made to the Respondent's Head of Corporate Services, Mrs Alison Elsdon. That disclosure was said to relate to pressure being placed upon Miss Leanne Laidler to raise a grievance against Mr Barry Rowland, so that Barry Rowland could be removed from office. The second was made in April 2016 and related to pressure bring brought by Steven Mason, the Chief Executive, to engineer the removal of Miss Zellah Weedy, from her position as a swimming instructor. This information was provided by the Second Claimant in a document dated 12

September 2017. On the 15 December 2017, the Second Claimant was informed by the Tribunal Judge that her claim "remained in a disjointed and confusing format". The second claimant was told that she would not be permitted to pursue any claim which had not been properly set out in terms which can be identified by the Respondent and the Tribunal. New allegations would not be permitted to be introduced at the stage when witness statements are exchanged. That would be unfair on the Respondent and a clear and obvious breach of the Overriding Objective, to deal with the case justly. Both claimants were told that "this was the last opportunity they would be given to get their case in order". On the 22 February 2018, the second claimant for the first time had the benefit of legal representation from Mr Menon of Counsel. With regard to her allegations that she had made protected disclosures, the second claimant was given a further opportunity to provide further information and was told to set out with particularity: -

a. Exactly what was said, setting out precisely which words were used.
b. To whom it was said.
c. When it was said.
d. Where it was said
e. Who else was present
f. If either of the disclosures was subsequently reduced to writing, the claimant must attach a copy of the document or otherwise identify the nature of the document.

In that hearing, at paragraph 11 of the Case Management Summary, it was specifically recorded as follows: -

"Mrs Kirk pursues complaints that she was dismissed and subjected to other detriments for making protected disclosures. The (second) Claimant alleges that she made two separate protected disclosures. The first was in or about the December 2014/January 2015 and related to activities by the Respondent`s Executive Directors to engineer the termination of the employment of another Executive Director, DR. The second protected disclosure is alleged to have been made on or about April 2016, when the second claimant disclosed to the respondent`s Director of HR "a move to terminate the employment of ZW, an employee of Active Northumberland, instigated by the Respondent's then Chief Executive Mr Steven Mason and his Wife Helen Mason." I note and record that these are the only two alleged protected disclosures upon which the second claimant relies."

The Case Management Summary goes on to record that Mr Menon agreed that the second claimant should "set out in as much detail as possible exactly what she recalls having said **on those two occasions**."

Finally, at paragraph 14 of the Case Management Summary, it is recorded as follows: -

"The (second) Claimant alleges that she was subjected to various detriments having made the first protected disclosure, those detriments being listed in the final column of the spreadsheet attached to her further and better information. The Claimant alleged that she was dismissed for making the second protected disclosure. I note and record that there is no other detriment alleged in respect of the second protected disclosure. It will therefore be for the Claimant to prove that the principle reason for her dismissal was the making of the second protected disclosure."

3.1 In her document headed " Claimant`s Particulars Public Interest Disclosures", dated 7 March 2018, the second claimant alleges that she made two disclosures about the Barry Rowland incident, one on or around December 2014/January 2015 and the other on or around June 2015/July 2015. The second claimant then says that she made disclosures about the Zellah Weedy matter, firstly in April 2016 to Kelly Angus and again in August 2016 to Kelly Angus and Lorraine Dewison. In respect of each disclosure the second claimant states that she "cannot remember the precise words used", but sets out the gist of what was allegedly said on each occasion.

3.2 The Respondent concedes that the second claimant was at all material times suffering from a disability, namely depression and endometriosis. The second claimant's allegations of direct disability discrimination and harassment relate to comments allegedly made to her by Kelly Angus at a meeting on the 4 April 2016. The second claimant alleges that the appointment of Kelly Angus to present the Respondent's case at her appeal was also an act of harassment and that she was victimised following the presentation of her grievance when she was "prohibited from entering the HR office and prohibited from having contact with her colleagues". In the Further Information provided by her on the 4 February 2018, the second claimant formally withdrew her other complaints of unlawful disability discrimination, which were contrary to Sections 15, 19 and 20 of the Equality Act 2010, namely unfavourable treatment because of something arising in consequence of her disability, indirect disability discrimination and failure to make reasonable adjustments.

3.3 In her Further Information provided on the 4 February 2018, the second claimant alleged that she had been subjected to 8 separate detriments because she had made protected disclosures. In his closing submissions, Mr Menon conceded that only one of those could properly be pursued as a detriment, namely the allegation that the second claimant had been excluded from HR management meetings and decisions. The only remaining allegation of harassment was that relating to the appointment of Kelly Angus to present the management case at the second claimant's appeal against dismissal and the only remaining allegation of victimisation

related to Kelly Angus "prohibiting the second claimant from entering the HR office or having contact with her colleagues."

3.4 Mr Stephenson, Mr Menon and Miss Millns had helpfully prepared an agreed a list of issues relating to each of the claims brought by each of the claimants. The Employment Tribunal's findings as set out below relate to the remaining issues from that list, following the concessions made by Mr Mnnon in his closing submissions.

4. Findings of Fact

4.1 The Tribunal made the following findings of fact on the balance of probability, having heard the evidence of the claimants, their witnesses and those of the Respondent, having examined the documents in the bundle and having carefully considered the closing submissions of the First Claimant, Mr Menon for the Second Claimant and Miss Millns for the Respondent.

4.2 Both claimants worked in the Respondent's HR Department and there has been no suggestion that either was anything other than a competent, loyal and devoted employee. The First Claimant was before his dismissal, engaged in the handling of equal pay claims, the volume of which had gradually reduced. The Second Claimant had a more senior role as HR Business Lead and was engaged in a variety of projects on behalf of the Respondent. Both claimants accepted that in recent years, the Respondent's HR Department had lacked both leadership and direction. In February 2014, management of the HR Service was taken over by Miss Alison Elsdon, Director of Corporate Services. A review of the Respondent's HR services was to be undertaken by Durham County Council. That review was concluded in September 2015, having been undertaken by Miss Kim Jobson of Durham County Council. In September 2015, Miss Kelly Angus joined the Respondent on a secondment from Northumbria Health Care NHS Foundation Trust, where she is the Deputy Director of Human Resources. Miss Angus identified that the Respondent "needed a resilient and business/partner focused HR service to support a significant overall programme of change within the Respondent." Miss Angus proposed a restructure of the HR function, having concluded that the present structure was not fit for purpose. On 4 May 2016, Miss Angus wrote to the relevant trade unions, setting out the background for the proposed restructure, including the reasons for the proposal, details of the proposal and options which were to be considered. Whilst the Respondent was not proposing to dismiss 20 or more employees from the HR service, it nevertheless decided to consult collectively with the trade unions and those who may be affected, as a matter of good HR practice. Miss Angus's detailed letter, running to 9 pages, appears at page 349 in the bundle. It sets out the reason for the proposal, details of the proposal and in particular, how the number of full-time equivalent (FTE) posts would be reduced from 11 to 5. The letter goes on to describe a proposed method of selection for the new

posts, confirming that the same would take place "in line with Council's guidelines on the Management of Change". Voluntary redundancies would be sought. Thereafter, existing staff would apply by expressing "a preference for a role which is comparable or as close to their qualifications, experience and skills". The letter specifically states as part of the proposed method of selection: -

> "All staff in the pool will be able to express a preference for posts taking into account existing contractual hours. Interviews will take place on a hierarchal basis taking into account each employee`s qualifications, experience and skills. Selection criteria will be fairly and consistently applied and staff will be given ample opportunity to demonstrate their skills, knowledge and abilities through a comprehensive selection process. An assessment centre will be part of the selection process for the roles at Bands 12 and 10."

4.3 A consultation meeting took place on the 5 May, which was attended by both claimants. The consultation period was extended to the 30 June, following receipt of comments from those in the pool and the trade unions. The Second Claimant objected to the use of an assessment centre for the roles at Bands 12 and 10, as she already held a Band 10 position and intended to apply for a Band 10 role. The assessment centre would have consisted of psychometric testing, presentation to stakeholders/customers, group discussions or written assessment facilitated by an organisational psychologist and a panel interview. As a result of those representations (including those from the Second Claimant) Miss Angus decided that a competitive interview would be the sole method for selection for the HR Manager, Band 10 roles. No objection was raised by anyone to that proposal.

4.4 Staff were encouraged to apply for a role suitable to their qualifications, experience and skills. They were able to apply for a higher band post, as long as they met the essential criteria for that post. "Hierarchical interviews" meant that the Respondent would conduct the process of interviews in order of hierarchy. For example, Band 10 interviews would be scheduled to take place before the Band 8 interviews. If an employee listed as first their choice preference a Band 10 role and as second choice preference a Band 12, they would be interviewed for the Band 10 role first, as this was their first preference and therefore it had to take precedence. The detail is set out in the letter from Miss Angus to the trade unions dated 8 July 2016 at page 418 in the bundle, in the following terms: -

> "All staff will be able to express a preference for two posts taking into account existing contractual hours. Interviews will take place on a hierarchical basis taking into account each employees qualifications experience and skills. Selection criteria will be fairly and consistently applied and staff will be given ample opportunity to demonstrate their skills, common knowledge and

abilities through a robust selection process. An assessment centre will be part of the selection process for the roles of Band 12. The selection process for all other posts will consist of an interview only. Due to the timescales involved, recruitment for the Band 12 posts will be ringfenced in the first instance for internal applicants who will be considered on a preferential basis. At the same time as the internal recruitment process, the Band 12 posts will also be advertised externally to ensure that any time scales are not further delayed, however external recruitment will not be progressed if internal candidates are appointed to the Band 12 positions. For the avoidance of doubt, any internal candidates who express an interest in the Band 12 positions will be considered in advance of any external candidates who may have responded to an open advertisement. A proposed timeline has been included as an appendix so that this can be visually shared".

4.5 Both claimants accepted that the consultation process itself was conducted in a fair and reasonable matter. Neither claimant objected to the amended process which was now proposed by the Respondent. The First Claimant submitted a first-choice preference for a Band 10 position and a second-choice preference for a Band 9 position. The Second Claimant submitted what she described as "an equal preference" at her current level Band 10 and also for a Senior HR Manager Band 12, on the basis that she met the criteria for both posts. In a subsequent exchange of emails, Miss Angus politely reminded the Claimant that candidates had been asked to express a first preference and a second preference and that if she was successful in her application for the Band 10 post, then she would not be considered for the Band 12 post. The Claimant considered that to be unfair and asked that she be interviewed for both positions. Miss Angus insisted that the Claimant must adhere to the agreed procedure, but suggested that the Claimant would be able to apply for the Band 12 post "externally", although this would mean that she was not given any priority as an existing employee. The Second Claimant decided to withdraw her application for her second preference Band 12 post and thus would only be interviewed for the Band 10 position.

4.6 The interviews for the new posts were to be conducted by a panel of three persons, namely, Kelly Angus, Mark McCarty (Deputy Chief Fire Officer) and Stephen Crosland (External HR Consultant). The interview would last approximately 45 minutes and would be based upon a list of 10 questions, which had been agreed in advance by the three panel members. The questions were said to be "designed to test each candidate's qualification and knowledge, experience, and skills and competency." Each candidate's answer for each question would be scored between 1 and 5 points, with 1 being well below standard, 2 below standard, 3 meeting standard, 4 above standard and 5 well above standard required.

4.7 Unbeknown to the candidates, the list of questions was exactly the same as that which had been used in an earlier exercise for appointments to a Band 10 post, which had taken place in 2015. The First Claimant had unsuccessfully applied for that post and had been asked these exact questions at that interview. The successful candidate on that occasion was Miss Ann Mehan. The First Claimant had scored a total of 20 points on that occasion, whilst Miss Mehan had scored 27. On that occasion, the First Claimant raised no objection to the interview process or the use of any of those questions, nor did he challenge the score allocated to him, or the appointment of Miss Mehan to the post.

4.8 In these Employment Tribunal proceedings, both claimants have alleged that Ann Mehan's appointment to the Band 10 post in 2015 had been "engineered by Miss Kelly Angus" and that Miss Mehan had been appointed to a "meaningless role" in what was a "non-job". Both claimants have alleged that this was done as an act of personal favouritism by Miss Angus towards Miss Mehan, so that Miss Mehan would be in a more favourable position to apply for a Band 10 role when the inevitable restructure of the Respondent's HR department was implemented. The claimants` evidence was that the post to which Miss Mehan was appointed was one which had been identified in the earlier review carried out by Durham County Council, but which had never been implemented. Miss Angus's evidence was that the Band 10 role in October 2015 had been properly identified, properly advertised and subject to a rigorous and competitive interview process, following which the most capable candidate at interview had been appointed. The Tribunal accepted Miss Angus's evidence in this regard. The Tribunal found that there was no evidential basis whatsoever for the allegations now being made by the claimants about the reason for, or the means by which, Miss Mehan was appointed to that position.

4.9 In the 2016 restructure, Miss Mehan found herself in the same position as both claimants, namely that she would have to apply for one of the new posts. At the time however, Miss Mehan was absent from work due to illness, having suffered a sub-arachnoid brain hemorrhage in May 2016. Miss Angus and Mr Peter Gosling (another HR Manager Band 10) visited Miss Mehan at her home in July 2016 and advised her of the new restructure. Miss Mehan stated that she did not think she would be fit enough to attend an interview in the short or medium term. As a result, Miss Angus and Mr Gosling agreed that it would be a reasonable adjustment in Miss Mehan's case, not to require her to attend for interview. It was decided that Miss Mehan would be allocated the scores which she had obtained at the interview in October 2015. That decision has also been criticised and challenged by both claimants in these Employment Tribunal proceedings. Both claimants have again alleged that this was an act of favouritism by Miss Angus towards Miss Mehan, the effect of which was to put both claimants at a disadvantage in the interview process. Both have pointed out that Miss Angus, when interviewed as part of the Second Claimant's

grievance, had said that Miss Mehan had indicated on her preference form that she didn't want to have an interview. That was in fact incorrect, as the preference form makes no mention of that. Miss Angus subsequently informed the investigating officer that she took Occupational Health advice following her meeting with Miss Mehan and decided that Miss Mehan would not have to go through that process. Both claimants have criticised Miss Angus for not keeping any clear notes of her discussions with Miss Mehan, or indeed anybody else, about the basis upon which the decision was made. The Tribunal accepted Miss Angus's evidence that her decision was made following her meeting with Miss Mehan and Mr Gosling and that the decision not to require Miss Mehan to attend for interview and to allocate her the scores obtained in the previous exercise, was a decision which some reasonable employers may have arrived at in all of the circumstances of this case. The Tribunal found that it did not impact upon the general fairness of the procedure by which the candidates for the new roles were to be selected. The Tribunal rejected as implausible, the claimants` suggestion that all of this was done because Miss Angus knew the score that Miss Mehan had obtained in the 2015 exercise and intended to ensure that both claimants scored less than that in the 2016 exercise.

4.10 Both claimants have criticised the use in the 2016 exercise of those questions which were used in the 2015 exercise. The claimants argue that any panel genuinely trying to be scrupulous to avoid unfairness, would not replicate interview questions, especially when there was a significant risk that some candidates may have been interviewed in the earlier process and thus have a potentially unfair advantage over the others. The explanation from the three panel members was that it is by no means unusual for questions from an earlier exercise to be utilized in a later exercise. The evidence of the panel members was that these questions are devised so as to provide the candidates with an opportunity to not only answer the questions on a factual basis, but to display as part of their answers those qualities to which the questions are directed. The Tribunal accepted the evidence of Miss Angus, Mr Crosland and Mr McCarty in this regard. The Tribunal found that it did not impact upon the general fairness of the selection process, to utilize questions which had been used in an earlier exercise.

4.11 Both claimants then challenged the nature of the questions themselves, alleging that they were "wholly subjective" and thus a breach of the Respondents policy in its "Management of Change", where the method of selection must be "fair, non-discriminatory and objectively justifiable". Mr. Menon on behalf of the Second Claimant (and with the support of the first Claimant) submitted that all but one of the 10 questions (question 2) were indeed "wholly subjective." The claimants allege that the questions did not match the qualities and attributes they purport to test. Those are said to be "qualifications and knowledge, skills and competence, experience and motivation". Under cross-examination, the panel

members accepted that the second question, "What are the 5 fair reasons for dismissal?" could only produce a factual response. That question is, according to the form, designed to test "qualifications and knowledge". The panel members` evidence was that they expected a candidate applying for a Band 10 post to be able to answer this question and thus it was an indicator of their knowledge and qualifications. All did however concede that the question could not effectively test "qualifications". Of those candidates who identified all 5 potentially fair reasons, the maximum score given was 3 points, which means "meets standard". All 3 panel members accepted that it was impossible for any candidates to obtain 4 points (above standard) or 5 points (well above standard). It was thus impossible for any candidates to obtain maximum marks for that question, or indeed for the entire 10 questions.

4.12 Criticism was also made of what the claimants described as "collaborative" marking in the 2016 exercise. It was alleged that it was a breach of the Respondent's own policies for each panel member not to mark his or her own score sheet individually and then at the end of the interview to discuss their own scores with the other panel members and make any agreed adjustments. The panel members agreed that this is what was done in the 2015 exercise. In the 2016 exercise, the panel members had not marked individually, but had allowed one member to ask questions, whilst the others made notes and at the end of the interview, following a joint discussion, they had jointly agreed on the score to be allocated to each candidate. The claimants referred to the Management of Change document at page 253 which states: -

> "Managers should ensure that the information they use is not subjective as it may be open to a challenge at a later stage. Normally (2 or more) managers should apply the criteria separately and then come to a consensus; this could demonstrate objectivity in the process, although it may not be appropriate in all the circumstances."

The evidence from the 3 panel members was that they all agreed that in this exercise, it would be appropriate for one of the panel members to ask questions of the candidate, whilst the other two panel members made notes of the questions and answers. The asking of the questions and taking of the notes would be done on a rotational basis. The panel members would then consider their own notes, and discuss those with their colleagues and agree on a score for each candidate. The Tribunal found that some reasonable employers in these circumstances may have utilized that procedure. The Tribunal found that the adoption of that procedure did not impact upon the general fairness of the process, nor did it amount to a breach of the Respondent`s own policies. The Tribunal rejected as implausible, the claimants` argument that this particular process was adopted so as to ensure that both claimants scored less than the other candidates and so that neither

claimant would achieve the score of 30 points which was necessary to display the required competencies for that particular role. Specific criticism was made by both claimants of the decision made by the panel to award the first claimant 3 points for providing all 5 potentially fair reasons for dismissal. The first claimant accepted that he had in fact only been able to provide 4 potentially fair reasons, because he could not remember that "redundancy" was a potentially fair reason. The first claimant`s evidence to the Tribunal was that he returned to his desk immediately following his interview and then remembered that redundancy was the 5th reason. He then telephoned the panel in the room where the interviews were taking place and explained that he had remembered the 5th potentially fair reason. The panel members` evidence was that upon leaving the interview room, the Claimant had immediately returned "sticking his head around the door" and stating that redundancy was the fifth reason. The Tribunal found that the version given by the panel members was more likely to be correct. Either way, the Claimant was given the benefit of the doubt and was give the maximum of 3 marks which were available for providing all 5 potentially fair reasons for dismissal. The First Claimant accepted that this could not have been unfair upon him personally, but both Claimants alleged that this was another indicator of the "general lack of integrity within the selection process". The Tribunal acknowledged that the purpose of the process was to test the knowledge and competencies of each candidate and to assess their suitability for one of the new positions. Accepting the first claimant's amended answer shortly after the interview had concluded, whilst somewhat unusual at first glance, did not impact on the general fairness of the procedure as a whole. It was certainly not unfair to the first claimant. The extra point allocated to the first claimant in any event made no difference whatsoever to the outcome of the exercise. The Tribunal again rejected as implausible the claimants` allegation that the reason why it made no difference or would not have made any difference, was because the scores of each claimant had been predetermined so as to ensure that neither would obtain any of the available posts.

4.13 Both claimants allege that at the start of their interview, they were "immediately struck by the subjective nature of the questions". The First Claimant's evidence was, "I was taken aback by the subjective nature of all but one of the questions." The first claimant does not expand upon how he felt the questions to have been subjective rather than objective. The second claimant says, "when the interview was finished, I asked if there was to be any further selection criteria, as I was immediately struck by the subjective questions". Again, no explanation is given as to why the questions are said to be subjective rather than objective. In answers to cross-examination by Miss Millns, both claimants accepted that this process was designed to select those candidates best suited to occupy the new positions and was not an assessment of historical performance to decide which current employees would retain an existing position where there were fewer of those positions in the

new structure. Both accepted that the selection for new positions involved an element of forward-thinking, which would inevitably involve an element of subjective assessment, which in turn meant that there could not be a wholly objective process.

4.14 The Tribunal found that in all the circumstances, the questions utilised and the interview process generally, was one which some reasonable employers may have adopted in all the circumstances. Any perceived lack of objectivity was not such that it made the process generally unfair. This was a particularly experienced panel, well versed in redundancy selection exercises where there was a simple reduction in the number of employees required and in those where a restructure involved the creation of new posts to which appointments had to be made. The Tribunal accepted the evidence of all three panel members, namely that they undertook their duty with care and diligence, so as to ensure that each candidate was treated fairly and had an equal opportunity to impress the panel.

4.15 At the conclusion of the interview process, 4 candidates had been interviewed for the 2 available Band 10 posts. Ann Mehan and Sarah Farrell both scored 35 points, whilst the first claimant scored 27 points and the second claimant scored 28 points. On that basis, Miss Mehan and Miss Farrell were to be appointed to the 2 new posts and the 2 Claimants were thereby at risk of redundancy. Each claimant was notified by letter dated 26 September 2016 of the outcome of the interview process, including their own scores and those of the other candidates. Each claimant was told that their redundancy would take effect from the 1st November 2016, unless suitable alternative employment could be secured. Each was told of their right to attend a formal representations meeting "to discuss the circumstances surrounding your selection for redundancy and to give you the opportunity either directly or through your representative to suggest alternatives to the proposed cause of action." Both claimants exercised their right to attend the representations meeting. The first claimant's meeting took place on the 19 October and the second claimant`s on the 4 November 2016. During his representation hearing, the first claimant raised no objection to the interview process, the questions, or his scores. The first claimant`s questions were directed towards retaining his employment and thus towards which posts had been filled and which remained available.

4.16 The first claimant then lodged a formal appeal against his dismissal by letter dated the 7th November 2016 (page 547). The first paragraph of his letter states: -

> "My grounds for appeal are that the Council has refused to avoid redundancy where it was possible to do so and has refused to minimise the number of redundancies if avoidance was not possible. It was not necessary to make me compulsorily

redundant and indeed several options still remain that make it unnecessary even now."

The First Claimant then goes on to describe various posts which, in his opinion, remained open and to which he should be considered for appointment. Nowhere does the Claimant challenge the validity of the interview process, the nature of the questions used at the interview nor the scores allocated to him. He concludes by saying: -

"The Council proposes to make me redundant after almost 34 years of faithful and often exemplary service when there was plainly no need to do so. The proposal seems particularly cruel in light of the fact that I am only three years from being able to gain access to my pension. To at least at first glance, artificially engineer a fake redundancy in this way is simply shameful. I would ask that no further appointments be made within the HR structure that would limit my options until such time as my appeal is heard".

4.17 The First Claimant also raised a formal grievance by letter dated 6 February 2017, but was told that it would be dealt with as part of his appeal, as his grounds of complaint related to the manner in which Kelly Angus had handled his selection for redundancy. This was in accordance with the Respondent`s grievance policy at page 320, which states that the grievance procedure cannot be used when there is another procedure (such as the appeals procedure) for dealing with the matter.

4.18 The Second Claimant raised a formal grievance by letter dated 11 October, addressed to Mr Steven Mason, the Chief Executive in the following terms: -

"I would like to raise a formal grievance. As my grievance is related to one of your subordinates, Kelly Angus, I am raising the matter directly with you. There are also historical issues in relation to Alison Elsdon. I believe that I have been subject of sustained and ongoing unfair treatment, bullying, victimisation, direct and indirect discrimination. It is also my belief that I have (sic) unfavourable treatment due to raising concerns. The Council has failed in its duty of care towards me. Clearly the above is a serious allegation and has had a significant detrimental impact on my health and wellbeing. I intend to provide evidence to the individual who has allocated to investigate my grievance."

That letter was acknowledged by Mr Mason on the 17 October (page 1276), in which he proposed mediation with both Kelly Angus and Alison Elsdon, failing which Mr Mason would appoint an investigating officer. Meanwhile, the second claimant was invited to report directly to Lorraine Dewison until the grievance was resolved. The second claimant acknowledged receipt of that letter on the 18

October. She again repeated that "The matter relating to Alison is historical, I made the decision to not instigate the formal procedure as I wished to move on. I named her in the grievance for reasons that I will discuss with the investigating officer and to ensure that she was not assigned to investigate." The second claimant stated that mediation was not appropriate in her circumstances and that she required an investigating officer to be nominated. The second claimant concludes by saying: -

> "I have a redundancy representation hearing tomorrow with Kelly. I will attend as I am aware that I cannot raise a grievance in relation to my selection for redundancy. However, I will not be raising any issues that form part of my grievance as it is not appropriate to do so at the hearing".

4.19 The second claimant's line manager, Lorraine Dewison sent a message to the Claimant on the 25 October stating: -

> "Kelly has said that you should work for us in Active and there is no need for you to attend team meetings within the HR. Are you ok? Email me if you need anything and Nigel is there for support too."

The Second Claimant replied: -

> "Can you explain what you mean. Just so I am crystal clear. Don't want to get into trouble."

Ms. Dewison replied: -

> "I forgot to add that this includes Management meetings and OD Meetings. So, all support from us. Nigel is aware and feel free to speak to him while I'm away."

4.20 The second claimant had in fact raised this matter with Kelly Angus by email dated 6th October, explaining that she "found it awful working in the HR Office" and that she "needed to consider her health and wellbeing". The second Ccaimant sought permission from Kelly Angus to work outwith the HR Office until her pending dismissal for redundancy on the 1st November. Miss Angus responded stating that the second claimant still needed to attend management meetings, team/colleague meetings and 1/1 meetings. The second claimant had a face to face meeting with Lorraine Dewison on the 25th October, when she was told by Miss Dewison that she was not to go into the HR Office or downstairs. The second caimant's witness statement at paragraph 17A states that, "KA prohibited me entering the HR Office from which I needed to work, isolated me from colleagues and did not permit me to attend team updates or Management meetings." The Tribunal found that this was not an accurate reflection of what was said or what was intended. It was the second claimant who had asked to

be allowed to work elsewhere than the HR Office and Miss Angus had simply stated that "there was no need for her to do so". The Tribunal found out there is a substantial difference between the phrase "there is no need to" and "you must not". The Tribunal found the second claimant's allegation that Miss Angus had "prohibited her" from entering the HR Office, was an exaggerated version of the true facts.

4.21 On the 24 November, the second claimant lodged a more detailed version of her formal grievance. The document runs to 5½ closely typed pages and appears at page 1409-1414 in the bundle. Of relevance to the Employment Tribunal proceedings, the Claimant for the first time raises the following matters: -

a. Concerns raised with Alison Elsdon in early 2015 relating to pressure allegedly placed upon Leanne Laidler to raise a grievance against Barry Rowland.

b. Disclosure made to Kelly Angus in relation to attempts to remove Zella Weedy from her position with Active Northumberland.

c. Comments made to the Second Claimant by Kelly Angus on the 4th April 2016, including "what is your problem", the Claimant was "negative" and that Miss Angus "did not get me".

d. The Second Claimant then refers to an "engineered redundancy process" and a "flawed selection process".

4.22 By letter dated the 30th November 2016, the second claimant lodged a formal appeal against her selection for redundancy. The relevant points of appeal were as follows: -

i. The selection for redundancy was based on 10 questions that had been used for a recruitment exercise for a different post in November 2015.
ii. The selection for redundancy was based on subjective questions rather than an objective assessment.
iii. The panel did not score independently or score during the interview.
iv. There was no opportunity to demonstrate qualification and previous experience or knowledge via technical questions.
v. The questions were flawed.
vi. There was no model answer and the scoring was not robust.
vii. No evidence has been provided that the Trade Unions were consulted on the actual selection process and how the selection would be scored in relation to objective criteria.
viii. There were two Band 12 posts within the new structure for which the second claimant was "more than qualified to do", yet for which she was not considered.

ix. The Second Claimant had not had any contact in relation to the appointment of a contact officer in accordance with the alternative employment procedure.

The Second Claimant went on to state that "it is my genuine belief that I have been engineered out of the Organisation."

4.23 The Second Claimant`s appeal hearing was arranged for 25th January 2017. On the 4th January, the Second Claimant asked who would be presenting the management case on behalf of the Respondent and was told that Kelly Angus would be presenting the Respondent's case. On the 5th January the Second Claimant objected to Kelly Angus presenting the case on behalf of the Respondent, on the basis that the original decision to dismiss her was taken by Mr McCarty and Mr Crosland. The statement of case for the Respondent was eventually presented by Mr McCarty.

4.24 Neither claimant has criticised or challenged in any respect the appeals procedure or the fairness of their respective appeal hearings. Each accepted in evidence that they were given a fair and reasonable opportunity to present their case to the appeal panel. Whilst neither claimant accepts the outcome of their appeals, there is no allegation that the appeals procedure followed was in any way unfair, although the first Claimant argued that he should not have been denied the opportunity to have a separate grievance hearing.

4.25 The first claimant's appeal made no reference whatsoever to the selection criteria adopted by the respondent, the allegedly "subjective" nature of the questions used of the interview nor any allegations of bias against any of the three members of the interview panel. The main thrust of the first claimant's appeal was to do with the respondent's alleged failure to fairly and reasonably address its mind to the possibility of alternative employment being found for the first claimant within the respondent's undertaking. The first claimant complained that the respondent failed to appoint a Contact Officer for him, as it was obliged to do under its own redundancy policy. The contact officer should have been appointed on 7th November 2016, but was not appointed until 19th January 2017. The respondent has readily acknowledged this oversight and when it was recognized, the claimant's employment was extended by a period of seven weeks so as to prevent any disadvantage to the claimant. The contact officer's role was to identify roles within the respondent's organisation which the claimant may be prepared to consider as alternative employment. In his evidence to the Employment Tribunal, the first claimant accepted that there had been no suitable roles which had been available during the period from 7th November 2016 until 19th January 2017. As a result, the first claimant was not placed at any disadvantage by the respondent's failure to appoint the contact officer at the appropriate time.

4.26 The first claimant maintained throughout these Employment Tribunal proceedings that the respondent had "targeted" him from the time that the possibility of redundancies was identified and that thereafter it was determined to ensure that there were no possible roles which could be offered to him as an alternative to dismissal. The first claimant alleged that he could and should have been considered for a band 12 post once his application for the band 10 position was unsuccessful. The first claimant insisted that the respondent was obliged to offer him that vacant position once he failed to secure the band 10 post. The first claimant's evidence was that he was prevented from applying for the band 12 post once he identified the band 10 position as his preferred choice in the redundancy selection exercise. The band 12 post was in fact to be advertised externally and the Tribunal accepted the respondent's evidence that there was nothing to prevent the claimant from applying for a band 12 post in the same way that any external applicant could do so. The Tribunal found that the first claimant was aware that he could have applied externally for a band 12 position, but chose not to do so. The Tribunal accepted the respondent's evidence that there was no obligation on the respondent to offer the claimant a band 12 post as alternative employment, when he had failed to secure a band 10 position.

4.27 One of the two successful applicants for the band 10 positions was Miss Sara Farrell. At the time of the interviews, Kelly Angus had overlooked that Miss Farrell was then working the equivalent of 0.6 full-time hours (FTE). The first claimant interpreted this to mean that there was a 0.4 role still available at band 10. What actually happened was that, shortly after the interview process, Miss Farrell informed Kelly Angus that she intended to increase her hours from 0.6 to 0.8 full-time equivalent. Kelly Angus agreed that Miss Farrell could do so and then decided that the remaining 0.2 full-time equivalent hours could be absorbed into the new structure, without the need for any further appointment. The first claimant's position was that, because he was at risk of redundancy, the respondent should have offered him the 0.4 full-time equivalent hours and added that to another position with 0.6 full-time equivalent hours at a lower grade, thereby creating for him a full-time position. The first claimant insisted it was not within the respondent's gift to agree to a 0.2 increase for Sara Farrell, when he was at risk of losing his job. The Tribunal accepted Kelly Angus' evidence that by the time the appointment was to take effect, Miss Farrell had made clear her wish to increase her FTE hours from 0.6 to 0.8 and that some reasonable employers would have agreed to and adopted that course of action. In that situation, some reasonable employers would also have decided there was no need to appoint to the remaining 0.2 full-time equivalent.

4.28 The first claimant also argued that there were a number of band 7 vacancies to which he should have been appointed. The respondent had advertised these posts, but had not received applications of sufficient quality to justify appointment. The

respondent then re-advertised those posts with different job descriptions as band 6 positions, following which they received sufficient applications of appropriate quality to enable appointments to be made. The first claimant accepted that he had not formally applied for any of the band 7 positions, although he insisted that he may have been prepared to do so had he received from the respondent sufficient information about the potential impact on his pay and pension entitlement. The respondent's "pay protection" policy in such situations, was that if an employee accepted a position 1 or 2 bands below that which he was currently employed, then the employee would receive salary of the lower band plus 15% of the original band for the pay protection period. Under the wording of that policy, the first claimant would not be entitled to pay protection for a band 7 post, because he had previously been working as a band 10. The first claimant's evidence to the Tribunal was that the amount payable as 15% of his original band 10 role would remain the same, whether or not he occupied a band 8 or a band 7 position and that therefore he should have been offered a band 7 position as "suitable alternative employment". It was put to the first claimant that it did not make sound commercial sense to employ someone at a band 7 post, yet pay them 15% of a band 10 salary in addition. The first claimant refused to accept this. The Tribunal found that there was no obligation on the respondent to offer the first claimant a band 7 post, either with or without 15% pay protection, but there was no reason why the claimant could not have applied for such a post had he genuinely been interested in that position. The Tribunal found that it was highly unlikely that the first respondent would have applied for those roles, had he known about them before his dismissal.

4.29 The first claimant maintained throughout the Employment Tribunal proceedings that there was an obligation on the respondent to provide him with appropriate pay and pension calculations in respect of any of the roles which he felt may have been suitable for him. The first claimant accepted that for much of his time with the respondent he had worked closely with the respondent's pay and pension department and that he was in as good a position as anyone to obtain this information for himself, in respect of any of the roles which may have been of interest to him. The Tribunal acknowledged that the claimant was absent from work due to illness for much of the time, but found that he was clearly capable of engaging with the respondent during that period and the Tribunal found that there was no good reason why the claimant could not have obtained this information for himself. The respondent's failure to provide him with that information did not impact on the general fairness of the procedure adopted in dismissing him for reasons of redundancy.

4.30 Finally, the first claimant alleged that band 7 roles had been deliberately changed and reduced to band 6 roles so that applicants for the positions would be of a different and younger age group than himself. This was the basis of the first claimant's allegation of

indirect age discrimination. The relevant advertisement appears at page 625 in the hearing bundle and states as follows:-

> "To enable us to plan for the future of this service we are looking to recruit two high performing individuals into entry level HR roles. The roles will challenge and inspire two CIPD qualified individuals and will provide the opportunity to gain operational and strategic experience by being supported by a committed and welcoming team. We are looking for exceptional newly qualified HR professionals to join us and become the HR leaders of the future. This is an excellent opportunity for a reason to graduate of a CIPD programme to take their first step on the path to a successful HR career. Essential requirements include CIPD qualified (level 7 or 5), demonstrable ambition to develop an HR career in local government and commitment to CPD. If you are looking to launch your career in public sector people management and can offer what we're looking for, we'd welcome your application.".

4.31 The Tribunal found that none of the band 10 roles was "replaced" with a role at band 6 or band 7. The Tribunal accepted the respondent's evidence that the band 7 recruitment exercise did not attract a sufficiently capable pool of candidates. They were therefore re-designed as band 6 posts. The first claimant confirmed that he did not become aware of these positions until after he had issued his Employment Tribunal proceedings on 22nd June 2017 and therefore the first claimant cannot have been "put off" from applying by the wording of the advert. The Tribunal found it highly unlikely that the first claimant would have applied for a band 6 post without pay protection, in any event.

4.32 The Tribunal rejected the first claimant's allegations that the procedure followed by the respondent, particularly with regards to looking for alternative employment, was pre-designed to ensure that no alternative employment would be offered to him, so as to ensure that he would be dismissed. There was no evidential basis for these assertions.

4.33 The second claimant's appeal was heard by Mr Geoff Paul (the respondent's Director of Planning and Economy) and took place on 25th January 2017 and 3rd February 2017. The respondent's case was presented by Mark McCarty, who was supported by Peter Gosling (HR Manager). Witness evidence was given by Steve Crosland and Kelly Angus. The claimant was accompanied by her trade union representative Miss Tanya Race. As is set out above, the second claimant has made no complaint about the fairness of the procedure followed by the respondent in dealing with her appeal. The Tribunal found that the second claimant was given a full, fair and reasonable opportunity to present her grounds of appeal and to challenge the respondent's statement of case.

4.34 The respondent's outcome letter appears at pages 1971-1972 in the bundle and is dated 9th February 2017. The document states:-

i) Consultation Process. The appeal body was satisfied that the legal requirements of the section 188 letter issued to staff had been met and that meaningful consultations were conducted with those affected on the process to be followed. The appeal body noted that an extension of time was agreed to allow further consultation with staff to take place.

ii) Selection Process. The appeal body was satisfied that the process followed for the selection of redundancy was appropriate and fair. In addition the appeal body was satisfied that you were provided with an opportunity, in writing, to state required adjustments when going through the process. Evidence of the hearing confirmed that you stated yourself that you required no reasonable adjustments other than to recognize that you struggle with short-term memory and concentration and that this was relayed to the interview panel thereby satisfying the requirements of the Equality Act.

iii) Suitable Alternative Employment. The appeal body was satisfied that the band 12 posts identified by you as suitable alternative employment as a means of avoiding dismissal on the grounds of redundancy, did not in its view amount to a suitable redeployment opportunity. The appeal body was satisfied with the explanation given by management that these new roles required a different skill set to those offered by yourself.

4.35 The second claimant's appeal against her dismissal on the grounds of redundancy was thus dismissed.

4.36 The second claimant's grievance was formally submitted on 11th October 2016 and followed with a more detailed version on 24th November 2016. The second claimant had her first grievance meeting with Mr Philip Soderquest on 20th November 2016. The second clamant then submitted a more detailed version of the grievance, together with supporting papers, on 7th December 2016. The only meeting between Mr Soderquest and the second claimant took place on the 28th November 2016. The second claimant was again accompanied by her trade union representative Miss Tanya Race. Minutes of that meeting appear at pages 1415-1428 in the bundle. The claimant raised a number of complaints, not all of which are relevant to these Employment Tribunal proceedings. The second claimant divided her complaints into 3 specific categories, as follows:-

i) unfair treatment, bullying and ultimately unfairly dismissed as a result of raising issues in the public interest with senior officers

ii) bullying, victimization, discrimination and engineered out of post – Kelly Angus

iii) discrimination and failure in duty of care.

There is an element of duplication in the second and third categories, particularly with regard to a meeting between the second claimant and Kelly Angus, which had taken place on 4th April 2016. During that meeting, Mrs Angus is alleged to have leaned across the table in an aggressive manner and stated "what is your problem" to the claimant and further said that she considered the claimant to be "negative" and that she (Ms Angus) "did not get the claimant". The claimant alleged that she found this terminology to be "insensitive, unfounded and linked directly to my mental health". The claimant said she found the comment to be "deeply hurtful and personal".

The second claimant alleges that these comments amount to harassment on the grounds of disability in the second category and "behavior that is intimidating-aggression leaning across table" in the second category. The second claimant said in her witness statement that Ms Angus was fully aware of her depression and endometriosis that she considered Ms Angus' comments to be "personal and linked to my disability". Ms Angus' evidence, set out in paragraph 94.4 of her witness statement, was that the second claimant's attitude during this impromptu catch-up meeting was "very negative" and that she was "dismissive of pretty much everything" Ms Angus said to her and was "huffing and puffing in a very disgruntled manner". The meeting dealt with a large number of flexi-time hours which the second claimant had accrued and which Ms Angus believed had not been authorised. The second claimant wanted to have time off in lieu of those hours, whereas Ms Angus had said she was prepared to pay for those hours, but that the claimant was to ensure that such a situation was not allowed to happen again. Ms Angus' evidence was that "she was visibly unhappy with my response regarding the hours and I asked "what was wrong?". I also stated that some days everything seemed fine and that on other days I found it difficult to understand what was going on for her, given the level of negativity. I said I struggled to sometimes get her in terms of understanding where she was coming from and what was going on for her as an individual member of the team. The second claimant responded to say that she had some unresolved health issues relating to anxiety/depression for which she was still taking medication and also endometriosis which could cause her mood and behavior to fluctuate. I stated that I felt a referral to occupational health was appropriate".

4.37 The Tribunal found that Ms Angus' comments to the second claimant were in no sense whatsoever related to the claimant's anxiety/depression or endometriosis. The Tribunal found that it was no more than straightforward and plain speaking by the second

claimant's manager, which were directed towards the second claimant's response to a management decision about the unauthorised flexi-time hours. The "what's wrong with you" comment was directed towards the claimant's attitude generally and had nothing to do with any physical or mental impairment.

4.38 The first category of complaints raised in the second claimant's grievance related to allegations by the second claimant that she had made protected disclosures relating to two particular incidents and that the making of these protected disclosures thereafter influenced the respondent's behavior towards her and also led to her ultimate selection for redundancy and dismissal.

4.39 Throughout the Tribunal hearing these two protected disclosures were referred to as the Leanne Laidler disclosure and the Zellah Weedy disclosure.

4.40 Leanne Laidler was a personal assistant to the respondent's Executive Director, Mr. Barry Rowland. Miss Laidler took a period of ill-health absence, alleging that she was suffering stress and anxiety because of the way she had been treated by Mr Rowland. When she returned to work, Miss Laidler was transferred to other duties. She is said to have been asked by another Executive Director Miss Daljit Lally, whether she intended to raise a formal complaint against Mr Rowland and is further alleged to have been told that if she did raise a formal complaint, then Mr Rowland would "leave the organization". It was accepted by all parties that Miss Laidler did subsequently raise a formal complaint and Mr Rowland did leave the respondent's employment under the terms of a confidential settlement agreement.

4.41 The second claimant's case is that she considered that Daljit Lally was attempting to influence Miss Laidler to raise a complaint so that Miss Lally could engineer that Mr Rowland's removal from the respondent. The second claimant considered this to be unlawful, a breach of the respondent's code of conduct and a misuse of public funds. The second claimant considered it to be a matter which ought to be brought to the attention of the respondent. The claimant's case was that in doing so, she made a qualifying and protected disclosure as defined in section 43B of the Employment Rights Act 1996.

4.42 The second claimant provided a number of different versions of what she considered to be the protected disclosure about Leanne Laidler. The different versions are as follows:-

a) In her grievance document (page 1409) the claimant states:-

> "Leanne informed John Stenhouse, Peter Hatley and others that she had been invited to a meeting with Daljit Lally, Executive Director and informed that if she raised a formal complaint Barry would leave the organization.

Leanne subsequently raised a complaint and an investigation was invoked and Barry did not return to work. Leanne raised this matter with occupational health and it was contained in correspondence. I was not at the meeting so the contact was between Daljit and Leanne and I have no idea what was actually said, however as Leanne was informing individuals that if she raised a complaint Daljit would see to it that Barry left the organization, I arranged a meeting with Alison Elsdon so that John Stenhouse could inform Alison what was being said.".

b) In her original claim form ET1, the second claimant simply states "I have been informed many times by a number of officers that senior officer was out to get me and that I would be restructured out. I raised four matters in the public interest.".

c) Having been ordered to provide further information about those allegations, the second claimant then set out on 12th September 2017 in her "further particulars" at page 113:-

"The disclosure of information was made in or around December 2014/early 2015. No exact date is available as the claimant does not have access to records. The disclosure is in respect of what the claimant believes is a breach of a legal obligation. The disclosure was made to the council's Mrs Elsdon, Head of Corporate Services and Deputy Section 151 Officer in the presence of Mr John Stenhouse, HR Advisor. The claimant was of the view that the approach by Mrs Lally was unlawful in that she was offering to terminate the employment of Mr Rowland if Miss Laidler raised a formal grievance. I informed Mr Stenhouse that we needed to raise the matter with Mrs Elsdon as a matter of urgency so she could take action. I informed Mrs Elsdon of the actions of Mrs Lally. Mr Stenhouse relayed the conversation to Mrs Elsdon. Mrs Elsdon visibly blanched on hearing this. She instructed me to leave the matter with her to resolve. I believe this meeting was a disclosure in the public interest. I raised the matter with Mrs Elsdon in good faith.".

4.43 The second claimant then provided a second version of her further information on 4th February 2018, in the form of a Scott schedule, this time stating:-

In December 2014/January 2015 the second claimant disclosed to the respondent's Head of Corporate Services and Deputy Officer (Alison Elsdon) that one of the respondent's executive officers, Daljit Lally was seeking to engineer the termination of the employment of another executive director Mr Barry Rowland. This was in the context of a complaint by another employee Leanne Laidler about Barry Rowland's conduct. Daljit Lally was encouraging Leanne Laidler to bring a

> grievance against Barry Rowland by suggesting to her that the termination of Barry Rowland's employment could be arranged if Leanne Laidler put in a grievance against Barry Rowland. The second claimant reasonably believed that the attempt to secure the termination of Barry Rowland's employment in these circumstances was unlawful and that such a course may result in the council incurring financial obligations which would entail an unjustifiable burden on its funds."

The second claimant had in fact been ordered on 18th August 2017 to set out "exactly what was said in the disclosure and how that is said to amount to "information". At paragraph 35 of her witness statement the claimant states:-

> "John Stenhouse and I met with Alison Elsdon the same day. I told her that on the information that I had been given by John Stenhouse, Daljit Lally had attempted to bring about the termination of Barry Rowland's employment which was unlawful and a breach of Barry Rowland's contract. John Stenhouse repeated the information to Alison Elsdon just as he had told me. I reiterated to Alison Elsdon that I believed that this was an unlawful attempt by Daljit Lally to terminate Barry Rowland's employment and also stated that it would leave the council at a risk of a successful claim by Barry Rowland which would have to be met from council funds.".

John Stenhouse says at paragraph 10 of his witness statement:-

> "Immediately after my discussion with Leanne Laidler, I reported the matter to the second claimant on the same day and told her what Leanne Laidler had said. The second claimant said to me that we ought to see Alison Elsdon, the Director of Corporate Resources and the council's Deputy Section 151 Officer (responsible for the proper administration of its financial affairs) straightaway. We met with Alison Elsdon in a meeting room at the council offices in Morpeth the same day. There were only the three of us present. The second claimant told her that on the information I had given the second claimant, Daljit Lally had attempted to bring about the termination of Barry Rowland's employment, which she believed to be unlawful. The second claimant then asked me to relate what I had told her. I repeated this information to Alison Elsdon such as I had told the second claimant. The second claimant then repeated that she believed that this was an unlawful attempt by Daljit Lally to terminate Barry Rowland's employment and also stated that it would leave the council a risk of a claim by Barry Rowland.

4.44 At a public preliminary hearing on 2nd December 2018, it was recorded that the second claimant alleges that she made two separate protected disclosures. The first was in or about December 2014/January 2015 about Barry Rowland and the second in or

about April 2016 about Zella Weedy. The Employment Judge's case management summary states, "I note and record that these are the only two alleged protected disclosures about which the claimant relies". It was then ordered that the claimant should "set out in as much detail as possible exactly what she recalls having said on those two occasions, to whom it was said, when, where and who else was present".

4.45 On 7th March the second claimant produced a document headed "Claimant's Particulars Public Interest Disclosures". In this document, the claimant states that the first disclosure about Barry Rowland was to Alison Elsdon in December 2014 and January 2015. However, the second claimant then introduces for the first time a second allegation, namely that she informed Kelly Angus between June 2015 and July 2015 that Mrs Lally was using Miss Laidler as leverage to remove Mr Rowland from his post as an Executive Director of Local Services and that the then lead Executive Director Mr Steven Mason was behind that.

4.46 At paragraph 86 of her witness statement, Kelly Angus states:-

> "The second claimant did not at any time during the telephone call of 18th June 2015 or 22nd June 2015 meeting or any other time in this period, raise the issue with me of the potential termination of Mr Barry Rowland's employment as pleaded in her "claimant's particulars public interest disclosures" document dated 7th March 2018 at pages 174-176 of the bundle."

4.47 The Tribunal found it more likely than not that Kelly Angus' recollection of these events was more accurate and that the second claimant had not raised with her personally, Daljit Lally's attempt to engineer the removal of Barry Rowland from his post. The second claimant was unable to provide any meaningful explanation as to why she had never mentioned this alleged discussion/disclosure on any of the previous occasions when she had been given the opportunity to do so. The second claimant states at paragraph 41 of her witness statement, that "Kelly Angus did not comment on what I had said other than to assure me that she would be carrying out a full and independent investigation into the matters raised and Barry Rowland would get a fair hearing." Again, Ms Angus denied ever saying any such thing to the second claimant. Ms Angus had in fact been appointed to investigate the allegations against Barry Rowland, in respect of potential disciplinary proceedings. That would have nothing to do with allegations by Leanne Laidler that Daljit Lally was attempting to engineer Barry Rowland out of the organization.

4.48 The Tribunal found that the second claimant's discussions with Alison Elsdon and John Stenhouse about the Barry Rowland matter probably did amount to a qualifying and protected disclosure, for the reasons set out below, but the Tribunal found that no such disclosure was made about that to Kelly Angus.

4.49 The Respondent's whistle-blowing policy appears at page 227-234 in the bundle. It sets out what constitutes "major concerns" which may form the subject matter of a protected disclosure and describes how such a disclosure may be made. At Section 29 the policy states that the person to whom the report is made must in turn report it to the Monitoring Officer within five working days. Thereafter the Monitoring Officer writes to the person raising the concern:-

- Acknowledging that the concern has been received
- Indicating how the County Council proposed to deal with the matter
- Giving an estimate of how long it will take to provide a final response
- Telling you whether any enquiries have been made
- Supplying you with information on support available from the welfare officers and
- Telling you whether further investigation will take place and if not why not

4.50 The second claimant in cross examination accepted that she was very well acquainted with the whistle blowing policy and had in fact played a major part in its preparation and introduction. Despite being as well acquainted with the policy as anyone else within the respondent's organisation, the second claimant took no further steps to ensure that her whistle-blowing complaint to Alison Elsdon was dealt with in accordance with that policy. The second claimant was unable to give any meaningful explanation as to why she had not done so. It was suggested to her that this could only be because she had not at the time intended to make a protected disclosure and did not believe at the time that she had done so. The second claimant denied this. The Tribunal found the second claimant's failure to follow up her disclosure to Alison Elsdon indicated that the second claimant did not regard her disclosure as something of any particular importance or significance. The Tribunal did not hear evidence from Alison Elsdon, but neither the second claimant nor Mr Stenhouse did anything thereafter to ensure that the disclosure was treated as something deserving of investigation and disciplinary sanction. The level of importance attached to it by the second claimant herself was something which the Employment Tribunal took into account in considering whether the making of the protected disclosure had any influence whatsoever on the Respondent's subsequent treatment of the second claimant. The Tribunal found that it did not.

4.51 The second alleged protected disclosure related to Miss Zella Weedy, a swimming instructor working at Ponteland Leisure Centre and an employee of Active Northumberland, a subsidiary company of the Respondent. Steven Mason was then the Chief Executive of the Respondent and his wife Helen Mason worked with Miss Weedy at Ponteland Leisure Centre. In December 2015, Kelly

Angus had asked the second claimant if she would support Active Northumberland for a period of six months, by providing HR support. Mr Stewart Crichton was appointed to the role of Interim Chief Executive of Active Northumberland and his main objective was to restructure that organization and make significant savings before 31st March 2016 to address a £2.7 million overspend which required a "£1 million bail out" from the Respondent.

On 5th April 2016 the claimant met Miss Lorraine Dewison, a service manager within the Respondent who had also been seconded to Active Northumberland to deal with the ongoing staff restructure. Miss Dewison informed the claimant that Steven Mason, the respondent's Chief Executive had asked Miss Dewison to suspend Zella Weedy, due to alleged discrepancies in the recording of her working hours on her timesheets. The second claimant was suspicious about the matter, as Miss Weedy had previously been exonerated of similar allegations which the claimant suspected had been instigated by Helen Mason, who was line managed by Zella Weedy. Mr Crichton informed the second claimant that he had been told by Steven Mason to make Zella Weedy redundant as part of the staffing review. The second claimant believed that there was no requirement to make Zella Weedy redundant and she believed that Steven Mason had sought to influence Active Northumberland by instructing Lorraine Dewison to suspend Zella Weedy and thereafter to make her redundant.

4.52 Kelly Angus' evidence at paragraph 96 of her statement, was that Mr Mason had asked Mr Crichton, in light of the ongoing disciplinary issues surrounding Miss Weedy, if she could not be made redundant as part of the ongoing restructure. Kelly Angus' evidence was that she advised the second claimant that Miss Weedy could only be made redundant if she was properly in a pool for redundancy and the correct process was followed. Kelly Angus' evidence was that the second claimant never suggested there was an unlawful attempt to terminate Miss Weedy's employment. Kelly Angus' evidence was that she did not understand at the time that her discussions with the second claimant about the matter amounted to a protected disclosure. Miss Angus' recollection was that it was a "very routine discussion about an operational HR matter on which I provided supervision to the second claimant.". Ms Angus went on to say that there were other disciplinary investigations ongoing into Miss Weedy's non-attendance at an incident which had occurred at the centre and in respect of which there was to be a formal disciplinary hearing. Following negotiations between Miss Weedy's trade union representative and the council, a settlement agreement was negotiated as an alternative to that disciplinary process and Miss Weedy left the respondent with effect from 15th August 2016.

4.53 Miss Weedy gave evidence to the Tribunal and confirmed that she was the subject of ongoing disciplinary investigations and that both she and her trade union representative considered that she was the victim of a "witch-hunt", in which Mr Steven Mason had involved

himself without any justification for so doing. The Tribunal accepted Miss Weedy's evidence that she honestly believed that Helen Mason had influenced her husband Steven Mason into engineering her out of the organisation. Nevertheless, Miss Weedy confirmed that she was quite willing to accept the terms of the settlement agreement and move on to different employment. Miss Weedy could not help the Tribunal to decide whether or not the second claimant had made a protected disclosure to Kelly Angus about the matter. The Tribunal found that the conversation between the claimant and Kelly Angus probably did contain sufficient information to amount to a qualifying and protected disclosure. Again, the claimant took no steps whatsoever to follow up the making of this disclosure, so as to ensure it was properly dealt with in accordance with the respondent's whistle blowing policy. The Tribunal again found that the claimant at the time considered the matter to be of insufficient importance or significance and that this approach was similar to that adopted by the Respondent. The Tribunal found that the making of the protected disclosure was not something which had any influence on the Respondent's subsequent treatment of the second claimant and especially was not the principle reason for the claimant's selection for redundancy.

THE LAW

The relevant statutory provisions engaged by the claimant brought by both claimants are contained in the Employment Rights Act 1996 and the Equality Act 2010.

EMPLOYMENT RIGHTS ACT 1996

94 The right not to be unfairly dismissed

(1) An employee has the right not to be unfairly dismissed by his employer.

(2) Subsection (1) has effect subject to the following provisions of this Part (in particular sections 108 to 110) and to the provisions of the Trade Union and Labour Relations (Consolidation) Act 1992 (in particular sections 237 to 239).

98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show--

(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it--

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
(b) relates to the conduct of the employee,
(c) is that the employee was redundant, or
(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)--

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and
(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)--

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

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.

47B Protected disclosures

(1) A worker has the right not 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.

(1A) A worker (“W”) has the right not be subjected to any detriment by any act or any deliberate failure to act, done-

(a) by another worker of W's employer in the course of that other worker's employment, or

(b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C) For the purpose of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

EQUALITY ACT 2010

13 Direct discrimination

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

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

(3) If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

(4) If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.

(5) If the protected characteristic is race, less favourable treatment includes segregating B from others.

(6) If the protected characteristic is sex--

(a) less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;

(b) in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy or childbirth.

(7) Subsection (6)(a) does not apply for the purposes of Part 5 (work).

(8) This section is subject to sections 17(6) and 18(7).

19 Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if--

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

(3) The relevant protected characteristics are--

age;

disability;

gender reassignment;

marriage and civil partnership;

race;

religion or belief;

sex;

sexual orientation.

26 Harassment

(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.

(2) A also harasses B if--

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if--

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(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.

(5) The relevant protected characteristics are--

age;

disability;

gender reassignment;

race;

religion or belief;

sex;

sexual orientation.

27 Victimisation

(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.

5. UNFAIR DISMISSAL

5.1 Where an employee brings a claim of unfair dismissal, the Employment Tribunal requires the employer to demonstrate that its reason for dismissing the employee was one of the potentially fair reasons set out in Section 98(1) and (2) of the Employment Rights Act 1996. If the employer establishes such a reason, the Employment Tribunal must then determine the fairness or otherwise of the dismissal by deciding in accordance with Section 98(4) whether the employer acted reasonably in dismissing the employee for that reason. Redundancy is a potentially fair reason for dismissal under Section 98(2). Both claimants accept that there was a need for a restructure within the Respondent's HR department and neither claimant challenged the nature of the restructure which was proposed by the Respondent. Both claimants accepted that under the new structure, the Respondent would require fewer employees to carry out HR duties and that those who were unsuccessful in their application for a role within the new structure would be redundant, unless the Respondent was able to find them alternative employment. The Tribunal found that there was a genuine redundancy situation within the definition set out in Section 139(1) of the Employment Rights Act 1996, in that the Respondent's requirements for employees to carry out work of a particular kind had ceased or diminished or were expected to cease or diminish.

5.2 Once the Tribunal is satisfied that redundancy was the real reason for dismissal, then they must decide whether dismissal for that reason was reasonable under Section 98(4) of the Employment Rights Act 1996. In judging the reasonableness of an employer's conduct, the Tribunal must not substitute its own decision as to what was the right cause to adopt, for that of the employer. In many cases, there is a band of reasonable responses within which one employer might reasonably take one view and a different employer might reasonably take another view. The function of the Tribunal is to determine whether, in the particular circumstances of the case, the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted.

5.3 In the case of **Williams and Others v Compair Maxam Limited (1982 ICR 156)** the Employment Appeal Tribunal laid down guidelines which a reasonable employer might be expected to follow in making redundancy dismissals. The EAT stressed however that in determining the question of reasonableness, it is not for the Tribunal to impose its own standards and decide whether the employer should have behaved differently. The Tribunal must ask whether "the dismissal lay within the range of conduct which a reasonable employer could have adopted.". The factors suggested by the Employment Appeal Tribunal in

that case, which a reasonable employer might be expected to consider, were whether the selection criteria were objectively chosen and fairly applied, whether employees were warned and consulted about redundancy, whether the union`s view was sought and finally whether any suitable alternative work was available.

5.4 There are however different sets of circumstances in which a fair redundancy dismissal may take place. In many cases, the employer is simply required to reduce the number of employees carrying out work of a particular kind. In those circumstances, a pool of employees is identified, from which those to be dismissed for redundancy are then selected. In those circumstances, where there is a relatively straightforward decision to be made as to which employees will be selected to be dismissed for redundancy, the guidelines in **Williams** include the formulation and application of objective selection criteria, so that decision does not depend solely upon the opinion of the person making the selection, but can be objectively checked against such things as attendance records, efficiency at the job, experience or length of service. The employer will seek to ensure that the selection is made fairly and in accordance with the criteria. When examining the fairness of the process of selection for a new role created by a re-organisation, the principle test for the Tribunal to apply is that set out in Section 98(4) of the Employment Rights Act 1996 and the criteria set out in **Williams** for selecting employees to be made redundant do not apply in the context of selecting between candidates for a new role. The guidelines in **Williams** are concerned with the formulation and application of objective criteria relating to selection for dismissal from a pool where some employees would be retained and others would be dismissed. Those guidelines do not apply to selection for alternative employment, where the issue is whether the employer has taken reasonable steps to find alternative employment for the employee. Where an employer has to appoint to new roles after a re-organisation, the employer's decision must of necessity be forward looking and is likely to focus upon an assessment of the ability of the individual to perform in the new role. For example, whereas a **Williams** type selection would involve consultation and meeting, appointment to a new role is likely to involve (as it did here) something more like an interview process.

5.5 In **Akzo Coatings Limited Plc v Thompson and Others** (EAT117/94 (HJ Peter Clark in the EAT said, "There is in our judgement a world of difference between the way in which an employer approaches selection for dismissal in the redundancy pool where some would be retained and others dismissed. It is to that exercise where the guidelines were **Williams** were directed. These observations have no application when considering whether the employer has taken reasonable steps to look for alternative employment.".

In **Morgan v Welsh Rugby Union (2011IRLR376)** the EAT said :-

"To our mind, a Tribunal considering this question must apply Section 98(4) of the 1996 Act. No further proposition of law is required. The Tribunal is entitled to consider as part of its deliberations how far an interview process was objective, but it should keep carefully in mind that an employer's assessment of which candidate will best perform their new role is likely to involve a substantial element of judgment. The Tribunal is entitled to take into account how far the employer established and followed through procedures when making an appointment, and whether they were fair. The Tribunal is entitled, and no doubt

will, consider as part of its deliberations whether an appointment was made capriciously, or out of favoritism or on personal grounds. If it concludes that an appointment was made in that way, it is entitled to reflect that conclusion in its findings under Section 98(4). In making an internal appointment we do not think there is any rule requiring an employer to adhere to the job description or person specification. To our mind, the employer is entitled to interview internal candidates even if they did not precisely meet the job description and is entitled to appoint a candidate who does not precisely meet the person specification. In other words, the employer is entitled at the end of the process, including the interview, to appoint the candidate which it considers able to fulfil the role.".

5.6 In **British Aerospace Plc v Green (1995IRLR433)** the Court of Appeal said that, in general, an employer who sets up a system of selection which can reasonably be described as fair and applies it without any overt sign of conduct which mars its fairness, will have done all that the law requires of him. Provided that the employer selection criteria are objective, the Tribunal should not subject them or their application to over-minute scrutiny. Most employers are given a wide discretion in their choice of selection criteria and the manner in which they apply them and the Tribunal will only be entitled to interfere in those cases which fall at the extreme edges of the reasonableness band .

5.7 The EAT's "lucid summary of the relevant principles" in **Morgan v Welsh Rugby Union**, was adopted by the EAT in **Samsung Electronics (UK) Limited v Monte-Cruz (EAT-0039/11).** The EAT held that, whilst it is good practice for interviewers to discuss the approach to be followed and to establish what they understand by any assessment criteria and what would be good answers asked, a failure to take these steps will not of itself render the interview decision unfair. The failures identified in that case did not result in the claimant suffering any serious substantial unfairness. Furthermore, the EAT dismissed as incorrect the proposition that is was unreasonable for an employer not to use past performance and appraisals when assessing the employee for the new role. The assessment tools to be used in an interview of this kind – which is not a redundancy selection exercise – were a matter for the employer's discretion. If the tools used are plainly inappropriate, that may be influential when determining the fairness of the dismissal. Where the post in question is a new job, despite similarities it may have with the employee's previous role, it is understandable that the employer should choose to interview for the new role on a forward looking basis.

5.8 It is not necessarily unreasonable for an employer to assume that an employee would not wish to accept an inferior position. The EAT suggested in **Barratt Construction Limited versus Dalyrimple (1984 IRLR 385)** that "without laying down any hard and fast rule", a senior manager who was prepared to accept a subordinate post rather than being dismissed, should make this known to his or her employer as soon as possible. Whether an employer's failure to offer an at risk employee an inferior position will render a dismissal unfair, will depend upon the circumstances of the case.

5.9 Each claimant, whilst conceding there was a genuine redundancy situation, alleges that their selection for redundancy was either a "sham" or in some way "rigged". Whilst the first claimant formally withdrew his allegations of direct age discrimination, he still maintained in his evidence that the reason why he was

selected for redundancy was in some way influenced by his age. The second claimant alleges that either the principle reason why she was selected for redundancy was because she made protected disclosures, or that the respondent's failure to offer her alternative employment was in some way influenced by those protected disclosures. Adopting the Human Rights Commissions Code of Practice on Employment which defines "detriment" as "anything which the individual concerned might reasonably consider changes their position for the worst or puts them at a disadvantage", then the respondent's alleged failure to fairly and reasonably address its mind to the possibility of alternative employment for the second claimant could indeed amount to a "detriment".

5.10 Although the tests of discrimination and unfair dismissal are different, it is difficult in the case of either claimant, to see how the respondent could act "reasonably" for the purposes of the Employment Rights Act, if it had committed a contravention of the discrimination legislation in selecting either claimant for redundancy, or in its treatment of them during the interview process, or in its treatment of them when considering alternative employment. As is set out above, a competitive selection process for a new role does not have meet quite the same stringent standards of objectivity as selection for redundancy from a pool, and this may leave more room for discrimination to "creep in", or at least be more readily inferred and harder to rebut. For example, in **Rivkin v Mott Macdonald Limited (ET Case No 2408125/09)** an Employment Tribunal found that, although the claimant's dismissal for redundancy was not on the ground of his age and was not unfair, the decision not to appoint him to an alternative post did amount to age discrimination. The fact that the manager claimed not to have known that the claimant was sixty years of age before the interview, despite the notice of appearance indicating to the contrary, and the fact that there had been a discussion during the interview about his age and the time it would take to train him up, led the Tribunal to infer that age was a factor in the decision not to offer the employee an alternative post.

5.11 It is well established that fair industrial practice requires an employer to offer a longstanding employee given notice of dismissal for redundancy, the opportunity of new employment which arises, before filling the vacancies with newly recruited employees. Implicit in the duty to look for alternative employment is a responsibility on the employer or not simply to look, but to give careful consideration to the possibility of offering the employee another job. The Employment Tribunal must decide the question of reasonableness on the evidence before them in accordance with equity and the substantial merits of the case. Although the principle that a reasonable employer will not make an employee redundant if he can employ him elsewhere still holds good, in the absence of evidence as to the availability of alternative employment, it is not for the Employment Tribunal to speculate as to what further steps might have been taken and to draw an inference adverse to the employer because it did not take them (**Barratt Construction Limited v Dalyrimple** – above). Furthermore, when making an offer of alternative employment, the employer should give the employee sufficient information upon which he can make a realistic decision whether to take the job or not. Whilst it will depend upon the circumstances of every case as to how much information and information upon what subject should be given, it is necessary for the employer to inform the employee of the

financial prospects of the new job. (**Modern Injection Moulds Limited v Price – 1976IRLR172-EAT).**

6. **INDIRECT AGE DISCRIMINATION**

6.1 The first claimant alleges that the wording of the advertisement for the band 6 roles was such that it amounted to indirect age discrimination, contrary to **Section 19 of the Equality Act 2010.** The first claimant alleges that the phrases "we are looking to recruit two high performing individuals into entry level HR roles", "we are looking for exceptional newly qualified HR professionals" and "if you are looking to launch your career in public sector people management" would discourage people from his age group from applying for the positions.

6.2 **Section 39 of the Equality Act** states that an employer must not discriminate against a person in the arrangements the employer makes for deciding to whom to offer employment. Theoretically, this means that a person who is not even applying for a job but has been put off applying by the terms of the advertisement, may bring a claim on the basis that the job advert is discriminatory. However, the claimant must have been genuinely interested in the job if he wishes to rely upon **Section 39**. In **Keane v Investigo** (EAT0389/09) a lady in her late forties unsuccessfully applied for a number of junior accountancy roles, for which she was overqualified. The lady conceded that she had not been genuinely interested in the jobs, but nonetheless argued that she had suffered discrimination. The EAT, presided over by the President Mr Jusice Underhill, noted that the definition of direct discrimination requires some kind of "less favourable" treatment of the complainant and that the definition of indirect discrimination requires the claimant to have been treated to his or her "disadvantage". Those elements are commonly and usefully referred to together as "detriment". An applicant such as the claimant, who is not considered for a job which she is not interested in, cannot in any ordinary sense of the word be said to have suffered a detriment – or to be more precise for being comparatively unfavourably treated or put at a disadvantage. Mr Justice Underhill also presided over the EAT case of **Berry v Recruitment Revolution and Others** (EAT0190/10) where a man in his fifties had brought a number of age discrimination claims against employers and employment agencies, even though he had not applied for the jobs, which he claimed were advertised in a discriminatory manner. Again, the EAT held that, since he had no intention of applying for the jobs in question, the terms of the advertisements could not be said to have deterred him from doing so, with the result that he suffered no detriment.

7. **DIRECT DISABILITY DISCRIMINATION**

The second claimant alleges that her selection for redundancy and ultimate dismissal was an act of direct discrimination because of her disability. The second claimant must show that the respondent discriminated against her in that, because of her disability, she was treated less favourably than the respondent treated or would treat others. It is now trite law, following a line of authorities from **Shamoon v Chief Constable of the Royal Ulster Constabulary** (2003 ICR337) that the Employment Tribunal should simply ask itself, "why was the claimant treated as she was?". If there were discriminatory grounds for that treatment, then there would usually be no difficulty in deciding whether the

treatment was less favourable than was or would have been afforded to others. That line of thought was followed by Lord Justice Mumery in the Court of Appeal in **Stockton on Tees Borough Council v Aylott** (2010 ICR 1278) when he stated; "I think that the decision whether the claimant was treated less favourably than a hypothetical employee of the council is intertwined with identifying the ground on which the claimant was dismissed. If it was on the grounds of disability, then it is likely that he was treated less favourably than the hypothetical comparator not having the particular disability would have been treated in the same relevant circumstances. The finding of the reason for his dismissal supplies the answer to the question whether he received less favourable treatment.". As was said in **Nagarajan v London Regional Transport** (1999 ICR 877 by the House of Lords) the crucial question in every case is "why did the complainant receive less favourable treatment. Was it on grounds of race? Or was it for some other reason, for instance, because the complainant was not so well qualified for the job?".

7.2 The second claimant has the benefit of **Section 136 of the Equality Act 2010** in that she only needs to prove facts from which the court could decide in the absence of any other explanation that the Respondent contravened **Section 13** and if so the Tribunal must hold that the contravention occurred. It remains for the claimant to prove those facts from which the Employment Tribunal could draw the appropriate inference.

8 HARRASSMENT

8.1 The definition of harassment has a wide scope, in that it covers harassment which "relates" to the relevant protected characteristic and not merely harassment which is "because of" that characteristic. In **GMB v Henderson** (**2016EWCA-CIV-1049)** the Court of Appeal suggested that deciding whether the unwanted conduct "relates to" the protected characteristic will require a "consideration of the mental processes of the putative harasser".

8.2 In determining whether conduct has the effect of violating the employee's dignity or creating the relevant environment for the purposes of **Section 26(1)(b),** the Employment Tribunal must take into account the employee's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect (section 26(4)). In **Land Registry v Grant** (2011 EWCA-CIV-769) the Court of Appeal focused on the words, "intimidating, hostile, degrading, humiliating or offensive" and observed that:-

> "Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

8.3 The test as to whether conduct has the relevant effect is not subjective. Conduct is not to be treated, for instance, as violating a complainant's dignity merely because he or she thinks it does. It must be conduct which could reasonably be considered as having that effect. However, the Tribunal is obliged to take the complainant's perception into account in making that assessment. The intention of the alleged harasser may also be relevant to determining whether the conduct could reasonably be considered to violate a complainant's dignity. However, it is not necessary that the alleged harasser should have

known that his or her behavior would be unwanted. (**Richmond Pharmacology Limited v Dhaliwal-**2009 IRLR336-EAT). Where the language of the alleged harasser is relied upon, it will be important to assess the words used in the context in which the use occurred. (**Lindsay v London School of Economics**-2003 EWCA-CIV-1650).

9 **VICTIMISATION**

9.1 The second claimant alleges that she was subjected to detriments because she had done a protected act. The protected act is said to be raising of her grievance on 11th October 2016. The detriments are said to be being prevented from entering the HR office and being prohibited from having contact with colleagues.

9.2 The employer must subject the employee to a detriment "because" the employee has done a protected act. The language used in **Section 27** matches that in the definition of direct discrimination in **Section 13** and it would seem to follow therefore that the protected act has to be an effective and substantial cause of the employer's detrimental actions, but does not have to be the principal cause.

10 PROTECTED DISCLOSURES

10.1 The first requirement of a "qualifying disclosure" is that the worker must disclose "information" and not merely state an opinion or make an allegation. It is accepted that sometimes the provision of information and the making of an allegation is often intertwined. The point was considered by the EAT in **Cavendish Munroe Professional Risks Management v Geduld** (2010-IRLR-38) and by the Court of Appeal in **Kilraine v London Borough of Wandsworth** (2018-AWCA-CIV-1436). In **Cavendish Munroe**, the claimant stated:-

> "Since the end of last term, there have been numerous incidents of inappropriate behavior towards me, including the repeated sidelining and all of which I have documented."
>
> The Employment Tribunal found that this was simply the making of an allegation and was not the disclosure of any information. However, in the EAT, Langstaff J said:-
>
> "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 suggests that very often information and allegation are intertwined."
>
> The Court of Appeal went on to say:-
>
> "In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have sufficient factual content and specificity which is capable of intending to show one of the matters listed in subsection (1). Whether an identified statement or disclosure in any particular case does meet that standard, will be a matter for evaluative judgment by the Tribunal in the light of all the facts of the case. It is a

> question that is likely to be closely aligned with the other requirements set out in **Section 43B(1)** namely that the worker making the disclosure should have the reasonable belief that the information that he discloses does tend to show one of the listed matters. This has both a subjective and objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such as it is reasonably capable of intending to show that listed matter, it is likely that his belief will be a reasonable belief.".

10.2 There is no definition of "public interest" in the Employment Rights Act 1996. No statutory or non-statutory guidance as to the meaning of the phrase has been published. Until recently, there were no cases which specifically defined what is meant by "public interest" or what is or is not in the public interest. In **British Steel Corporation v Granada Television**-1981AC1096, the House of Lords commented that "there is a wide difference between what is interesting to the public and what is in the public interest to make known.". Lord Denning said in **London Artists v Littler** (1969-2QB-375) in the Court of Appeal that, "Whenever a matter is such as to affect people at large, so that they may be legitimately interested in or concerned at what is going on, or what may happen to them or to others, then it is a matter of public interest on which everyone is entitled to make fair comment.". In the **Freedom of Information Act 2000,** the Information Commissioner's office issued guidance on the meaning of the public interest in that context, stating:-

> "The public interest can cover a wide range of values and principles relating to the public good, or what is in the best interests of society. Thus for example there is a public interest in transparency and accountability to promote public understanding and to safeguard the democratic processes. There is a public interest in good decision making by public bodies, in upholding standards of integrity, in ensuring justice and fair treatment for all, in securing the best use of public resources and in ensuring fair commercial competition in the mixed economy.".

In **Chesterton Global Limited v Nurmohamed** (Court of Appeal-July 2017), Lord Justice Underhill said in the Court of Appeal:-

> "It is in my view clear that the question whether a disclosure is in the public interest depends on the character of the interest served by it rather than simply on the number of persons sharing that interest. That in my view is the ordinary sense of the phrase "in the public interest". There may be many types of case where it is reasonably to be thought that a disclosure was or was not in the public interest. The question falls to be answered by the Tribunal on a consideration of all the circumstances of the particular case.".

10.4 Helpful and detailed guidance on the approach to be taken by the Tribunal in determining whether protected disclosures have been made is provided in the case of **Blackbay Ventures Limited v Gahir** (2014IRLR416). The Tribunal should:-

i) separately identify each alleged disclosure by a reference to a date and content
ii) identify each alleged failure to comply with a legal obligation or health and safety matter (as the case may be)
iii) identify the basis on which it is alleged each disclosure is qualifying and protected, and
iv) identify the source of the legal obligation relied upon by reference to statute or regulations (except in obvious cases).

In performing this exercise, the Tribunal will not know whether the particular disclosure is said to have resulted in a particular detriment, nor the relevant date of the alleged detriment. The Tribunal should then go and to consider whether the claimant had the reasonable belief required under **Section 43B(1).** The enquiry should then move on to whether the disclosure was made in the public interest. The Tribunal must identify the alleged detriment and the date thereof as part of its findings.

10.5 There is no absolute requirement that any particular legal obligation in fact exists. The objective reasonableness of the employee's belief is what is an issue. In **Korashi v Abertawe Bro Morgannwg University Local Health Board** (2012 IRLR 4) the EAT gave guidance on "reasonable belief". Although the test is objective, this has to be considered taking into account the personal circumstances of the disclosure. The question is whether it was reasonable for him to believe it. Further, where an employee relies upon multiple protected disclosures, reasonable belief must be made out in relation to each of the disclosures and a general belief in the broad gist of the content of the disclosures is not enough.

10.6 Consideration of the meaning of being "subject to a detriment" was given by the EAT in **Abertawe Bro Morgannwg University Local Health Board** v **Ferguson** (2014IRLR14). In that case the EAT held that the employer does not have to be able to control the circumstances giving rise to the detriment and guidance was given on the concept of a deliberate failure to act by the employer. Under the **Employment Rights Act 1996, section 42(2),** it is for the employer to show the ground on which any act or deliberate failure to act was done. In **NHS Manchester v Fecitt** (2012IRLR64) the Court of Appeal held that the test in discrimination law of "in no sense whatsoever" derived from **Wong v Igen Limited** (2005-3AER-812), was not to be imported into the statutory test for whistleblowing. The correct test is "whether the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistle-blower".

10.7 Dismissal on the grounds of having made a protected disclosure is automatically unfair. The protected disclosure must be the reason or principle reason for dismissal – it is not sufficient that the disclosure was a material influence, as that test only applies to detriment cases and not dismissal. Anyone subjecting a whistle-blower to a detriment must personally be motivated by the protected disclosure in order for a detriment claim to succeed. Another person's knowledge/motivation cannot be imputed to the decision maker (**Malik v Cenkos Securities PLC**-UKEAT/0100/17).

11 WITNESS CREDIBILITY

11.1 In this case the agreed bundle of documents comprised three A4 ring binders containing 2472 pages of documents. There are numerous notes of meetings and discussions and voluminous e-mail chains between various people. The Tribunal heard evidence from the claimants and from three witnesses on their behalf and six witnesses on behalf of the Respondent. The hearing itself lasted 14 days. Having heard all that evidence and considered all the documents referred to, the Tribunal was required in closing submissions by Mr Menon on behalf of the second claimant, to consider specifically the issue of witness credibility. Mr Menon considered this to be particularly important because "there are several crucial disputes of fact" which meant that the Tribunal would have to make an assessment of the credibility of the witnesses for each side.

11.2 Witness credibility is a factor which is engaged in the vast majority of cases before the Employment Tribunal. Witness "demeanour" is now generally accepted as being of less significance than had previously been the case, so that the following "tools" if fairly and property used, may assist in the assessment of witness credibility:-

1) comparison between the witness evidence and contemporaneous documents. For example, did the claimant raise a grievance or write a complaint at the time? If so, what did they say? Did the respondent reply, and if so what terms?

2) comparison with what was said by the witness in any subsequent investigation of the incident.

3) evidence from others about the parties` behavior immediately after the alleged incident. Did they appear to be on good terms? Did the claimants tell anyone about what had happened? Did they seem angry or offended?

4) evidence about the parties behaviour on other occasions. For example, has the respondent behaved in a particular way towards anybody else in a manner which supports or contradicts the alleged treatment of the claimants?

5) whether, if a witness is found to have been inaccurate or untruthful about a particular matter, that means that the witness is more likely to be inaccurate or untruthful about another matter. Does it matter whether there is a cumulation of points against a particular witness?

6) The inherent plausibility or implausibility of a witness's evidence. This more often comes into play where the Tribunal is asked to consider more complex scenarios. It may be suggested that our common sense and general experience of life tell us that the point about unusual events is that they do not happen very often and that simplest explanation of a situation is often the best.

11.3 It must be recognised that these are only tools and all have their limitations. Human beings are inconsistent creatures and an individual with an otherwise impeccable record may inexplicably do something that seems completely out of character. None of the above factors should be given any more

weight than the others and the Tribunal must always look at all the circumstances of the case, in the round. When faced with competing accounts of events and little by way of corroboration to assist, the Tribunal must fall back and ask itself which version seems more likely to be right, as a matter of common sense. Of course, unusual things do happen and the fact that something may initially look improbable does not of necessity mean that it could never have happened.

11.4 The Tribunal took all of these factors into account in undertaking the credibility assessment which Mr Menon asked us to perform. All the witnesses had prepared detailed, typed and signed witness statements which were taken "as read" by the Tribunal, subject to supplemental questions, questions in cross - examination and questions from the Tribunal. Questions in cross-examination in particular were direct and probative from both counsel. Of particular significance was a line of questioning in cross-examination of the Respondent's witnesses by Mr Menon. Whilst not mentioned anywhere in either of the claimants` pleaded case, nor in either of their witness statements, Mr Menon vigorously pursued a line of questions based upon an allegation that the respondent`s witnesses were part of a "cabal of corruption", as part of which they "feathered their own nests" whilst "climbing the greasy pole" so as to further their own careers at the expense of others (including the claimants). The premise behind this allegation was that senior members of the Respondent`s staff were engaged in a corrupt process whereby they would engineer themselves into positions of power and authority, with generous salaries and terms and conditions of employment. Kelly Angus in particular was accused of playing a major role in this conspiracy, including the positioning of others into roles which would either support or not challenge the process, and the removal of others (such as the claimants) who would not have been so subservient. Mr Menon also focused upon what he identified as particular flaws or inconsistencies in the evidence of the Respondent's witnesses, which he submitted, supported the allegation of corruption. At no stage however did Mr Menon land what could be described as a "killer blow", the effect of which was to totally undermine the credibility of that witness, or his or her evidence. Mr Menon specifically invited the Tribunal to consider the credibility of Ms Angus, Stephen Crosland and Liam Henry. The Tribunal sets out below its findings on the credibility of those three witnesses, but also sets out its findings on the credibility of Mr Mark McCarty, the third member of the panel who undertook the interviews of both claimants and of the claimants themselves.

11.5 **Mark David McCarty**

Mr McCarty is the Deputy Chief Fire Officer for Northumberland Fire & and Rescue Service and thus an employee of the respondent. He has been employed by the respondent for over twenty years and has been Deputy Chief Fire Officer since July 2016. He was previously lead for HR in the Northumberland Fire and Rescue Service and responsible for various aspects of the Assessment and Development Centres in which employees were selected for promotion opportunities. Mr McCarty has over fifteen years experience in interviewing candidates for new roles or promotion and redundancy selection exercises. Mr McCarty confirmed that there was nothing unusual in the use of questions in one exercise, which had been previously used in another exercise. Mr McCarty described how there was a bank of questions from which a panel would choose which were appropriate in the particular circumstances. Mr McCarty confirmed that there was nothing unusual in the interview panel deciding

who would question a candidate and who would keep notes. Similarly, there was nothing unusual about the panel then discussing candidates performance before coming to a collegiate decision as to the score to be allocated to that candidate. Mr McCarty rejected Mr Menon's proposition that the questions used in this exercise were wholly unsuitable and said he was quite satisfied that each candidate was given a fair and equal opportunity to impress the panel with the factual content of their replies and the manner in which they gave those replies. Mr McCarty robustly denied any suggestion that he had been influenced in any way by Kelly Angus as to the way in which he assessed each candidate and came to a collective decision as to the scores to be allocated to each candidate. The Tribunal found Mr McCarty to have a clear, precise and accurate recollection of the entire interview process. The Tribunal found Mr McCarty to be an entirely honest and credible witness and one who did not, or would not, allow himself or any other panel member, to be improperly influenced by another panel member in his or their assessment or scoring of a candidate. The Tribunal found that Mr McCarty was sufficiently robust to avoid being unconsciously steered by the views of either of the other panel members into reaching a conclusion which suited their purposes.

11.6 **Stephen Crosland**

Mr Crossland is a consultant, specialising in HR design and execution of major restructuring programmes. He has over twenty years experience at senior level within large UK and US owned companies and what he describes as a "successful track record of performing pivotal roles in HR, operations and business governance, particularly through periods of significant change and upheaval within organisations.". Mr Crosland was engaged by the respondent as an HR consultant to support Kelly Angus with the service review of the respondent's human resources department and its organisational development and future strategy. Mr Crosland was satisfied that the interview process followed by the respondent was entirely reasonable in the circumstances of this restructure exercise. Mr Crosland had no difficulty with the use of questions which had been used in an earlier exercise, again stating that this was not particularly unusual. Mr Crosland was satisfied that the questions themselves were sufficient to test the relevant competencies of the candidates and to give each and equal and fair opportunity to impress the interview panel. Mr Crosland did acknowledge an error in paragraph 37.7 of his witness statement which he sought to correct when he was first called to the witness stand. The difficulty arose with question 2 of those put to the candidates (that relating to the 5 potentially fair reasons for dismissal). Mr Crossland accepted that candidates who managed to identify all 5 potentially fair reasons, could only possibly score 3 marks and not the maximum of 5 marks which was supposed to be available of all questions. The relevant sentence in his witness statement is as follows:-

"the second claimant went on to question why she only scored a mark of three in relation to question two, which asked the candidates to tell us the five fair reasons for dismissal. I explained to the second claimant that candidates only got a score of three if they got all five reasons and that to score five the candidate needed to weave in examples from their own experience.".

Mr Crossland sought to change the second sentence, to read as follows:-

"I explained to the second claimant that candidates only got a score of three. If they got all five reasons and that to score five the candidate needed to weave in examples from their own experience.".

It was put to Mr Crossland by Mr Menon that he was changing his evidence because of the difficulties encountered by Kelly Angus when she was answering questions in cross examination about this point. Mr Crossland's evidence was that the first sentence as amended referred to question 2 but the remainder referred to the other questions which would permit the candidates to expand upon their answers by giving examples from their own experience. Mr Crossland referred to the minutes of the second claimant's representation hearing on 3rd November 2016 which appear at page 1317 in the bundle. At that meeting Mr Crossland himself was asked to identify the 5 reasons and had been unable to do so. Mr Crossland explained to the Tribunal that this was simply a lapse of memory by him at that time. Whilst great play of this was made by Mr Menon, the Tribunal found the point point to be of little significance in all the circumstances of the case. The fact of the matter was that all the candidates obtained 3 marks for providing the 5 reasons and therefore there was no prejudice or unfairness to any of the candidates. It did not adversely affect the Tribunal's assessment of Mr Crossland as a professional, competent, honest and credible witness as to the interview process, the panel's individual assessments of the candidate and their assessment as to the final scores. The Tribunal found Mr Crosland to be robust and honest when rejecting any suggestion that he had, or would have, allowed himself to be influenced by Kelly Angus into artificially deflating the scores of either claimant.

11.7 **Liam Henry**

Mr Henry is the respondent's "Head of Legal" and also "Monitoring Officer". Mr Henry's role was to carry out an investigation into the second claimant's complaints of whistle-blowing. The second claimant's grievance had been investigated by Mr Philip Soderquest and he had brought to Mr Henry's attention those parts which related to allegations of whistle-blowing. Under the respondent's policy it was Mr Henry's role to investigate whistle-blowing complaints. Mr Henry accepted that investigation into the claimant's whistle-blowing allegations was not given the level of attention which it should have been given. Mr Henry was heavily engaged in a number of other matters, including the recent County Council elections which took place in May 2017. It was not Mr Henry's role to consider whether there had been a protected disclosure as defined in the Employment Rights Act 1996. His role was to investigate the actual allegations made by the claimant, namely that Stephen Mason and Daljit Lally had put pressure on Leanne Laidler to engineer Barry Rowland's departure from the organisation and that improper influence had been exerted by Mr Mason and his wife Helen Mason to secure the termination of Zella Weedy's employment. Mr Menon's assessment of Mr Henry's evidence was that his report to the second claimant's allegations was a "false account" and a "deliberate distortion" of the evidence, all of which was "calculated to exonerate Daljit Lally of any finding of wrong doing". Mr Menon was particularly critical of Mr Henry's failure to conduct a proper investigation into crucial documents which had gone missing. Mr Menon described this as "an extremely sinister development". Mr Menon criticised Mr Henry's conclusion that there was no evidence to support either of the allegations made by the second claimant. The Tribunal found Mr Henry to be a poor witness, in the sense that he had failed to

devote anywhere near as much attention as was necessary to the claimant's complaints. The general impression created by Mr Henry was that he had better things to do at that time than investigate the second claimant's complaints. The Employment Tribunal's function in the second claimant's case is to decide whether or not she made any qualifyingf and protected disclosures and if so, whether she was thereafter subjected to any detriment and ultimately dismissed because she had made those protected disclosures. The Tribunal found Mr Henry's evidence to be of little, if any, assistance in dealing with those issues. Mr Menon placed great emphasis on Mr Henry's failure to investigate the disappearance of documents which have supported the claimant's allegations. Again, the Tribunal took into account the existence/disappearance of those documents in deciding whether or not the claimant had actually made qualifying and protected disclosures. The Tribunal concluded that she had done so and therefore the quality of Mr Henry's evidence was of little assistance. The Tribunal did however reject Mr Menon's submission that Mr Henry's poor investigation and ultimate findings supported the claimant's allegations that this was a corrupt organisation where those in positions of authority conspired together to protect their own positions and advance their own careers.

11.8 **Kelly Angus**

Kelly Angus was the principal witness for the respondent. At the relevant time, she was on a secondment with the respondent from Northumbria Healthcare NHS Foundation Trust, where she held a post of Deputy Director of Human Resources. Ms Angus has over twenty-five years experience in senior HR and general management leadership roles within the NHS. Ms Angus was asked by Mr Stephen Mason the Chief Executive of the respondent at the time, to undertake a service review of the respondent's human resources and organizational development. The review took place between July and September 2015 and Ms Angus joined the respondent on a secondment to progress a workplan to follow up that review. It was towards Miss Angus that Mr Menon mainly directed his allegations on behalf of the second claimant that the respondent was a corrupt organisation, which corruption was devised, implemented and maintained by those in senior positions, including Ms Angus herself. Mr Menon accused Ms Angus of deliberately engineering Anne Mehan into a position where her employment would be protected via a "rigged" process in both the 2015 and 2016 exercises. Mr Menon went on to accuse Ms Angus of deliberately engineering the second claimant's removal from the respondent's organisation, principally because she had made protected disclosures. Mr Menon accused Ms Angus of devising a selection process which would ensure the second claimant's removal and of conducting an interview which was a "sham" as a decision had already been made to appoint Messrs Mehan and Farrekll and to remove the second claimant from her post. By way of response, Miss Millns submitted that, whereas the first claimant had simply accused Miss Angus of maliciously removing him from the organisation, the second claimant had thrown as many unfounded allegations as possible against Ms Angus and the respondent generally. Miss Millns particularly drew the Tribunal's attention to the fact that none of the allegations of corruption had been pleaded or set out in either claimant's witness statement and that Ms Angus therefore had to meet those most serious allegations without any prior notice. The Tribunal found that Miss Angus met those accusations with considerable patience and fortitude and that her evidence was given in an honest, straightforward and credible manner. The Tribunal found that Ms Angus' evidence was better supported by

contemporaneous documents than any of the different versions given by the claimants and that where there was a material difference between their evidence, that of Ms Angus was to be preferred.

11.9 In his closing submissions Mr Menon argued that Ms Angus had given four different versions of her reason for giving Anne Mehan a waiver from the interview in the 2016 process. The Tribunal found that they were minor discrepancies which had little if any significance of the overall fairness of the decision to grant Miss Mehan a waiver from the 2016 interview. Mr Menon's suggestion that the four versions of Miss Angus's reasons were "mutually irreconcilable" was rejected by the Tribunal, as was Mr Menon's submission that this was "an attempt to deceive the Tribunal and cover up the fact that she gave Anne Mehan a waiver without any proper process thereby justifying the claimant's characterisation of Anne Mehan as a management favourite". Mr Menon criticised Ms Angus for denying any knowledge of the first disclosure about Zella Weedy, stating that her conversation with the second claimant was only a request for advice. Mr Menon criticised Ms Angus for not formally reporting this disclosure under the respondent's whistle-blowing policy. However, that overlooks or ignores the fact that the claimant also took no steps to do so. Mr Menon criticised Ms Angus for the selection of questions in the interview process and her inability to explain the scoring given to another candidate who used the Working Time Regulations of 1998 as an example of "recent legislation". Mr Menon criticised Ms Angus for devising a system of questions "which lacked objectivity and integrity and was subject to manipulation". Mr Menon criticised Ms Angus for her inability to explain the missing documents, having failed to launch any meaningful enquiry and trying to explain their disappearance "in a thoroughly dishonest fashion." Again, the Tribunal rejected these submissions.

11.10 **First Claimant (Mr C Stephenson)**

The Tribunal firstly acknowledges that Mr Stephenson did not have the benefit of legal representation throughout these proceedings. Nevertheless, the Tribunal found Mr Stephenson to be educated, knowledgeable and articulate and that he was well capable of presenting his evidence and his arguments in a meaningful fashion. However, the Tribunal found the first claimant to be a less than impressive witness. The first claimant's entire case was based upon the premise that his selection for redundancy and dismissal was an act of "malice" by Kelly Angus. Mr Stephenson was quite simply unable to provide any kind of explanation as to why Ms Angus would want to act towards him in a malicious manner. They were relatively unknown to each other before Ms Angus was seconded to the respondent. There was no evidence of anything that happened thereafter which could have led Ms Angus to behave towards Mr Stephenson in such a way. Mr Stephenson initially brought various allegations of unlawful disability discrimination, unlawful sex discrimination, unlawful age discrimination and automatic unfair dismissal for making protected disclosures. When ordered by the Tribunal to provide further information about those allegations, the claimant was unable to do so and they were all withdrawn. The allegation of unlawful age discrimination (namely that the reason why he was selected for redundancy because of his age) was replaced with one of indirect disability discrimination in relation to the advertisement referred to above. Despite that, the first claimant still maintained in his evidence to the Tribunal that age was indeed a factor in the respondent's decision to dismiss him, because had it not

done so, he would have able to access his pension in two years time and this would have been a substantial financial burden for the respondent. Again, there was no evidence whatsoever to support that allegation. The first claimant insisted that he was unable to make any meaningful decision about the possibility of alternative employment in the respondent's organisation, unless and until they provided him with detailed pension calculations relating to each of the possible alternatives. The first claimant himself was in as good a position as anyone to obtain that information. His explanation that he was inhibited from doing so because of his ill-health was contradicted by the level of attention he was capable of paying to the documentation he was preparing throughout the relevant period. Whilst understanding the first claimant's disappointment at failure to secure one of the new posts, the Tribunal found that the first claimant's approach to these proceedings was tainted by his bitterness and ire in failing to secure one of the available posts. Those tainted his evidence to the Employment Tribunal, which found that the first claimant's allegations about the fairness or otherwise of the entire procedure were without foundation.

11.11 **Second Claimant (Sarah Kirk)**

The Tribunal found that the second claimant's allegations of wrong doing and her evidence to the Tribunal were also tainted by her being personally affronted by the respondent's failure to select her for one of the new posts. What the second claimant perceived to be the unfairness of that decision was something which she was entitled to have tested in the Employment Tribunal. However, the claimant has then thought to bolster her case by trawling back over a considerable period of time to introduce allegations of discriminatory and retaliatory conduct, which the Tribunal found would never have formed the subject matter of proceedings, had it not been for her selection for redundancy. Whist the Tribunal has found that the second claimant probably did make protected disclosures on two occasions, the Tribunal found that the second claimant herself did not attach any substantial level of importance to those disclosures at the time. Despite her personal, intricate knowledge of the whistle-blowing policy, the second claimant took no steps to ensure that what she now describes as protected disclosures were properly dealt with. In their immediate aftermath, the disclosures were either forgotten about or discarded by the second claimant. The second claimant recites a series of incidents alleged to have occurred over a period of time which in these proceedings she alleges amounts to acts of direct disability discrimination, harassment or being subjected to detriment for making protected disclosures. The vast majority of those were abandoned by Mr Menon by the time he reached his closing submissions. It was on behalf of the second claimant that extremely serious allegations of corruption were made and put the respondent's witnesses during cross examination, which allegations were found by the Tribunal to be unsubstantiated. The Tribunal found that much of what was said by the second claimant was exaggerated or a distorted version of what actually happened and that the second claimant was to a large extent being less than candid with the Tribunal in her evidence. Where there was a material difference between the evidence of the second claimant and that of the respondent's witnesses, the Tribunal found that the evidence of the respondent's witnesses was to be preferred.

11. 12 Another point raised by Mr Menon and which he submitted goes to the respondent's credibility, relates not to those witnesses who were called to give evidence, but those who were not. Mr Menon submitted that the respondent had

failed or refused to call a number of material witnesses, whose evidence would have been of assistance to the Tribunal in deciding those issues which it was charged with deciding. Mr Menon submitted that the respondent's failure to call these witnesses was a deliberate act which was designed to conceal material evidence about matters which support the second claimant's allegations of widespread corruption within the respondent's organisation. Mr Menon drew the Tribunal's attention to the decision of court of appeal in **Wisniewski v Central Manchester Health Authority** (1998 PICR-324), which held that in certain circumstances, the court may be entitled to draw adverse inferences from the absence or silence of the witness who might be expected to have material evidence to give on an issue in an action. The Tribunal rejected this submission. The Tribunal accepted Kelly Angus' explanation, namely that the respondent had called those witnesses who could give meaningful evidence to assist the Tribunal in deciding the issues which had been properly identified. Those persons to whom Mr Menon referred included Daljit Lally, Alison Elsdon and Leanne Laidler. Those witnesses` evidence could have only gone to the making of the protected disclosures by the second claimant, which the Tribunal found probably did take place. In those circumstances, their attendance would have added little, if anything to proceedings.

12 **DISCUSSION, SUMMARY & CONCLUSIONS**

Ordinary Unfair Dismissal

12.1 Each claim brings a complaint of ordinary unfair dismissal, relating to their selection for redundancy and dismissal for that reason. Both claimants accept that there was a genuine redundancy situation and both claimants accept that there was fair and reasonable consultation about the implementation of the new structure which would involve the creation of two new posts for which there were four potential candidates.

12.2 Both claimants challenged selection criteria, the application of that criteria and whether the respondent in each case reasonably addressed its mind to the possibility of suitable alternative employment.

12.3 The claimants` challenge to the selection criteria and its application is based upon the use of 10 questions from an earlier exercise at a "behavioural" interview. The claimant's allege that using questions from an earlier exercise was unfair, because it did not comply with the respondent's policy, which states that the method of selection must be fair, non-discriminatory and objectively justifiable. The Tribunal accepted the evidence of the three panel members, namely that it was not unusual for questions to be used from a bank of questions, nor was it unusual for the same questions to be used from one exercise when they had been used in an earlier exercise. The Tribunal accepted the evidence of the three panel members that Ms Angus had chosen the questions and that Mr McCarty and Mr Crosland agreed as part of their "mapping" exercise, that the questions could be fairly used for these interviews. The Tribunal found that some reasonable employers would have utilised that process. The claimants go on to allege that the questions themselves were "wholly subjective". That goes to the third of the principles suggested in **Williams,** namely that "the employer will seek to establish criteria for selection which so far as possible do not solely depend upon the opinion of the person making the selection but can be objectively

checked against such things as attendance record, efficiency at the job, experience or length of service.". It is therefore the entire method of selection that must be objectively justifiable, not just the questions themselves. The Tribunal found that the panel members were entitled to use those questions which they considered to be most suitable to enable the candidates to display those qualities which the respondent was looking for in the two new positions. As the Court of Appeal said in **British Aerospace Plc v Green**, the Tribunal is not entitled to embark upon a re-assessment exercise of the candidates. The Tribunal accepted the evidence of the three panel members, that each of the candidates was given an equal, fair and reasonable opportunity to display their qualities. The Tribunal found that there was no unfairness about the criteria adopted by the respondent, nor its application.

12.4 The Tribunal rejected each claimant`s allegation that the redundancy selection process was "rigged" or a "sham". The Tribunal found that the panel members approached and conducted their duties in an professional and impartial manner, without any overt sign of conduct which marred its fairness. The Tribunal found that the panel members assessment of each candidate and their ultimate selection of those suitable for the posts were decisions which a reasonable employer could have made in all the circumstances. The claimants` allegations that the process was "rigged" or a "sham" were wholly unsubstantiated.

12.5 Each claimant alleges that the respondent failed reasonably address its mind to the possibility of alternative employment. The respondent has acknowledged throughout that it had a duty to look for alternative employment for each claimant and to do so by giving careful consideration to the possibility of offering each claimant another job. The Tribunal found that, in general terms, the respondent complied with its obligation in respect of each claimant. Neither claimant has identified a specific role which could or should have been offered to him or her in circumstances where failure to do so would amount to a breach of the respondent's obligation. There is no duty to make every possible effort to look for alternative employment. The claimants must play at least an active part themselves in identifying the possibility of an alternative role. The Tribunal found that there were no roles available during the relevant period which either claimant has identified as being roles which could and should have been offered to them. The Tribunal found that in each case the respondent had complied with its duty to reasonably address its mind to the possibility of alternative employment.

12.6 For those reasons each claimant's complaint of ordinary unfair dismissal is not well-founded and is dismissed.

13 <u>INDIRECT AGE DISCRIMINATION</u>

13.1 The first claimant alleges that the wording of an advertisement of a band 6 role was such that it amounted to indirect age discrimination. The Tribunal found that the wording of the advertisement itself did not amount to a provision criterion or practice which was discriminatory to the first claimant's age. The claimant has not said that he did not apply for the position because of the wording of the advertisement. The claimant has not actually said that he would have applied for the position. The Tribunal found that he would not have applied for the position, because he did not discover its existence until after his dismissal. The claimant's

evidence throughout the Tribunal proceedings was that he would only consider alternative positions if he was first of all provided with details of the impact of taking such a position upon his pension entitlement. The Tribunal found it highly unlikely that the first claimant would have applied for this position. For those reasons his complaint of unlawful indirect age discrimination is not well-founded and is dismissed.

14 DISABILITY DISCRIMINATION

14.1 The second claimant brings allegations of direct disability discrimination contrary to **section 13 of the Equality Act 2010**, in respect of the incident alleged to have taken place on 4th April 2016. That is when Kelly Angus is said to have asked the claimant, "what's your problem?" The Tribunal found that comment to be wholly unconnected to the claimant's disability and that it was no more than straightforward, plain speaking by the second claimant's manager and directed towards the second claimant's response to a management decision about her unauthorised flexi-time hours. Furthermore, this is a "stand-alone" incident which occurred some eighteen months before the claimant entered into ACAS early conciliation. The claim is significantly out of time. The claimant was more than capable of presenting a complaint to the Employment Tribunal about this incident but failed to do so. The second claimant has failed to provide any evidence to suggest why it would be just and equitable for time to be extended. That claim is not well-founded and is dismissed.

15 HARASSMENT RELATED TO DISABILITY

15.1 The second claimant alleges that the initial appointment of Kelly Angus to present the respondent's statement of case at her appeal against dismissal was an act of harassment related to her disability. The claimant accepts that once she raised an objection to Kelly Angus presenting the statement of case, then Kelly Angus stood down and the case was presented by someone else. The Tribunal found that this did not amount to an act of unwanted conduct which had the purpose or effect of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for her. Furthermore, in no sense whatsoever could the appointment of Kelly Angus be said to be related to the claimant's disability. That complaint is not well-founded and is dismissed.

16 VICTIMISATION

16.1 The second claimant alleges that, having raised a grievance on 11th October alleging victimisation, bullying and disability discrimination, Kelly Angus prohibited the second claimant from entering the HR office and prohibited her from having any contact with a colleague. The Tribunal found that the second claimant herself had asked to be allowed to work elsewhere than the HR office and Ms Angus had simply stated that there was no need for her to do so. The Tribunal found that the second claimant's allegation that she had been "prohibited" from entering the HR office was an exaggerated version of the true facts. The Tribunal found that it was not a detriment in all the circumstances of the case.

17 PROTECTED DISCLOSURES

17.1 The Tribunal has found that the second claimant made two different protected disclosures – the first to Alison Elsdon in December 2014 and January 2015 about pressure being put upon Leanne Laidler to raise a grievance about Barry Rowland, and the second to Kelly Angus in or about April 2016 relating to the attempts to make Zella Weedy redundant. In her pleaded case, the second claimant alleges that she was thereafter subjected to a series of detriments because she had made those protected disclosures. In his closing submissions, however, Mr Menon conceded that the only possible detriment which could be connected to the protected disclosures, was that relating to the claimant being allegedly excluded from entering the HR office, having contact with her colleagues, being excluded from management meetings and decisions. For the reasons already given, the Tribunal found that the second claimant had requested not to have to do so and it was the implementation of that express wish which led to her no longer being involved in those meetings and decisions. The Tribunal found that any decision made by Kelly Angus relating to these matters was in no sense whatsoever influenced by the fact that the claimant had made protected disclosures. This "causation" point is dealt with in more detail below.

18 AUTOMATIC UNFAIR DISMISSAL FROM MAKING PROTECTED DISCLOSURES

18.1 The second claimant's case is that she was automatically unfairly dismissed because she had made protected disclosures and that this was the principle reason why she was dismissed. The Tribunal has found that the claimant probably did make protected disclosures to Alison Elsdon in the first instance about the Barry Rowland affair and then to Kelly Angus in the second instance about the Zella Weedy affair. The respondent has put forward as its principle reason for dismissing the second claimant, a reason related to redundancy. The respondent's position is that, as part of a genuine reorganization within its HR department, the claimant was fairly and reasonably included in a pool of persons from which selection would be made for appointment to the new roles, with the likely consequence that those not selected would be dismissed for redundancy. The second claimant acknowledges that there was a genuine need for a reorganisation within the HR department and accepts that she was fairly included in the pool of persons affected by the proposed restructure. She accepts that if she was unsuccessful in securing one of the new positions, then she would be liable to be dismissed for redundancy. It is the claimant's case that the redundancy selection exercise was deliberately "rigged" and a "sham", so as to ensure that she did not secure one of the new roles and that the principle reason for this was because she had made the protected disclosures.

18.2 For the reasons already set out above, the Tribunal found that the redundancy selection itself was neither "rigged" or a "sham". Those findings were made upon applying the usual test of fairness set out in **section 98(4)** of the **Employment Rights Act 1996.** Ordinarily, that would be sufficient to satisfy the burden placed upon the respondent to show what was its principle reason for dismissing the second claimant. If the principle reason was redundancy then the claim under **Section 103A of the Employment Rights Act 1996** will fail. The claimant seeks to persuade the Employment Tribunal that it was her selection for

redundancy, which in turn led to her dismissal, which made the dismissal automatically unfair. Mr Menon and Miss Millns both accepted that if the Tribunal was satisfied that the selection process had been manipulated so as to produce the second claimant's inevitable selection for redundancy, then that would amount to an automatic unfair dismissal contrary to **Section 103A.**

18.3 The issue is therefore one of causation. The question for the Tribunal is "Was the claimant's selection for redundancy and her ultimate dismissal, because she had made protected disclosures?" If the allegation by the second claimant was that she had been subjected to a detriment because she had made protected disclosures, it would only be necessary for her to show that the making of the protected disclosures had a material influence on the respondent's conduct towards her. Because the claim relates to a dismissal, the claimant must still show that the respondent's principle reason for dismissing her, was because she made protected disclosures. The question of causation in protected disclosures cases was recently considered by the Honorable Mr Justice Choudhury in the Employment Appeal Tribunal in **Malik v Cenkos Securities Plc** (UKEAT/0100/17/RN). The EAT reminded the Employment Tribunals that it is helpful for them to make positive findings on why things happened. The burden of proof is on the claimant to show that a ground or reason (that is more than trivial) for any detrimental treatment to which she is subjected is because of a protected disclosure she made. By virtue of **section 48(2) of the Employment Rights Act 1996,** the employer must be prepared to show why the detrimental treatment was done. If they do not do so, inferences may be drawn against them. However, as with inferences drawn in any discrimination case, inferences drawn by Tribunals in protected disclosures cases must be justified by the facts as found. In the second claimant's case, she alleges that Kelly Angus, knowing that the claimant had made protected disclosures, deliberately influenced the interview and selection process by tainting the opinions of both Mr McCarty and Mr Crosland with regard to the second claimant. In **Royal Mail v Jhuti** (2017-EWCA-CIV-1632), the correct analysis of a "manipulation" case requires some care. It is best to take it in stages, by reference to the status of the manipulator. The Tribunal is satisfied that it would not be necessary to find that Kelly Angus specifically informed either Mr McCarty or Mr Crosland that the claimant had made protected disclosures. It will be sufficient if, because the second claimant had made protected disclosures, Kelly Angus was able to persuade either or both of them to agree to allocate to the second claimant a mark in the interview process which would ensure that she would not secure one of the two available positions.

18.4 The Tribunal found that the claimant had failed to produce any evidence which could support a finding of fact that Kelly Angus had done so. The second claimant was unable to show that her marks in the interview had been deliberately manipulated so as to bring them below the level of the other candidates. The Tribunal found that both Mr McCarty and Mr Crosland were experienced, professional and robust members of the panel, who would not have allowed themselves to be manipulated in this way by Kelly Angus. In their statements and answers to cross examination, both Mr McCarty and Mr Crosland explained the basis of their assessment of the second claimant's performance and how the three panel members had agreed upon the marks which should be allocated to her. The Tribunal accepted Kelly Angus' evidence that her assessment of the second claimant's performance during the interview process

had not been influenced by the fact that the claimant had made earlier protected disclosures. There had been no formal investigation following those disclosures. Neither the second claimant nor Kelly Angus had considered them further, until they were raised by the claimant in her grievance following her selection for redundancy. The Tribunal found that the disclosures were not operating on the mind of the second claimant throughout this period and that it was highly unlikely that they were operating on the mind of Kelly Angus throughout the same period. The Tribunal found that making of the two protected disclosures had no material influence on any part of the decision making process by Kelly Angus which led to the claimant's dismissal for reasons of redundancy. The Tribunal found that the principle reason for the second claimant's dismissal was that she was redundant. The principle reason was not because she had made any protected disclosures. Accordingly, the second claimant's complaints of automatic unfair dismissal for making protected disclosures is not well founded and is dismissed.

Employment Judge Johnson

Date: 4 February 2019