EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Ms E Pringle	**AND**	**Sage Group PLC**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Heard at: **North Shields** **On: 1, 4, 5, 6,7 and 8 June 2018**
Deliberations: 18 June 2018
Before: **Employment Judge Shepherd**

Members: Ms S Mee
Mr D Wilks

Appearances

For the Claimant: **Mr Jenkins**
For the Respondent: **Mr Serr**

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. On a preliminary issue the Tribunal found that the claimant did not establish that she was a disabled person within the meaning of section 6 of the Equality Act from March 2015 to January 2017.

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

3. The claim of unfair dismissal is well-founded and succeeds.

4. The claim of breach of contract was withdrawn by the claimant. That claim is not dismissed pursuant to rule 52 and the respondent's application for costs is refused.

A further hearing will be listed to determine the appropriate remedy for unfair dismissal. If the parties cannot reach agreement within 14 days of the date this judgment is sent to them they should provide details of unavailability for a one-day hearing in the following two months. If they are of the view that further case management orders are required they should contact the Tribunal to arrange a telephone Preliminary Hearing.

REASONS

1. The claimant was represented by Mr Jenkins and the respondent was represented by Mr Serr.

2. The Tribunal heard evidence from:

Emily Pringle, the claimant;
Will Bruce, former Vice President of Financial Planning and Analysis(Mr Bruce gave evidence via Skype from Australia);
Steven Hare Group Chief Financial Officer;
Marita Eddon, Group HR Manager;
Catriona Harrison, Director of Finance Systems;
Rebecca McDonald, People Business Partner.

3. The Tribunal had sight of a bundle of documents which, together with documents added during the course of the hearing, was numbered up to page 946. The Tribunal considered those documents to which it was referred by the parties.

4. The claims brought by the claimant were claims for disability discrimination, unfair dismissal, breach of contract and dismissal by reason of making a public interest disclosure. The claim for breach of contract was withdrawn shortly before the

substantive hearing. This claim was in respect of an allegation that the respondent had breached an implied term of the claimant's contract of employment that the respondent would not dismiss her in a situation where it was likely that she would qualify for income protection insurance. The letter of withdrawal of the breach of contract claim indicated that it was the claimant's intention to bring a High Court claim concerning the same subject matter and she specifically requested that the claim was not dismissed.

5. Rule 52 provides that where a claim, or part of it, has been withdrawn, the Tribunal shall issue a judgment dismissing it (which means that the claimant may not commence a further claim against the respondent raising the same, or substantially the same, complaint) unless –

> (a) The claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied that there would be legitimate reason for doing so; or
> (b) The Tribunal believes that to issue such a judgment would not be in the interests of justice.

6. Mr Serr, on behalf of the respondent, submitted that the prospect of the withdrawal had been mentioned by the claimant in September 2017, some nine months before the hearing. It had been included in the list of issues to be determined two days before the hearing and it had only been withdrawn shortly before the hearing. No good reason had been given for that delay and the Tribunal should dismiss the claim. If not, the respondent should be awarded costs with regard to that part of the claim.

7. Mr Jenkins, on behalf of the claimant submitted, that there was no discretion under rule 52. The reason for the lateness of the dismissal was that the claimant was seeking financial support to run a High Court case. The Tribunal's jurisdiction is limited to £25,000 and the claim in respect of this was a large claim of hundreds of thousands of pounds. The respondent had suffered little or no prejudice. The prejudice to the respondent was nowhere near the prejudice of depriving the claimant of the opportunity to bring that claim. With regard to the costs application, he was not of the

view that the application should be dealt with at this stage and, in any event, it could not be said, as required by rule 76, that the claimant had acted vexatiously, abusively, disruptively or otherwise unreasonably in bringing the claim or the way that it had been conducted. Mere delay was not enough.

8. The Tribunal is satisfied that it would not be appropriate to dismiss the claim. The claimant had a legitimate reason for bringing a civil claim. Also, the Tribunal is satisfied that it would not be in the interests of justice to dismiss the claim.

9. The Tribunal makes no award of costs against the claimant in this regard. There was no evidence that the claimant, or her representatives, had acted vexatiously, abusively, disruptively or otherwise unreasonably in the bringing of the claim or the way the claim had been conducted. The obtaining of funding for the High Court action is a legitimate reason for a delay and there was no evidence that the length of the delay was as a result of such behaviour by the claimant or her representatives.

10. The issue considered by the Tribunal as a preliminary issue was with regard to disability. It was conceded that the claimant was a disabled person from February 2017. The preliminary issue was whether the claimant was a disabled person from March 2015 to December 2016/January 2017.

11. The Tribunal heard evidence from the claimant followed by submissions in respect of this preliminary issue.

12. A joint medical report was provided by a consultant psychiatrist, Dr Britto, who had been instructed by both the representatives, and it was agreed that his report accurately reviewed the claimant's medical records.

13. The Tribunal has considered the Secretary of State's guidance on matters to be taken into account in determining questions relating to the definition of disability (2011). Substantial effect is an effect that is more than a minor or trivial effect. Long-term means an impairment which has lasted for at least 12 months or is likely to last at least 12 months. In assessing the likelihood of an effect lasting for 12 months,

account should be taken of the circumstances at the time the alleged discrimination took place.

14. The Tribunal is satisfied that the claimant was diagnosed with depression and anxiety in March 2015. She was prescribed medication and referred for cognitive behavioural therapy. The medical records indicated that the claimant suffered from a major depressive disorder of mild to moderate severity in 2012. This was short-lived and resolved spontaneously. She had not suffered from mental health issues for at least two years prior to March 2015. Her impairment did have effects on her day-to-day living activities such as poor sleep, failure to provide meals for her family and little socialisation. She continued to work in a high-pressure job in corporate finance. She had no time off work as a result of the impairment although she did have days when she was unable to get out of bed and arranged to work from home.

15. In 2016 there were entries in the claimant's medical records with regard to physical symptoms, acute cholecystitis and gallstone disease. The claimant underwent a cholecystectomy (surgical removal of the gallbladder) on 16 May 2016. There were no entries between 30 August 2016 and 8 November 2016 when it was indicated that the claimant had not obtained a prescription for sertraline for a couple of months. Initially she had a bad few days but then seemed to be ok but her mood had then deteriorated in the previous two weeks.

16. Dr Britto's opinion was that, although the claimant suffered from depressive psychopathology during the relevant period, there was no evidence to suggest that the impairment had an adverse effect on ability to carry out normal day-to-day activities, in respect of both work and personal activities, or indeed if there was intermittent adversity, it was not substantial and consistent with long-term effect. The claimant led a near-normal life during the relevant period, did not avail herself of sickness absence apart from in respect of the cholecystectomy in May/June 2016. She was able to cope with day-to-day living, concentrate on work, look after her children, part take of day-to-day chores and indeed undertook work in corporate finance. He also stated "However, there is no doubt that the then depressive illness was potentially prone to

worsening and/or recurrence." He was of the opinion that the then clinical state of the claimant did not fulfil the criteria of disability in accordance with the Equality Act.

17. The claimant's condition deteriorated and after December 2016 she was diagnosed with fibromyalgia by a Rheumatologist and it is accepted by the respondent that from that time she met the definition of a disabled person.

18. The Tribunal has given careful consideration as to when the claimant's impairment was such as to have a substantial and long-term adverse effect on her day-to-day living activities. The claimant was suffering from an impairment and it did have an effect on her day-to-day living activities but, prior to the end of 2016 it was not shown that these effects were substantial or long term. The Tribunal is not satisfied that it has been shown that the impairment had a substantial adverse effect on the claimant's ability to carry out normal day-to-day activities which had lasted 12 months or was then likely to last 12 months at the material time. It is important to note that the issue of how long an impairment is likely to last should be determined at the date of the discriminatory act and not the date of the Tribunal hearing. In respect of this preliminary issue the date in question is March 2015 to December 2016.

19. In considering the word 'likely' in the context of determining whether the adverse effects of an impairment were likely to last more than 12 months at the relevant date the House of Lords in SCA Packaging Ltd v Boyle (2009) ICR 1056 indicated that the test was that 'likely' simply meant 'could well happen' rather than 'more probable than not'. In considering the medical records and the claimant's evidence, it was not established that, during the material time, the claimant's impairment could have been seen as substantial and long-term. Obviously, depression and anxiety has the potential to have substantial adverse effects and for those effects to be long-term. However, throughout the relevant period the evidence did not establish that the claimant's depressive condition could well have deteriorated so as to be both substantial and long-term.

20. The Tribunal has considered the medical evidence and the claimant's evidence. It is not satisfied that the claimant has established that she was a disabled person within

the meaning of section 6 of the Equality act 2010 at the material time. However, she was a disabled person within that meaning from early 2017.

21. Following determination of the preliminary issue, the parties agreed that the list of issues to be determined by the Tribunal were as follows:

21.1. Unfair dismissal

21.1.1. Did a genuine redundancy situation exist?

21.1.2. Did the respondent identify the correct pool?

21.1.3. Did the respondent follow a fair and reasonable consultation process?

21.1.4. Did the respondent take sufficient steps to search for and offer the claimant suitable alternative employment?

21.1.5. Did the respondent dismiss the claimant by reason of redundancy or by reason of SOSR being a business reorganisation?

21.1.6. If so, was that dismissal reasonable in all the circumstances?

21.1.7. Should any compensation be reduced under the principle of Polkey v AE Dayton Service Ltd and/or contributory fault?

21.2. Protected Disclosure Detriment

21.2.1. Did the claimant's grievance dated 07.02.17 constitute a protected disclosure under either section 43B (1) (b) or 43B (1) (d) of the Employment Rights Act 1996? Specifically:

- Did the grievance contain information tending to show the content of either of those sections?

- Did the claimant have a reasonable belief that information showed the content of either of those sections?
- Was a disclosure made in the public interest?

21.2.2. If so did the respondent dismiss the claimant, as a result of that protected disclosure?

21.3. Victimisation

21.3.1. Did the claimant's grievance dated 07.02.17 constitute a protected act for the purposes of section 27 (2) of the Equality act 2010?

21.3.2. If so, was the information false and/or made in bad faith pursuant to section 27 (3) of the Equality Act 2010?

21.3.3. If so, did the respondent dismiss the claimant as a result of that protected act?

21.4. Reasonable Adjustments

21.4.1. Did any of the following constitute PCPs?

- The practice of inviting employees to consultation meetings at short notice
- The requirement that employees at risk of redundancy apply for roles and/or apply through external recruitment processes without additional support
- The requirement that employees at risk of redundancy are to interview for roles.

21.4.2. Did any of the PCPs put the claimant at a substantial disadvantage compared to non-disabled workers?

21.4.3. If so, did the respondent fail to make reasonable adjustments, including

- Providing the claimant with additional notice of meetings
- Providing the claimant with additional time to process and absorb information
- Removing the requirement for the claimant to apply externally for alternative roles and/or interviewing for those roles
- Altering the recruitment process so as to provide more support for the claimant, such as by arranging informal meetings with recruiting managers.

22. There was a further issue that had to be determined by the Tribunal in respect of the claimant's withdrawal of her breach of contract claim. This was that the claimant had withdrawn the claim one day before the final hearing and the respondent indicated that it applied for this claim to be dismissed and, if not, the respondent made an application for its costs in this regard. The Tribunal's determination of this issue is set out above.

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

23.1. The claimant is a Chartered Accountant. She qualified in 2008 and following that worked for a number of financial institutions. She commenced employment with the respondent on 23 September 2014.

23.2. The respondent is an established plc with over 13,000 employees throughout the globe.

23.3. The claimant was initially appointed to the position of Interim Planning Manager on a 12 month fixed term contract. On 2 March 2015 the claimant was appointed to a full time permanent position as Insight and Analysis Manager. The job description provided as follows:

> "Role Summary
>
> An opportunity has arisen for the right individual to join the Sage Financial Planning and Analysis team as Insight and Analysis Manager. This role has become available at a milestone point in the transformation of the Sage global finance function, and is expected to appeal to experienced FP&A professionals who will bring discipline to decision-making by driving a data driven culture.
>
> The successful candidate will be expected to build strong relationships with the countries and regions and develop deep knowledge and understanding of the business. This will be a highly visible position in the Global Services team which undoubtedly could lead to further opportunities across the business.
>
> Key Responsibilities
>
> - Provide timely, accurate and fit for purpose analysis and insight to drive forward commercial and strategic decisions across all aspects of a fast paced organisation
> - Deliver best in class MI and analytics looking at data relationships with an understanding of drivers, products and markets
> - Deliver analysis of key financial and non-financial performance indicators to support commercial decision-making
> - Develop financial models and analyses to support strategic initiatives

- Develop strong relationships with strategic leads, ensuring integrity and consistency of financial analysis and information
- Operate as a Business Partner, develop and maintain a strong understanding of their drivers and financial performance
- Prepare timely, accurate, and insightful analysis and presentations to the Group Board and Executive Committee
- Identify key drivers of business performance, developing and implementing new KPI's and metrics against which performance can be measured over time
- Input into forecast, budget and long-term financial planning to ensure alignment with overall strategy
- Develop and implement a Business Review Framework to understand the key drivers of business performance
- Together with the Group Financial Reporting and Planning teams, ensure consistent definitions are developed and maintained for the KPIs and other metrics in order to enable meaningful planning and analysis
- Leave the design and implementation of a Business Intelligence tool and dashboard reports
- Provide ad-hoc financial and business analysis as required"

23.4. Steven Hare, the respondent's Chief Financial Officer, said that in around early 2015 he became Executive Sponsor for the KPI project. He said that the idea of the project was to form a designated project team to pull lots of information from different areas of the business to evolve Sage from being a series of decentralised businesses using different management information to one that was more consistent and was using common KPIs. The KPI project team would be 'tasked' with defining the KPIs and then cleansing the data to comply with the definition to sit in a dashboard. He said that the claimant was appointed to project manage the KPI project and that he believed that, prior to this appointment, the claimant had been on a temporary contract. There was

no documentary evidence with regard to the inception of the project, the involvement of Steven Hare as Executive Sponsor, the budget of £1.4 million, the appointment of the claimant to work on the project or the commencement of the contract with Deloittes to provide the IT services and to then remove them from that contract.

23.5. The claimant said that she was appointed to a permanent role as Insight and Analysis Manager. This had been a newly created role and involved her putting together business plans to be provided to the Board. She said that it was in June 2015 that she had been asked to work on the KPI project. Her responsibility was to design the KPI framework and the IT part of the project was contracted to Deloittes.

23.6. Marita Eddon, the respondent's Group HR Manager's evidence was that the claimant became a permanent employee on 2 March 2015. Her title was changed to Insight and Analysis Manager within the same team with the same line manager, Beth Crosier. In around June 2015 the claimant was asked to work on the KPI project. Marita Eddon said that the claimant's previous role in the FP&A team had disappeared as part of subsequent restructuring.

23.7. The Tribunal is satisfied that the claimant's permanent appointment was in respect of the key responsibilities set out in the job description. Only two of these items were those that would be carried out within the project and she continued to carry out other aspects of the Insight and Analysis Manager role during the time of her work on the project. However, it is accepted that her other key responsibilities were gradually taken over by other employees.

23.8. Will Bruce was appointed to the role of Vice President of Financial Planning and Analysis in October 2015. He gave evidence that the claimant was carrying out other functions as well as the KPI project particularly using data in the quarterly business reviews and that the data used for these reviews was that utilised in the KPI project. This was a finite project and the intention was to set it up and move it into "Business as Usual". When asked whether it

was envisaged that the claimant would move to another role, Will Bruce said that his understanding at the time was that there would be plenty of opportunities for the claimant in other positions in finance at the end of the project.

23.9. The Tribunal is satisfied that the claimant took over the KPI project work in or around June 2015. Her earlier appointment to the role of Insight and Analysis Manager was not an appointment to the role of Project Manager or Project Owner. She was given the role in the KPI project and a large number of her tasks were gradually being undertaken by other employees as the project occupied the majority of her time. The Tribunal is also satisfied that the intention was that she would move on to into another role within the finance area once the project came to an end or moved into Business as Usual.

23.10. On 30 September 2015 the claimant sent an email to Steven Hare in this she stated:

> "You have probably guessed that I am very ambitious and like to be working in an environment when I can see progression from me. I am really enjoying the work that I am doing at the minute but I am worried about what is there for me once this project is delivered. I have noticed over the last few months as all of the more senior roles are coming in these are being offered externally and we usually don't find out about these until the person is in the role. I am worried that whilst I am working flat out delivering a project that I am being overlooked for progression…"

23.11. On 4 October 2015 Steven Hare sent an email to Will Bruce indicating that he had 25 minutes on the telephone with the claimant:

> "Her initial concern was that jobs like planning were not being advertised and she wasn't sure she could see a career path for her and her team and she was therefore wondering if she should go and work in marketing, I pointed out that we advertised over 30 jobs internally in the last year

> and that never in the last 20 years had I failed to give a high performing person the ability to develop and get promoted. I also pointed out our ambition to be a $10b company and therefore there would be lots of opportunities. I also said however I reserve the right to appoint people without running a process if I thought that was the best thing to do however it would be the exception."

23.12. On 9 November 2015 Amanda Cusdin, Vice President Human Resources sent an email to the claimant stating:

> "I wanted to follow up on your message last week. I have discussed with the team and I'm now clear on what has been communicated regarding your role.
>
> You have always made clear that you wish to remain in FP&A and that is exactly where the finance leadership team would like you to remain. It fits your skills set and experience and you are a highly valued member of this team. Eventually the maintenance of KPI data (your current project) will move to finance reporting and control as it becomes maintenance rather than set up. At this point you will take on a new project as part of FP&A. I recommend you work closely with Will Bruce to determine what your next project will be as you simultaneously bring the KPI project to its next phase and then transition the work to controlling and reporting in due course
>
> Emily, I hope this has clarified the matter and that you can continue to perform in your current role and drive the critical activities you have been focusing on."

23.13. On 25 November 2015 the claimant wrote an email to Will Bruce indicating that she would be off sick with toothache. She sent a further email on 1 December 2015 indicating that she would not be in again that day. The claimant said in that email that she was very rarely off ill and felt really bad for letting him down.

23.14. On 5 January 2016 Will Bruce sent an email to the claimant in which it was stated:

> "Your communication skills and clarity over status of the project, limiting factors, resource etc needs to improve as we move into 2016. I can only provide assistance when you make it clear what is limiting the success of the project. Emails are not an appropriate discussion tool (see attached) – please deliver the one-page document discussed that documents what stands in the way of our success and delivery of the KPI project…"

This email set out five critical comments with regard to issues in respect of the project.

23.15. The claimant wrote to Will Bruce on 5 January 2016 indicating that she had read through and accepted his comments but then set out a lengthy response including:

> "As I mentioned I am passionate about the project, I have come so far and want to take this through to the end, but at present I am set up to fail…"

The claimant referred to agreeing that her communication needs to improve but for the level of resource she had received she had achieved a massive amount.

23.16. In early January 2016 the respondent's FP&A team was rebranded as Strategic Finance and the responsibilities for budgeting, forecasting and quarterly business reviews were moved to the Performance Reporting team. The KPI project was moved to Performance Reporting and, on 11 January 2016, the claimant was told that she was being transferred to the Performance Reporting team and was to report to CK (a former employee of the respondent who shall remain anonymous in this judgment and reasons)

23.17. The claimant said that CK informed her that Will Bruce wanted her out of the business. CK said that the claimant was not performing but that CK knew she was good but that Will Bruce had said he wanted the claimant out of the business due to her depression and weight. The claimant said that CK said the claimant's appearance had been a factor in her success in the business. She had to do more than perform well, she had to dress right and look right and concentrate on losing some weight. She also said that CK had said that Will Bruce had told her about the claimant's mental health problems and alleged underperformance. The claimant was required to move into the IT project team.

23.18. The claimant met with Steven Hare on 26 January 2016. She said that she was told that he wanted the claimant to deliver a 60 day plan then return to him. Steven Hare said that the claimant and her team were consistently not delivering on the project and that she had both the skills and intelligence to deliver on the project but, because she and her team were failing she wanted to move elsewhere in the business. He said he explained to the claimant that if she delivered some usable output in the next 60 day wave they could have a conversation about what she could do next in the business. He said:

> "I did not promise Emily that she could move back to her old team and I felt that, if Emily wanted to talk to me about her career options, she needed to demonstrate that she could be successful first."

23.19. The claimant said that CK said that if the claimant did not deliver she would not have a job.

23.20. The claimant said that, at the same time as delivering the 60 day plan, she underwent a weight loss programme on the advice of CK. She lost 4.5 stone in three months. The claimant said that during this time CK would announce in team meetings how much weight the claimant had lost each week which she found humiliating. On one night out at a restaurant, CK took a fish pakora from the claimant's plate saying that she should not be eating it.

23.21. On 27 April 2016 the claimant sent an email to Steven Hare. She indicated that she had delivered the first phase of the project, she was coming up to her second anniversary at the respondent and starting to think about her future. Steven Hare responded indicating that the claimant should speak to the newly appointed Executive Vice President of Finance

23.22. In March 2016 the claimant was diagnosed as having gallstones which were blocking her gallbladder. The claimant underwent a cholecystectomy on 18 May 2016. The claimant was informed by her treating consultant that the reason she had gallstones was because she had lost weight too quickly.

23.23. During her absence on sick leave the claimant applied for the post of Director of Performance Reporting for Europe. She attended an interview for the post but was unsuccessful.

23.24. A grievance was raised by another employee in respect of allegations against CK and CK was dismissed from the company.

23.25. On 24 June 2016 the claimant sent an email to Steven Hare stating:

> "I am conscious that given I am now a member of the financial systems team my role is veering further and further away from my skill set. As you know my strengths are my knowledge of the business and my commercial finance skills. My experience is in performance reporting, insight and corporate finance and my knowledge of financial systems is very limited.
>
> As you know I am very ambitious and have a definite career path planned out, and whilst I am not averse to change, I know that I don't want to work in the area I currently am. Whilst I love working at Sage, and have great interest in technology and our customers I am way too driven to plod along in a role that doesn't interest me and I am not excelling in.
>
> Hopefully I can get some time in with Guy/Kevin next week."

23.26. On 12 July 2016 the claimant sent an email to Amanda Cusdin requesting a meeting. Amanda Cusdin indicated that Marita Eddon would be in touch with the claimant.

23.27. On 12 July 2016 Marita Eddon asked Rachel Bone, People Assistant, to prepare redundancy calculations for the claimant based on a leaving date of 5 August 2016.

23.28. On 18 July 2018 the claimant sent an email to Amanda Cusdin stating:

> "I really love working at Sage, so don't want to leave, but am currently in a position where my role has drifted so far from my skill set and interests that I don't see many other options.
> I have a meeting with Marita tomorrow afternoon so we can catch up then."

23.29. On 19 July 2016 Guy Rudolf, Executive Vice President, Finance Control and Operations sent an email to Marita Eddon stating:

> "I know that you are planning to see Emily tomorrow and I just wanted to let you know that I had an intro session with her today. She went to some length to say why things had not worked and how it was not really her fault and that her current role was not using her skills etc.
> I was quite blunt and said that frankly I was not too interested in the past but I had inherited a failing/spinning its wheels project and that really now that Cat and myself had responsibility we had to work out a plan to make it successful etc. She said it was "so close" to delivering and if she was empowered she could make it deliver so I repeated myself be proactive come up with a solution to get the project working – you won't get support to move roles until this delivers so the best thing you can do is to work out a plan to make it work…"

23.30. On 19 July 2016 the claimant met with Marita Eddon and on 20 July 2016 Marita Eddon sent an email to Guy Rudolf stating:

"To summarise our conversation this morning in terms of Emily:

- We discussed some concerns around possible grievance/harassment in terms of comments by CK on Emily's appearance, which led to subsequent weight loss and illness
- We discussed the fact that Emily has not been managed correctly during her time at Sage and she has had 4 different managers in less than two years with no real direction during the current D& I project.
- Emily's skill set is not technical aspect of the current project and therefore she should not be expected to be an expert on this.
- Emily feels she is being blamed for the project not being delivered although some aspects were outside her control
- Some broken promises in terms of possible career moves might have been made along the way and this is now lead(sic) Emily believing she is boxed/stuck with the project instead of being able to move elsewhere in the future
- Emily is committed to turning project around as long as she has adequate direction and support
- Agreed not to give any guarantees of future roles. If project is a success and there are suitable roles at the right time, Emily is of course able to apply.
- We discussed your concerns of not been able to backfill quickly if Emily leaves through settlement. This would mean not being able to deliver metrics and measures as required by year end.
- Options:

    1. Emily stays in her current role with clear direction/management from Catriona and Guy plus adequate support from technical perspective. Need to

make clear there are no guarantees of future roles. *This is currently our preferred option.*

2. Exit through settlement. If we decide to proceed, this needs to be executed by the end of August. Settlement figures and proposal is in place and this conversation can be kick started immediately if decision is to go down this route.

- Actions

  1. Guy to discuss further with Catriona and Kevin today and follow up with Steve.

  2. If agreed Emily stays, Guy to have follow-up conversation with Catriona and Emily next week when in Newcastle.

  3. If agreed Emily goes, Marita to arrange a conversation with Emily."

23.31. On 20 July 2016 the claimant sent an email to Marita Eddon apologising for the day before and indicating that she thought six months of anguish had just flowed out together. She indicated that since meeting Guy she felt lots better.

23.32. Guy Rudolf sent a reply to Marita Eddon on 21 July 2016 stating:

> "Had conversation with KS so far in light of issues below he agrees Option 1 – our preferred option too. Will speak to Cat today."

23.33. The claimant told the Tribunal that she was unaware that there was a draft redundancy payment illustration dated 5 August 2016. She was disappointed that, at this stage, a decision had been taken to keep her in the organisation despite knowing about the harassment and bullying and the impact it was having on her mental health because she would be hard to replace. She

said that the KPI project was prioritised before her well-being. Had they made her redundant then, after a recovery period, she may have felt well enough to go and work for another organisation at a similar level.

23.34. On 28 September 2016 Amanda Cusdin sent an email to Marita Eddon stating:

> "We might have a risk of redundancy on our hands as project is coming to an end in December."

23.35. Guy Rudolf left and Catriona Harrison became the claimant's line manager. The claimant said that Catriona Harrison made it clear that she disliked inheriting a failing project. The claimant said that she felt that Catriona Harrison disliked her. However, she said in the Tribunal hearing that she may have been mistaken in that regard.

23.36. At a year-end annual performance meeting Catriona Harrison provided the claimant with a rating of "Meets Expectations"

23.37. A calibration meeting took place in November 2016. This was chaired by Steven Hare. He told the Tribunal that he did not believe it was correct that the claimant was the project manager of a project that the business had spent hundreds of thousands of pounds on, and was achieving no output but had been given a score of "Meets Expectations". He felt that the claimant's score should be "Needs Improvement". The rest of the calibration team agreed and the claimant's score was changed to "Needs Improvement."

23.38. The claimant sent an email to Steve Hare on 13 December 2016 stating amongst other things:

> "FY16 has been a tough year, I have had four different line managers, all with different ideas and different personalities. I was told continuously that I was performing well, this came from my line managers, you, Amanda, other colleagues etc. and was hopeful I would be promoted. I

> was told in January by my line manager (CK) that the only reason that I had not been promoted to Director was because of my weight. She advised that I went on a strict diet. I am dedicated to doing well at Sage so of course I did this immediately. Whilst I lost four stone in three months I became very unwell and had to have my gallbladder and part of my liver removed and spent 8 weeks out of the office. I am not however making excuses as despite all of this I have delivered something that everybody said was impossible with our systems and also earned myself a great reputation across the business.
> I understand the need for a high performing culture and your decision being based on your perception that the project was not delivering, however I would have hoped that if I was going to be held accountable for the outcomes of the project I should have been allowed to make decisions.…"

23.39. On 20 December 2016 Steve Hare sent an email to the claimant indicating that the performance management process involves calibration to ensure consistency of rating. It was incorrect to state that her rating was his decision but he stated that he supported the rating:

> "…and it is incorrect that I told you that you were performing well in fact the last time we spoke I emphasised that the D&I project had not delivered the required outcome and it still hasn't."

He indicated that the allegations the claimant had made should be addressed with Marita and Catriona.

23.40. The claimant appealed against her year-end rating. She was informed by Marita Eddon that the appeal would be heard by someone outside of finance and it would not reflect badly on the claimant.

23.41. The claimant's appeal against her year-end rating was upheld and her grade was reinstated as 'meets expectations'.

23.42. Catriona Harrison said that Marita Eddon and Catriona Harrison agreed that they need to start the redundancy process during the week commencing 30 January 2017. The Tribunal had sight of a presentation in which it was stated that the project was scheduled to end on 31 March 2017 and the team would be disbanded or become Business as Usual.

23.43. On 7 February 2017 the claimant lodged a grievance. Within that grievance she referred to her role having changed considerably from the role she was recruited to complete without a change to her job description or job title. She referred to mistreatment over the last 15 months and that she felt she had been discriminated against based on her physical appearance. She said that the treatment had had such a significant impact on her that she had become very unwell. She referred to being diagnosed with clinical depression and fibromyalgia. The claimant referred to having been told that the reason she had not been promoted in the past was because she was 'obese'. She referred to having been told by Catriona Harrison that when the project finishes there would no longer be a role for her.

23.44. On 9 February 2017 the claimant had a telephone conversation with Marita Eddon in which there was discussion in respect of the claimant 'exiting' the business.

23.45. On 9 February 2017 the claimant sent an email to Catriona Harrison and Marita Eddon indicating that her GP had provided her with a sick note for a period of three weeks and that she was seeing the consultant rheumatologist on 25 February 2017 and that, by the time the sick note ended, she would have some idea of the longer term implications. Marita Eddon sent an email in reply indicating that the claimant should provide an update in respect of her health towards the end of the three-week period.

23.46. Also on 9 February 2017, Marita Eddon sent an email to Amanda Cusdin indicating that in the conversation that day the claimant was non-committal in

terms of what outcome she was looking for and it was agreed that Marita Eddon would look at options for her 'exiting' the respondent. It was also stated that redundancy calculations were attached with the end date of 31st March which was stated to have been the original plan and still was as the claimant's role was becoming redundant. It was stated that it was agreed with the claimant that the grievance investigation would not be started at the time. Amanda Cusdin replied indicating that:

> "We can go ahead with this package – assuming she signs a settlement for this"

23.47. On 13 February 2017 the solicitors who were then instructed on behalf of the claimant sent an email to Marita Eddon suggesting that discussions and meetings be held in abeyance until the claimant attended her appointment with the consultant. Marita Eddon replied indicating that it was fine to wait until the claimant had seen her specialist. It was also indicated:

> "I would also like to confirm that Emily is still comfortable in waiting until we have spoken again and then decide if she would like her grievance to be taken forward. This was the agreement after our last call however if anything has changed, please do let me know and we can action internal grievance process accordingly."

23.48. The claimant sent an email to Marita Eddon on 28 February 2017 stating:

> "My current note is until 24th March which is when I see the consultant again, however he has indicated that there is currently no cure for my condition and there is a possibility that I would be incapacitated for some time. (He was unable to say how long for as he has said that he could not say whether or not there would or wouldn't be a cure for any time in my working life)."

Marita Eddon replied indicating that she had not proceeded with the claimant's grievance as had been agreed on their last call and that she had received an email from the claimant's lawyer asking to postpone the conversation.

23.49. On 1 March 2017 Marita Eddon sent an email to the claimant referring to an earlier conversation and inviting the claimant to a consultation meeting the following day to discuss "proposed changes within finance function"

23.50. On 2 March 2017 the claimant sent an email to Marita Eddon indicating that she was not well and finding discussions distressing:

> "You are aware of my disability, and its link with stress, and you have witnessed first-hand my current state and its difficulties.
> I am finding it really difficult to understand that you are now saying that my role is redundant, not least because we are both aware that a role very similar to one that I have been carrying out, has been advertised and that advertisement now taken down.
> Put simply, I am not well enough to engage with you in today's conference call: to do so would be very prejudicial to me, because I'm not well. I should also have somebody with me, and this is not possible.
> To be clear, I am not saying that I will not engage in the procedure, and indeed I will want the opportunity to challenge much of what you are saying, and have said to me. However, I am very concerned that I will not do myself any favours having the discussion with you today, and accordingly I will not be dialling into the conference call. Again you should not misconstrue this as my refusal to engage in the process. Instead you should consider this my request for reasonable adjustments to allow me more time to prepare, and to prepare myself for engaging in the procedure which I have significant concerns about being either fair, or genuine.
> I trust that you do understand my position, and my request for more time, being a reasonable adjustment will be granted.

I would also request that you do not contact me for a little while, at I need time, and as above, I'm quite distressed at some of the things that you have said to me."

23.51. On 6 March 2017 Rebecca McDonald, People Business Partner, wrote to the claimant stating:

"You asked for no contact for a little while so I didn't want to message you on Thursday following your email, I wanted to give you some space and time. Unfortunately we can't have an indefinite amount of time where we do not have any contact with you. I am really sorry that you are not feeling well and that you are finding the discussions distressing. I do want to support you with the discussion so please let me know what I can do.

We do need to consult with you regarding your role being at risk of redundancy, the consultation process is your opportunity to challenge the role being put at risk. You have said in your email you are questioning the genuineness and fairness of this and the consultation meeting gives you the chance to discuss this. We can also discuss other opportunities for you in the business.

You have asked for a reasonable adjustment to be made to allow yourself time to prepare for the meeting and have someone at the meeting with you. We would usually allow for a Trade Union Representation, Colleagues@Sage representative or colleague, however if you would like someone else to attend as a reasonable adjustment please let me know. Also as a reasonable adjustment rather than give the 24 hours notice we would usually give for a consultation meeting I would propose that we give you four days notice of the consultation meeting and schedule this in for Thursday.

The original consultation meeting was scheduled as a phone conversation, I am happy to have this meeting over the phone again rather than in person. Please let me know if there are any other

adjustment you required to attend this meeting and I can make sure these are put in place."

23.52. On 17 March 2017 Rebecca McDonald wrote to the claimant to reschedule the initial consultation meeting which was then to take place on 20 March 2017.

23.53. The first consultation meeting took place over the telephone between the claimant and Catriona Harrison and Rebecca McDonald. It was indicated that the reason for the redundancy was that the project the claimant was working on was coming to an end and the project role the claimant was performing was no longer going to be needed. Catriona Harrison said that the logical thing would have been for the claimant to go back into the role she had been doing prior to the project role but, due to restructures in the business, this role no longer existed. The notes show that the claimant said:

> "That she agreed her role in the project team no longer existed, but her previous role in the commercial financial team should exist. EP said that she'd been promised by Steve Hare and David Allen that she would have a role in the commercial team and the role she was doing was just a project. EP explained that she was ill due to the stress she had had over the last 15 months in her role, EP said she did not believe she should be in the role she was in for the short period of time she was. EP said she raised a grievance with Marita Eddon and ME read her grievance but did not investigate it and instead wanted to discuss ways for EP to exit the business. EP said she did not think that in raising a grievance the outcome would be to be asked to exit the business or to end up in a redundancy situation.…
>
> CH said that she could confirm that the redundancy consultation was not a part of EP raising the grievance. CH said that on 31st December she had notified EP that the project would be coming to an end in March and they would always start a consultation meeting closer to the end date…"

There was some discussion with regard to possible alternative roles.

23.54. On 22 March 2017 Rebecca McDonald wrote to the claimant confirming that the role she was performing in the project was coming to an end and that she was being placed at risk of redundancy.

23.55. On 27 March 2017 Rebecca McDonald sent an email to the claimant in respect of the role of Investor Relations Manager asking if the claimant was still interested in the role. The claimant asked about the level at which the role was being pitched. The claimant was informed that the role would be a grade lower than her current role.

23.56. On 27 March 2017 the claimant was invited to a meeting to discuss a grievance which was to take place on 30 March 2017.

23.57. On 28 March 2017 Rebecca McDonald sent an email to the claimant attaching all the roles that they were currently recruiting for. The Finance Transformation Director and Global Process Owners were particularly mentioned. The claimant replied that she did not have the relevant experience or qualifications for those roles. The claimant also stated:

> "With regards my grievance meeting invitation letter, the letter said bullying and harassment based on physical appearance. I was obviously having a breakdown when I wrote the grievance, so apologies if this isn't clear, but I believe the harassment and bullying started when I informed my manager Will Bruce that I had depression however the treatment from Catherin was regarding my mental health and physical appearance. She told the team about my depression and instructed me to stop taking my tablets and insisted that I downloaded a mindfulness app on my iPhone.

23.58. On 30 March 2017 the claimant attended a grievance investigation meeting with Jane Minchinson, Vice President for Services, accompanied by

Rebecca McDonald. The notes of that meeting show that the claimant made a number of allegations including in respect of being placed in the wrong role and promises in respect of a move into the commercial team. The way she had been treated had made her ill. When she submitted the grievance Marita Eddon said that she wanted to put the grievance on hold to look at ways for the claimant to exit the business and that she would be leaving Sage for sending in her grievance. She said that when she told Will Bruce about her depression he had said that he didn't have any weak links in his team. She referred to the problems with the KPI project, her work responsibility becoming blurred and that Will Bruce couldn't get his head around the work or the claimant's depression and was trying to get her out of the team. CK had told the claimant that she had been demoted because of her appearance, she was obese and so would not get promoted and she referred to the treatment of her by CK who was constantly getting at her, although she didn't think that CK was being deliberately vindictive. She did not think that Catriona Harrison wanted her in the team because she had spoken to CK and Will Bruce about the claimant's illness and didn't like her. She felt the treatment was unfair and had caused her to get a chronic illness.

23.59. On 31 March 2017 the claimant attended a second redundancy consultation meeting by telephone with Catriona Harrison and Rebecca McDonald. The claimant said that she would apply for other roles but didn't see the point as she had already been advised that, as a result of raising the grievance, she would be exiting the business. Rebecca McDonald said that the grievance and consultation processes were completely separate and she would not be exiting the business as a result of raising the grievance and they wanted to support the claimant in getting a new role. There was discussion about informing any hiring managers about the claimant's ill-health and any reasonable adjustments but there was no reason they would need to know about the grievance. It was indicated that the Finance Business Partner role the claimant previously applied for and that it could be based outside London if the person was willing to travel as part of the role. The claimant said that she would be interested in the role.

23.60. Rebecca McDonald sent an email to the claimant providing further information in respect of the role of Finance Business Partner and asking whether the claimant would be happy for the level of travel. The claimant replied indicating that she would not be able to travel at present and she was off sick for another three months, probably longer and she was not sure if there any point in applying for the role.

23.61. On 3 April 2017 Rebecca McDonald sent an email to the claimant asking if, when she was ready to return to work, would she be able to do frequent travelling in which case she would send the claimant's CV forward for the role. Also, the role of Pricing Strategist was raised. The claimant indicated that she did not think that, given her current condition, she would be able to travel frequently. With regard to the pricing role the claimant asked if it had to be based in London or could it be in Newcastle.

23.62. On 4 April 2017 claimant sent an email to Rebecca McDonald in respect of the roles discussed in the second consultation meeting indicating that she was worried that she was not physically or mentally well enough to attend an interview for any role.

23.63. On 6 April 2017 the claimant sent an email to Rebecca McDonald indicating that she hadn't slept for three nights and was experiencing panic attacks. In a telephone call the claimant said that the redundancy process was causing her stress and she wasn't going to be well enough to go to any interviews and that she wanted to be made redundant.

23.64. On 7 April 2017 Rebecca McDonald sent an email to the claimant in which she stated:

> "Following our conversation yesterday, in which you advised that you did not feel well enough at this stage to go through an interview process so did not want to apply for any other roles. You also advised that the

consultation process was also adding additional stress and you just wanted to take your redundancy. I have attached a letter which has your leave date of today and what you will be paid as your redundancy payment. You said that you did not want to sign a settlement agreement and therefore would not be taking your enhanced redundancy pay.
We talked about when you were better and if you wanted to come back to Sage in a different role and you said this was something that you would consider. I have attached the reinstatement policy so you can see what the policy is about returning to work after being made redundant."

23.65. Jane Minchinson investigated the claimant's grievance and on 25 April 2017 providing the grievance outcome. This letter set out the issues raised in the claimant's grievance, the investigations and the findings and provided:

"In summary, having taken into consideration; the above findings, I am unable to uphold your grievance. I cannot find evidence that due to you submitting a grievance you were asked to leave the business for the reasons I have already stated. Whilst your role did evolve as do most roles in a changing business this was not considerably different to the role you are asked to do. To your credit my investigations have found that when you are challenged with delivering this project you were always upbeat that you could deliver on the project and when the project was not going well you believed that you could turn it around. You wanted to progress in the organisation and made it clear that the role you were doing was not your long-term career ambition and spoke to different people regarding your career prospects at Sage. Everyone was supportive of you applying for other roles in the business, but did say the onus was on you to apply for roles and to further your own career. No one could promise you roles in the business.
Regarding the 3 different managers you have raised concerns about Will, Catherin and Catriona treating you any differently to anyone else in their team. There are common themes in that both Will and Catriona said that you never raised any ongoing concerns regarding your health so

were unable to support you with this. Will and Catriona have both said that although you didn't see any long-term future in the project team, you were always willing to drive this forward despite setbacks in the project. You have said that you received constant good feedback about the project you were delivering, through my investigations I have found that initially the project got off to a good start but then it didn't deliver what it needed to, you received feedback to that effect from Will in your one to ones and Catriona in your end of year review."

23.66. On 27 April 2017 the claimant sent an email to Rebecca McDonald and Jane Mitchinson indicating that she obviously disagreed with the outcome of the grievance and didn't see any benefit in raising an appeal.

23.67. On 20 July 2017 the claimant presented a claim to the Employment Tribunal after going through the early conciliation process. She brought claims of disability discrimination, unfair dismissal, breach of contract and public interest disclosure detriment and dismissal.

The Law

Unfair dismissal

24. Where an employee brings an unfair dismissal claim before an Employment Tribunal and the dismissal is established or conceded it is for 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) of the Employment Rights Act 1996 whether the employer acted reasonably in dismissing the employee. Redundancy is a potentially fair reason for dismissal under Section 98(2).

25. The definition of redundancy is contained in Section 139(1) of the Employment Rights Act 1996. This states:

> "For the purposes of this act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to:-
>
> (a) the fact that the employer has ceased or intends to cease –
>
> (i) to carry on the business for the purposes of which the employee was employed by him or
>
> (ii) to carry on that business in the place where the employee was so employed, or
>
> (b) the fact that the requirements of that business –
>
> (i) for employees to carry out work of a particular kind, or
>
> (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer
>
> have ceased or diminished or are expected to cease or diminish"

26. If it is accepted that the reason for dismissal was redundancy then it is necessary to decide if that dismissal was reasonable under Section 98(4) of the Employment Rights Act 1996. In judging the reasonableness of an employer's conduct, a Tribunal must not substitute its decision as to what was the right course 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 and 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 an employer might have adopted.

27. The factors of which a reasonable employer might be expected to consider are whether the selection criteria including the pool for selection were objectively chosen and fairly applied, whether the employee was warned and consulted about the redundancy, whether any alternative work was available.

28. In Williams & Others v Compare Maxam Limited [1982] ICR 156, the Employment Appeals Tribunal laid down guidelines which a reasonable employer might be expected to follow in making redundancy dismissals. The factors suggested 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 the redundancy, whether, if there was a union, the union's view was sought and whether any alternative work was available.

29. In carrying out a redundancy exercise, an employer should begin by identifying the pool of employees from whom those who are to be made redundant will be drawn. The Tribunal will consider whether an employer acted reasonably in identifying the pool for selection and may consider whether other groups of employees are doing similar work to the group from which the selections were made, whether employees' jobs are interchangeable and whether the employees' inclusion in this unit is consistent with his or her previous positions. A fair pool of selection is not necessarily limited to those employees doing the same or similar work. Employers may be expected to include in the pool those employees whose work is interchangeable.

30. In Polkey v AE Dayton Lord Bridge of Harwich said :

> *"Employers contesting a claim of unfair dismissal will commonly advance as their reason for dismissal the reasons specifically recognised as valid by (Section 98(2)). These, put shortly, are:*
>
> *(c) that he was redundant.*
>
> But an employer having prima facie grounds to dismiss. will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in

most of the authorities as "procedural", which are necessary in the circumstances of the case to justify that course of action. Thus … in the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select redundancy and take such steps as may be reasonable to avoid or minimise redundancy by redeployment within his own organisation. If an employer has failed to take the appropriate procedural steps in any particular case, the one question the Industrial Tribunal is not permitted to ask in applying the test of reasonableness proposed by section 98(4) is the hypothetical question whether it would have made any difference …. "

31. In the case of R v British Coal Corporation and Secretary of State for Trade and Industry Ex parte Price [1994] IRLR 72 Glidewell LJ stated:

"Fair consultation means:

(a) consultation when the proposals are still at a formative stage;
(b) adequate information on which to respond;
(c) adequate time in which to respond;
(d) conscientious consideration by an authority of the response to consultation."

32. **Duty to Make Reasonable Adjustments**

Section 20 of the Equality Act 2010 states:

"(1) Where this Act imposes a duty to make reasonable adjustments of a person, this Section, Sections 21 and 22 and the applicable schedule apply; and for those purposes a person on whom the duty is imposed is referred to as A.

(2) The duty comprises the following three requirements,

(3) The first requirement is a requirement, where a provision, criterion or practice of A puts a disabled person at a substantial disadvantage in

relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to take to avoid the disadvantage.

(4) The second requirement is a requirement, where a physical feature puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

(5) The third requirement is a requirement, where the disabled person would, but for the provision of an auxiliary aid, be put at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to provide the auxiliary aid".

33. **Victimisation**

Equality Act 2010

Section 27 states:

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.

34. **Protected disclosure**

Employment Rights Act 1996

47B Protected disclosures

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

43A Meaning of "protected disclosure"

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

43B Disclosures qualifying for protection

(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and 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.

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

Disclosure

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

"That the Employment Rights Act 1996 recognises a distinction between "information" and an "allegation" is illustrated by the reference to both of these terms in S43F……It is instructive that those two terms are treated differently and can therefore be regarded as having been intended to have different meanings……the ordinary meaning of giving "information" is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating "information" would be "The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around." Contrasted with that would be a statement that "you are not complying with Health and Safety requirements". In our view this would be an allegation not information. In the employment context, an employee may be dissatisfied, as here, with the way he is being treated. He or his solicitor may complain to the employer that if they are not going to be treated better, they will resign and claim constructive dismissal. Assume that the employer, having received that outline of the

> employee's position from him or from his solicitor, then dismisses the employee. In our judgment, that dismissal does not follow from any disclosure of information. It follows a statement of the employee's position. In our judgment, that situation would not fall within the scope of the Employment Rights Act section 43 … The natural meaning of the word "disclose" is to reveal something to someone who does not know it already. However, s43L(3) provides that "disclosure" for the purpose of s 43 has the effect so that "bringing information to a person's attention" albeit that he is aware of it already is a disclosure of that information. There would be no need for the extended definition of "disclosure" if it were intended by the legislature that "disclosure" should mean no more than "communication".

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

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

> "I would caution some care in the application of the principle arising out of **Cavendish Munro**. The particular purported disclosure that the Appeal Tribunal had to consider in that case is set out at paragraph 6. It was in a letter from the Claimant's solicitors to her employer. On any fair reading there is nothing in it that could be taken as providing information. The dichotomy between "information" and "allegation" is not one that is made by the statute itself. It would be a pity if Tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggest that very often information and allegation are intertwined. The decision is not decided by whether a given phrase or paragraph is one or rather the other, but is to be determined in the light of the statute itself. The question is simply whether it is a disclosure of information. If it is also an allegation, that is nothing to the point".

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

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

office accounts (paragraph 151). He believed that the First Appellant, a well-known firm of estate agents, was deliberately mis-stating £2-3million of actual costs and liabilities throughout the entire office and department network. All this led the Tribunal to conclude that a section of the public would be affected and the public interest test was satisfied*".*

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

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

Reasonable Belief

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

> "… I agree with the EAT in **Darnton** that a belief may be reasonably held and yet be wrong… if a whistle blower reasonably believes that a criminal offence has been committed, is being committed or is likely to be committed. Provided that his belief (which is inevitably subjective) is held by the Tribunal to be objectively reasonable neither (i) the fact that the belief turns out to be wrong – nor (ii) the fact that the information which the claimant believed to be true (and may indeed be true) does not in law amount to a criminal offence – is in my judgment sufficient of itself to render the belief unreasonable and thus deprive the whistle blower of the protection afforded by the statute… An employment Tribunal hearing a claim for automatic unfair dismissal has to make three key findings. The first is whether or not the employee believes that the information he is disclosing meets the criteria set out in one or more of the subsections in the 1996 Act section 43B(1)(a) to (f). The second is to decide objectively whether or not that belief is reasonable. The third is to decide whether or not the disclosure is made in good faith".

Legal Obligation

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

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

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

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

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

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

Method of Disclosure

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

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

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

Claim for Automatic Unfair Dismissal Section 103A 1996 Act

47. Section 103A of the 1996 Act reads:-

> *"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or if more than one the principal reason) for the dismissal is that the employee made a protected disclosure".*

48. The burden of proof lies with the respondent to establish the reason for dismissal. If the reason is established it will normally be for the employee who argues that the real reason for dismissal was an automatically unfair reason to establish some evidence to require that matter to be investigated. Once that has been done the burden reverts to the employer who must prove on the balance of probabilities which one of the competing reasons was the principal reason for dismissal. The Tribunal has referred to **Maund v Penwith District Council [1984] ICR 143**.

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

Conclusions

Unfair dismissal

50. The first issue after the preliminary issue the Tribunal has considered is that of unfair dismissal. The first identified issue is whether a genuine redundancy situation existed.

51. The Tribunal has to consider whether the respondent has established that the requirements of the business for employees to carry out work of a particular kind had ceased or diminished or were expected to cease diminish.

52. The respondent's case and evidence with regard to the claimant's role was inconsistent. In its response to the Tribunal claim, the respondent said that the claimant's role of Insight and Analysis Manager had become permanent and that she was then seconded into a finance led project. Steven Hare said that the claimant was appointed to project manage the KPI project and that prior to this she was on a temporary contract. Marita Eddon said that the claimant became a permanent employee in March 2015 and was then asked to work on the KPI project in June 2015.

53. There was a remarkable lack of evidence in respect of this project. It was a £1.4 million project but there were no notes of discussions or authority being sought or provided to recruit an employee to work on it full-time. There was also a lack of documentation with regard to discussions between the claimant and HR representatives at any time.

54. The claimant was appointed to a permanent position. There is nothing mentioned in respect of the project in her job description. There was a substantial amount of change happening within the respondent at the time, especially within the finance department. Roles within the respondent are subject to change and they evolve. If an employee does well in a role they tend to take on extra responsibilities and their role will then develop.

55. It was envisaged that the claimant would move on to another role at the conclusion of the project. It was a finite project but Steven Hare said that they would never have hired the claimant as a permanent employee if it was envisaged that she would be made redundant. In the early stages he was favourably impressed and said that that the claimant was exactly the type of person they were looking for. They hire people who deliver and are flexible in terms of pursuing their career in other roles and the intention was that an employee would develop into other roles or opportunities. Will Bruce said that his understanding at the time was that there would be plenty of opportunities of finance roles at the end of the project. In an email of 9 November 2015 to the claimant, Amanda Cusdin referred to the project and when it would be moved into maintenance rather than set up and that, at that point, the claimant would take on a new project.

56. The project was not successful. Steven Hare said that they were looking for the claimant to deliver a successful outcome and if the project had been partially successful, and the claimant had played a strong role in elements of that success, then they would continue to encourage the claimant to continue her career in other roles.

57. The project was not considered to be a success and it was not believed that the claimant had performed to a successful level. There had been some discussion of putting the claimant on a performance plan before she went off sick.

58. The Tribunal is not satisfied that the respondent has established that there was a genuine redundancy situation. There was no evidence of any consideration of the need for employees to carry out work of a particular kind having ceased or diminished. The reason for the claimant's dismissal was that there was a failed project and it was perceived that the claimant was responsible for that failure.

59. There was a substantial amount of reorganisation within the respondent and the claimant was moved to a different team for reporting purposes. It was submitted that the reason for dismissal was, in the alternative to redundancy, some other substantial reason, that reason being business reorganisation. The Tribunal appreciates that an organisation can decide the roles and the staff it needs, however, the reason for the claimant's dismissal was not shown to be due to reorganisation.

60. The respondent is a rapidly evolving global company and roles change and evolve. They employ numerous chartered accountants. There was no consideration of the need for employees to carry out the role of an accountant within the finance department and whether that need had ceased or diminished. The project had not been a success and the claimant's continuing employment was subject to her performance.

61. There was no consideration of any pool for selection. Although jobs changed and evolved and there were a number of other chartered accountants employed in the

respondent's organisation in the Newcastle area and nationally and, indeed, globally, there was no consideration of the correct pool. The claimant was considered to be not performing. She had been appointed to a permanent role and then, around three months later, she had been given the project ownership or management which had always been considered to have a finite end. It had been envisaged that the claimant's employment would continue once the project came to an end. The termination of the claimant's employment was by reason of considerations of her performance and culpability in the failed project. It was expressed in terms of redundancy rather than capacity or performance. Although the Tribunal did not hear specific evidence as to why the terminology was used, it is likely that it was with a view to convenience and accommodating a financial settlement.

62. The Tribunal had sight of an organisational chart in respect of the finance team structure. However, during the course of the evidence at the hearing, it was indicated that this chart was of unknown provenance and was inaccurate. Towards the end of the respondent's evidence Rebecca McDonald was given time to prepare a handwritten diagram showing the finance teams and, for the first time, providing grades for the level of employee within those teams. There was no evidence that the respondent had considered the structure before or after the claimant's proposed termination for redundancy.

63. There was no consultation with the claimant in respect of the need for a redundancy or ways to avoid a redundancy. It had been decided that the project had come to an end or moved into its 'maintenance' or 'business as usual' stage and this meant that the claimant's employment could be ended.

64. There was some discussion with regard to alternative roles. It was largely left to the claimant and she was encouraged to reach out to her contacts. All the roles discussed were either in London or required a significant amount of travelling. The claimant was ambitious and did ask about roles that would be at her level or above and opportunities for career progression. The respondent formed the impression that the claimant would not countenance an offer of a job at a lower grade. However, there

was no evidence that it was ever put to the claimant that the position was that she could accept a role at a lower grade or be dismissed.

65. If the dismissal had been shown to be by reason of redundancy or some other substantial reason, the Tribunal finds that the consultation, selection criteria including identification of any pool for selection, and steps to find suitable alternative employment were not fair and reasonable as set out above and the decision to dismiss was outside the band of reasonable responses available to the respondent. The Tribunal has been careful not to substitute its views for those of the respondent and is satisfied that no reasonable employer acting reasonably would have dismissed the claimant in these circumstances.

66. In the circumstances, the claim of unfair dismissal succeeds. This hearing was not listed to deal with remedy. However, it is anticipated that the issue of reduction of any compensation on the principles set out in the case of Polkey v A E Dayton may be a significant consideration. The Tribunal does not anticipate any reduction for contributory fault unless the parties wish to provide evidence and submissions in this regard.

Public Interest Disclosure

67. The protected disclosure asserted is the claimant's grievance dated 7 February 2017. That grievance included concerns relating to changes to the claimant's role, allegations of bullying and harassment based on the claimant's physical appearance and consequent illness. The Tribunal has considered the grievance carefully. The assertion is that the health and safety of an individual has been, is being or is likely to be endangered. It is clear that the claimant raised concerns with regard to her health and safety. However, all the concerns raised by the claimant were in relation to her personal concerns and the treatment of her as an individual.

68. The grievance referred to health issues with regard to the remarks in respect of the claimant being obese and the subsequent removal of the claimant's gallbladder. It also referred to changes in the claimant's role and the claimant having been told that

there was no role for her when the project finished. It did not show any public interest element. These were allegations in respect of treatment of the claimant personally. It was not established that the claimant had a reasonable belief that the alleged disclosure was in the public interest. The claimant raised allegations in respect of the treatment by managers with regard to her role and her health. It was not a disclosure of information that would affect other employees or members of the public. It was a grievance which was raising concerns with regard to the treatment of the claimant as an individual. The Tribunal has sympathy with the claimant but is not satisfied that there was a protected disclosure.

Victimisation – Protected act section 27 Equality Act 2010

69. With regard to a protected act for the purpose of the Equality Act, there is no reference to a disability within the grievance. Indeed, at the time that the grievance was presented, the claimant had not been diagnosed with fibromyalgia although she had referred to it in an email of 3 February 2017. The Tribunal is not satisfied that this was a protected act pursuant to section 27.

70. The decision by the respondent to consider the claimant's position on the basis of perceived redundancy or to treat it as a redundancy situation, had been reached some time before. The draft redundancy calculations having been requested as long before as 12 July 2016. The considerations of what would happen if the claimant left by means of a settlement had been considered in an email dated 20 July 2016. The Tribunal accepts that Catriona Harrison and Marita Eddon had decided to start the redundancy process at the end of January 2017 and prior to the presentation of the claimant's grievance.

71. The detriment alleged was that the respondent dismissed the claimant as a result of the protected act of raising the grievance. The Tribunal is satisfied that the decision to terminate the claimant's employment was not because the claimant had raised a grievance. It was because the project was coming to an end. The respondent saw it as a failed project and it was perceived that the claimant was responsible.

72. The Tribunal is not satisfied that the grievance was the reason or principal reason for the claimant's dismissal pursuant to section 103A of the Employment Rights Act. Also, the claimant's dismissal was not a detriment because she had done a protected act pursuant to section 27 of the Equality Act 2010. It was not an effective or substantial cause of her dismissal.

Reasonable Adjustments

73. The Tribunal has considered the PCPs identified within the agreed list of issues which were as follows:

> The practice of inviting employees to consultation meetings at short notice.
>
> The requirement that employees at risk of redundancy apply for roles and/or apply through external recruitment processes without additional support.
>
> The requirement that employees at risk of redundancy are to interview for roles.

74. The Tribunal accepts that these were PCPs and that they would have placed the claimant at a substantial disadvantage when compared to a nondisabled person.

75. Consultation meetings had to be arranged. The claimant attended by telephone. She did not apply for any roles once she was a disabled person within the meaning of section 6 and was unfit to work in any event. If there was a duty on the respondent to make reasonable adjustments then the respondent did make some adjustments in respect of the redundancy consultation. The claimant was allowed to attend meetings by telephone. She was allowed extra time and it was indicated that she could be accompanied by someone beyond those allowed to accompany employees to such meetings within the respondent's usual practice.

76. The claimant was not fit to attend any interviews and, had she been, the respondent had indicated that they could have discussed what reasonable adjustments they could put in place for the interview.

77. The reasonable adjustments which were put forward in the agreed list of issues were as follows:

> Providing the claimant with additional notice of meetings.
>
> Providing the claimant with additional time to process and absorb information.
>
> Removing the requirement for the claimant to apply externally for alternative roles and/or interviewing for those roles
>
> Altering the recruitment process so as to provide more support for the claimant, such as by arranging informal meetings with recruiting managers.

78. The claimant was provided with additional notice of the redundancy consultation meetings. The process was extended and the claimant was allowed additional time and was permitted to be accompanied by someone outside the respondent's normal practice.

79. With regard to the recruitment process, it was indicated that adjustments would be considered. As the claimant remained unfit to work and had not been required to attend an interview, it was not shown that such adjustments were reasonable or that they had not been made.

80. The claimant was not fit to work and any adjustment would not have been likely to have ameliorated any substantial disadvantage at which she was placed.

81. In all the circumstances, the claims of public interest disclosure detriment or dismissal, victimisation and failure to make reasonable adjustments do not succeed.

82. The claimant was unfairly dismissed and a further hearing will need to be listed to consider the appropriate remedy. It was indicated by the representatives that they would wish to provide further evidence and submissions in this regard. It was acknowledged that the principles set out by the House of Lords in the case of Polkey

v AE Dayton could be of some significance in respect of an award of compensation for unfair dismissal.

83. It was indicated that the parties may be able to reach some accommodation with regard to the appropriate remedy. If not, they should contact the Tribunal within 14 days of theisjudgment and reasons being sent to them providing dates of non-availability. The period for which dates should be provided is two months from the date the judgment and reasons are sent to them by the Tribunal. If it is felt appropriate that further case management orders should be made then they should seek agreement in respect of those orders and contact the Tribunal. A telephone preliminary hearing will be arranged if necessary.

Employment Judge Shepherd

28 June 2018