# EMPLOYMENT TRIBUNALS

**Claimant:** **Miss K Linsley-Hood**

**Respondent:** **Camps International Group Ltd**

**Heard at:** **Southampton** **On: 30 September and 1,2,3 and 4 October 2019**

**Before:** **Employment Judge Rayner**
**Members Mr N Cross**
**Mrs C M Earwaker**

**Representation**
**Claimant:** **Mr Large, of Counsel**
**Respondent:** **Mr Veal, of Counsel**

# JUDGMENT

1. The Respondent did have actual or constructive knowledge of the Claimants disability and its effect on her at all material times;

2. The Claimant was discriminated against on grounds of disability;

3. The Claimant was treated unfavourably for a reason arising from her disability in that she was dismissed;

4. The Respondent failed to make reasonable adjustments for the Claimant in respect of its procedures and in respect of hearings at which the Claimant was dismissed;

5. The Respondent did not discrimination against the Claimant for a reason arising from her disability by giving her a notice to improve on 31 October 2017

6. The Claimant did not make a protected disclosure within the meaning of section 43B ERA 1996;

7. The Claimant was not subjected to a detriment for making a public interest disclosure;

8. The Claimant was not dismissed for making a public interest disclosure;

9. The Claimant conversation on 7 September 2019 did not amounted to a Protected Act, and the Claimant was not victimised for doing a protected act by being given the notice to improve on 31 October 2017;

10. The Respondent will pay the Claimant compensation for discrimination of **£42,284.12** comprised as follows:

    a. Basic award - £508.00
    b. Loss of earnings – 23848.80
    c. 15% uplift on loss of earnings – £3577.32
    d. Injury to feeling award - £14,000.00
    e. Loss of statutory rights - £350.00

# REASONS

1. By a claim form dated 8 February 2018 the Claimant brings claims against her former employer Camps International, that as a result of making protected disclosures and/or because of her disability, she was subjected to unfavourable treatment and dismissed. The events on which the Claimant relies span a relatively short period of time. The Claimant started work for the Respondent in June 2016 and was dismissed at a meeting on the 11 December 2017.

2. The Claimant is and was at all material times a disabled person within the meaning of the Equality Act 2010 by reason of post-traumatic stress disorder. This is admitted by the Respondent.

3. The Respondent denies that they had actual or constructive knowledge of the Claimants disability at any point during her employment. They deny that the Claimants disability was any part of the reason for the dismissal and also deny that they were under a duty to make reasonable adjustments.

4. The Claimant alleges that she made protected disclosures in respect of the organisations approach to charitable fundraising. The Respondent denies that the Claimant made any protected disclosures and further generally that any of the treatment they subjected her to, up to and including dismissal was materially influenced in any way by any disclosure which the Claimant may have made. The Respondent asserts that all their actions, including the dismissal, were reasonable management actions taken to deal with the Claimant's alleged poor performance.

5. The Claimant had worked for the Respondent for less than two years at the point that she was dismissed, and the Respondent's rely upon the contract of employment which contains a discretion for managers not to follow a formal disciplinary procedure when dismissing an employee with less than two years service.

6. The issues before the Employment Tribunal following amendment were as follows;

**Public interest disclosure subsection 43B and C ERA 1996**

7. Did the Claimant make the following disclosures?
    a. An oral disclosure on the 30 October 2017 to Mr Lacey that raising funds for projects which had already been paid for by students breached charity rules;
    b. written disclosure on 1 November 2017 to Mr Lacey that there was no detailed communication about what funds are being raised for.
8. Did the Claimant disclose information rather than opinion?
9. If so, does content of any of the disclosures constitute a qualifying disclosure? The Claimant alleges that the disclosure concerned a criminal offence or breach of a legal obligation.
10. Were any Disclosures in the public interest and
11. If so was the qualifying disclosure made in accordance with the 1996 Act?

**Public interest disclosure dismissal section 103A era RTS a**

12. Was the sole principal reason for the dismissal on the 11 December 2017 the fact that the Claimant had made protected disclosures?
13. If yes has the Claimant mitigated her loss
14. If yes what should Claimant be awarded

**Public interest disclosure detriments section 40 7B era RTS a**

15. did the Claimant suffer detriment in that
    a. she was given a notice to improve on 31st of October 2017
    b. she was dismissed.
16. Were any detriments done on the ground that they were materially influenced by the making of any protected disclosures?

**Disability**

17. did the Respondent have actual or constructive knowledge of the Claimants disability of PTSD and if so when?

**Victimisation**

18. Section 27 and section 136 Equality Act 2010: Did the Claimant do a protected act by making an oral grievance on 7 September 201/7
19. If yes was the giving of a notice to improve on 31 October a detriment?
20. if yes did the Respondent subject the Claimant in the detriment because of the protected act?

**Failure To Make Reasonable Adjustments**

21. Did the Respondent apply the following provision criterion or practice:
    a. not permitting a companion to meetings which were neither grievance and disciplinary meetings
    b. providing little or no notice of meetings
    c. failing to tell the Claimant that the meeting which resulted in her dismissal, could result in dismissal
    d. failing to consider alternatives to dismissal such as redeployment
22. Was the Claimant placed at a disadvantage by any PCP in that she was
    a. left unsupported anxious and insufficiently able to respond to issues raised at meetings
    b. unable to prepare in such a way as to deal appropriately with issues at meetings
    c. placed at risk of having a panic attack not being watered meeting could result in dismissal

d. the Respondent created an environment whereby the Claimant was at real risk of

23. The comparator is a nondisabled person.
24. Were the disadvantages substantial in comparison to the effect on a nondisabled person?
25. Did the Respondent take such steps as were reasonable to avoid the disadvantage?

**Discrimination Arising From Disability**

26. Did any or all of the following arising from the Claimant's disability
    a. the need to take periods of sick leave
    b. the need for adjustments such as an amended timeframe for achieving improvement at work the need for adjustments such as the need for flexible work on return to work after a period of sick leave in November
27. Was the Claimant subjected to unfavourable treatment by
    a. being given a notice to improve on 31 October 2017
    b. by being dismissed
    c. by being dismissed summarily rather than being allowed to work notice
28. Was the unfavourable treatment because of the thing arising from the Claimant's disability if so can the Respondent establish that the treatment was a proportionate means of achieving a legitimate aim?
    a. What is the legitimate aim relied upon
    b. was treatment a proportionate means proportionate means of achieving that aim

**ACAS uplift**

29. Was there a breach of the ACAS code and if so what level of uplift that be applied.

**The Hearing**

30. At the start of the hearing we were provided with an agreed bundle of documents of 481 pages. We were provided with an agreed list of issues and opening submissions on liability and ACAS uplift on behalf of the Claimant. We were provided with written statements and heard oral evidence from 8 witnesses. For the Claimant we heard from Katherine Linsley Hood the Claimant, Anita Dyball and Natalie Bull. For the Respondent's from Matthew Lacey; Hannah Davies; Sharon Cruise; Cheryl Newstead and Kim Warner.

31. In advance of hearing the Claimant has requested reasonable adjustments to enable her to be seated where she could see the door. The Tribunal room was therefore arranged in order that this was possible.

**Findings of Fact and Reasons**

32. The Claimant maintains that she was open with the Respondent about the fact that she had suffered an event in the past which gave rise to PTSD from the outset of her employment. She states that she discussed this during the course of her interview in the context of telling the Respondent about the occasion when she received an award for bravery as a result of being

involved in an armed robbery. It was this event that led to her PTSD and she says she spoke about it openly. Mr Lacey for the Respondent states that this was not discussed. He has no notes of the interview.

33. We find that the Claimant did refer to her PTSD and its affect on her during the course of the interview. We find it more likely that Mr Lacey did not particularly focus on what the Claimant was saying about the cause of the award for bravery, than that the Claimant did not raise it. We note that the members of staff we heard from told us that the organisation does not have any regular training on disability or mental health issues.

34. In giving evidence before us the Claimant was able to talk about the difficult past events confidently and clearly, and we find that it is more likely that she raised the matter in a positive way and that the Respondent simply do not recall her talking about it than that she said nothing about it at all.

35. We do not fault the Claimant for not putting the fact and nature of her disability on the application or employment form. There is no requirement for her to do so, and we understand that prospective employees do not always wish to reveal a disability. We also accept that the Claimant did not at this point consider herself to be a disabled person and was feeling in good health. None the less, we find that she did talk about the award for bravery and the fact that she had and did suffer from post traumatic stress at interview.

36. The Claimant was promoted towards the end of 2016 when her then line manager resigned and the Claimant's promotion at this point is indicative of the positive view that the Respondent had of her abilities as a marketing assistant and her potential to take on the role of a marketing manager.

37. At about the same time, Ms Hannah Davis prepared an appraisal document for the Claimant. She told us that she had prepared it for Mr Lacey to use but Mr Lacey said he had never seen it. We find that it was not in fact ever used as to appraise the Claimant. Nonetheless, the document is stored on the Claimant's file and she came across it at a later point in time.

38. We find that the facts and matters set out are a fair and honest reflection of the opinion that the Respondent had of the Claimant in December 2016. It is a glowing appraisal which raises no concern about the Claimant's work or her abilities. When Ms Davis gave evidence, she sought to suggest that some comments within it contained an implied criticism of the Claimant. We reject this and note that the numerous comments of approval include noting her real flare. We accept that the document was not given to Mr Lacey, it seems bizarre that they drafted the document but had not done anything with it but we also accept that it was not in fact provided to the Claimant and was certainly not discussed with her. In most firms the clear purpose of an appraisal is to share with an individual, positive comments of any constructive criticism and set out areas of development for the future. This did not happen with the Claimant.

39. Over the summer of 2017, the Claimant's step father became critically ill and sadly died towards the end of 2017. The Claimant was understandably upset when she was giving evidence about this.

40. The Claimant says that her step father death affected her PTSD and that the impact on her would have been obvious to her work colleagues.

41. We accept the evidence the Claimant has given of the of impact of her step father death upon her and also find as fact that it did exacerbated her PTSD.

42. From the evidence we have heard, we find that the Respondents had an open and chatty workplace, and staff appeared to have known one another well. The Claimant's colleagues must have known of her upset and the cause of it.

43. As a result of her bereavement, and the need to continue to support her mother, the Claimant was granted compassionate leave and then allowed to work flexibly from home. The Claimants managers knew of her bereavement and that it was having an impact on her, and it is clear that up until September 2017 that the Respondent was supportive of the Claimant.

44. On 7 September, the Claimant was working at home and the during the course of a telephone call with Ms Warner she was told that an issue had arisen about some marketing materials which she had produced. Mr Lacey had apparently changed his mind about them and asked for them to be changed. Mr Lacey had indicated to Miss Warner who was a marketing assistant reporting to the Claimant that the Claimant did not need to be contacted.

45. Nonetheless the marketing assistant had informed the Claimant who had become concerned and contacted Mr Lacey by phone. When she received no reply, she sent an email which we saw at page 238 of the bundle. This email is a clear indication that the Claimant is distressed. In the header it says "can you hear me screaming". It says within it that she is convinced that Mr Lacey is trying to drive her to gin and ends with the words "help me".

46. Mr Lacey did not reply and the Claimant decided she needed to go into the office and she then sought to meet with him We find that this email was a clear flag to any manager that one of their employees was distressed. Any reasonable manager receiving that email would have checked that the individual writing it was alright, either themselves or by referring to another person. It was a clear indication that her mental health was not good and it required at least a short response. Mr lacey knew that the Claimant was recently bereaved, and that she was supporting her step mother, and we have found that he also knew or ought to have known of her PTSD.

47. Mr Lacey did not in fact contact the Claimant at that point. Mr Lacey's evidence was that he felt she didn't need to be contacted. However, he did not at that point make it clear to the Claimant, by replying to her email, and did not take any steps to in respect of her health, or to offer any reassurance to her.

48. The Claimant was also concerned because she had been told by Ms Warner that Mr Lacey appeared to be finding the matter funny. Mr Lacey denies that he did find anything funny but in her evidence, Ms Warner confirmed that she had said this to the Claimant. We find as fact that Ms Warner was reporting

something about Mr Lacey's demeanour to the Claimant and that he did appear to her, Ms Warner to be finding something funny.

49. When the Claimant went into the office on 7 September, she met with Mr Lacey and they had a conversation that appears to have fallen into two parts. The Claimant states that during the course of this discussion she explained how she was feeling and that she was dealing with her grief over bereavement and how it was impacting on her PTSD. Mr Lacey asserts that while they discussed how she was coping with her grief, she did not raise her disability or the impact her grief was having upon it. We are unanimous in preferring the Claimants evidence and finding that the Claimant did refer in that meeting to the fact of her PTSD and that she was suffering flashbacks, lack of sleep and that the last time she had felt that way was during the course of the robbery. We find that she did say that she felt undermined by not being spoken to and we also find that Mr lacey did apologies to her.

50. There are no notes of this meeting, but we have taken account of what Mr Lacey told us about how he saw his role. He described his role as being one of running group business and said that he was not interested in the close management of people and that he expected people to self-manage. He was clearly not enthusiastic about the formality of management and did not find it necessary to put matters in writing.

51. We find that Mr lacey was more likely to have forgotten, or not taken much notice of what the Claimant told him in that meeting about her health, that that the Claimant did not tell him.

52. In making this finding we rely in part on the email exchange which followed the meeting and which is at page 239. The Claimant thanked Mr Lacey for his support and he refers to her suffering dark days. His email response suggests that her was empathising with her at that point and that he realised that she was really distressed. We find that his understanding of how she was feeling and how her health was suffering at that point was part of the reason for his apologies for the way he had handled things.

53. Mr Lacey may well have related to how she was feeling about her bereavement and focussed on that aspect of the conversation, but we find that she did raise the fact and the impact on her of her disability.

54. As a consequence, we find that at this point Mr Lacey knew that the Claimant was distressed and that she was suffering flash backs to the break- in and armed robbery and that she was losing sleep as a result and that the flashbacks and distress were the result of her PTSD. Whether or not the Claimant referred to PTSD or used that label, Mr Lacey would have been in no doubt that her mental state was being affected by her past experiences.

55. We find that at this point there was sufficient knowledge of matters relating to the Claimants health for Mr Lacey to have actual knowledge of her disability and its impact on her. If we are wrong, then we find as fact that he had constructive knowledge of her disability by the end of this meeting.

56. Employers have duties under the Equality Act 2010 to their employees who have disabilities and we find that any reasonable employer would make enquiries about additional needs for support if the employee wrote an email of the type the Claimant sent in advance of the meeting or made the statements that we find she did make during the course of the meeting.

57. We find the email at page 239 shows a real change of attitude in Mr Lacey and is an indication of him acknowledging the Claimant's state of mind.

58. On 17 September 2017, the Claimant was asked to provide management with details of where the enquiries that they received were coming from. Whilst we accept that the Claimant felt this was unfair and found it stressful, we find that this was a reasonable management request and was not a criticism of the Claimant. The Claimant produced a report which gave joint information about sales and marketing.

59. From the evidence we have heard we find that Mr Lacey was not unhappy with the results of the marketing and sales teams. We find that at this point his unhappiness was directed at both marketing which was the responsibility of the Claimant but also at the sales figures which were primarily within the responsibility of Hannah Davis.

60. About a month later on 16 October 2017, the CEO Stuart Reece-Jones visited from Dubai and became very critical of marketing materials. The Claimant became upset about the criticism.

61. We find that from the evidence before us that at this point there had been no specific criticisms made about the Claimant or her work specifically. We find that no any issue or concern been raised with her about her work attitude or her interaction with others as a specific performance issue or at all, and we find that there is no evidence of any one in the organisation raising any performance issues about the Claimant with any of her managers.

62. We have heard evidence from the Respondent witnesses Hannah Davis and Mr Lacey, that they had numerous concerns about the Claimant prior to October 2017. We have not heard any evidence of what the specific concerns were alleged to be, and if any such concerns did exist, we find that they had not been raised with the Claimant either formally or informally at that point.

63. Hannah Davis told us that she was aware of performance issues as early as May 2017 but was unable to give any detail, or tell us of any actual conversation which had taken place with the Claimant, and could not produce any written note or email referring to any need for improvement in performance or other such concerns.

64. Miss Davis told us that she raised her concerns in July 2017 with Mr Lacey but we note that the details of what those concerns were is not provided even before the Tribunal. Whilst we accept that Hannah Davis, who worked at the same level as the Claimant and worked closely with her, did have her own concerns and criticisms about how the Claimant worked, about deadlines being missed and about matters taking too long we find that any concerns about the Claimant's performance were not serious enough to merit any action being taken at that point by either Miss Davis or Mr Lacey. We find that

the lack of any detail, or any note or email is evidence that neither manager had any serious concerns at that point.

65. We also note that during the period of July and August the Claimant's step father became critically ill and she was involved in supporting her mother. She was absent from work, and her managers knew the reason for it, and had arranged for her to work flexibly. Mr Lacey was aware of this.

66. Mr Lacey as the Claimant's manager tells us that he spoke to the Claimant about concerns he had but there is no evidence of what was actually said by him and what type of concerns were raised or when they were raised. Whilst we observe that Mr Lacey and Miss Davis both refer to the informal nature of management as a reason for there being no notes, we reject this.

67. There were no targets set for the Claimant at any time prior to her producing her own action plan and for much of the time Mr Lacey appeared to be out of the office. The Claimant had taken on a new and demanding role in December 2016 and had had no appraisal, no targets set and an absent manager and then had to deal with a family emergency. Both Mr Lacey and Miss Davis were asked for details of performance issues which were said to exist and neither could provide them.

68. we were referred to an issue with Rory Hall which took place prior to September 2017. The evidence we have seen suggests that Mr Hall who was from the Australian branch had contacted the Claimant with some issues about marketing materials in March 2017. The Claimant had responded and on 27 April 2017, (page 189) she had sent a long email setting out the work that she had in fact done for him. We note that the email was written in response to a query and appears to be the Claimant offering solutions to problems.

69. Later in the year, an error was discovered on some marketing materials which had been provided to Rory. Following a series of emails about the matter, Mr Lacey sent an email to the Claimant (page 208) in which her states that he is not looking to place blame and that the error was definitely the result of shared responsibility.

70. When Mr Lacey was asked about issues raised as performance issues in respect of the Claimant, he referred to Rory and said that the work the Claimant had done created complaints. However, on written the evidence we find as fact that any issue from Rory was firstly the result of shared responsibility and secondly, an issue concerning some of the materials produced by Rory which were criticised by the Claimant.

71. This was simply an example of the Claimant doing her job and suggesting that he should not use the materials and Rory being unhappy about this.

72. We find that at the time of the Claimant's interactions with Rory they were appropriate and business like and that at the time Mr Lacey and others accepted that this was the case. It is our conclusion and we find as fact that it is only in retrospect that the Respondent considered that issues raised by Rory were complaints about the Claimant which were valid and that this was not their view at the time.

73. We note that this is one of the few incidents where there are contemporary documents from the parties involved and we note and find as fact that in this instance the documents show the Claimant was doing her job. It is not reasonable of her manager to look back subsequently and to suggest there was an issue which was not raised at the time.

74. We note that in July 2017 the Claimant received a salary increase. The Claimant says that she was given an increase in recognition that she was doing a good job. Mr Lacey states that she was given a pay rise because she was doing a more senior job and that this had not been reflected previously in her pay. We accept the Claimant's evidence that not everybody received a pay rise and that there was a management discretion as to whether a pay rise was given or not. However, we also accept the Respondent's evidence that the primary reason for the pay rise was to recognise the seniority of her role.

75. Whilst we do not find that the pay rise was a reward specifically for the Claimant's good performance at that point, we are satisfied that had there been serious concerns about the Claimant's performance at that point that she would not have been rewarded the pay rise. We conclude that at the point that she received her pay rise in July 2017, any concerns that did exist were not serious enough to have an impact on a discretionary pay rise.

76. Turning to the visit from the CEO and the issue of marketing materials. The Claimant told us that the CEO was discussing her work behind her back and was undermining her. She said it felt like a witch hunt and that neither the CEO nor her manager discussed matters with her. We find that the CEO was entitled to ask for changes to the materials and was entitled to review them at a late stage. It was appropriate for him to discuss matters with Mr Lacey who was the senior manager and who reported to the CEO. However, it appears that there was discussion with members of the Claimant's team and and we accept that it would have appeared unfair to the Claimant, as it does to us, not to have included in the discussions when she was in the office and the discussion about work done by her and her team.

77. We accept that the Claimant was told that the CEO would not discuss matters with her when she asked to speak to him. We accept this made her feel humiliated; that it increased her stress and anxiety levels and that she found it upsetting. We find that she was justified in feeling side lined and even humiliated. She worked in a shared and open plan office and we accept that the events of the week of 16 October when Mr Reece visited would have been noted and observed by others working in the office at that date.

78. It was in this context that the Claimant then asked to meet with Mr Lacey. She contacted him on 27 October and he arranged to have a catch-up meeting with her on 30 October. We find as fact that it was the Claimant who initiated this meeting. We also note Mr Lacey's evidence that the meeting was to discuss several matters but find that the Claimant was given no notice of the matters which Mr Lacey wanted to discuss.

79. Mr Lacey was asked in evidence what his intended outcomes of the meeting were and he said that he had none. There are no notes of the meeting and

we have therefore had to determine what was said at that meeting on the basis of conflicting evidence from the Claimant and Mr Lacey.

80. Mr Lacey has told us that he is not a micro manager when asked about giving notice of the purpose of the meeting. We find that whilst it would be good practice from an employer to give details of the purpose of the meeting, particularly where performance issues may be discussed, in advance that on this occasion it was not unreasonable of Mr Lacey not to give notice of the broad range in matters that were subsequently discussed.

81. Both parties agree that at this meeting the Claimant's performance was discussed and the nature of that discussion was such that the Claimant was prompted to ask whether her job was at risk. Mr Lacey accepts that he gave firm assurances to the Claimant that her job was not at risk. Both parties agree that one of the outcomes of the meeting was that the Claimant was to produce an action plan or strategy for her work.

82. We have already found that it was the Claimant who had asked to speak to Mr Lacey and have heard her in her evidence, and have heard how speaks about her experiences and disability. We accept that she was feeling undermined by the CEO and was dealing with grief before that meeting, and for these reasons wanted to speak to Mr Lacey and we are satisfied that she did raise how she was feeling and did talk about how the treatment by the CEO had made her feel, how it affected her health and in particular, how she was struggling to support her mother and deal with her grief.

83. We find that she said that that the issues of concern that were being raised with her at the meeting had only arisen because of her taking time off and needing additional support because of her disability. Whilst the Claimant may not have used the words post traumatic stress disorder we are sure that she did talk about her ill health and her past experiences and how she thought this was affecting her work. We are satisfied that she talked to Mr Lacey about the fact of her disability by telling him about how she was feeling and how her health was affecting her work. She went into the meeting knowing that Mr Lacey had been supportive of her in the past and we accept and find as fact that she was open about her condition and the causes of it and its impact on her. In this respect, we prefer her recollection of the meeting to Mr Lacey's.

84. The Claimant tells us and we find as fact that she did raise an issue of desk moves. We accept the Claimant's evidence that she did tell Mr Lacey that she needed to sit at a desk facing the exit. The Claimant is adamant that she raised this at the meeting and that her short note of the meeting refers to the matter, by her noting the word *desks*. Mr Lacey denies any recollection of desk moves being discussed and denies that the Claimant told him she needed to sit facing the door. We prefer the Claimant's evidence and find the Claimant did remind him that she needed to face the door and this is why her note uses the word desks. At this point, we have found that Mr Lacey was aware of the impact of the Claimant's past traumatic experiences upon her and find that he was did know of her need for specific seating as a result following this meeting.

85. The parties also disagree about what was said in respect of fundraising. The Claimant asserts that she raised concerns about possible double funds arising from her fundraising activity. In his witness statement Mr Lacey denied there was any such discussion. However, when crossed examined he accepted that fundraising in a broad sense was discussed but not that the Claimant had raised a concern about the issue of double funding. Mr Lacey responded to questions by referring to lots of information being available to the Claimant about funding and what it was used for. Mr Lacey appeared to be irritated with the Claimant's enquiries and seemed to think that she was raising the issue because she was asking him to tell her how to do her job.

86. We find that the facts that the Claimant did raise were more in the nature of her needing to know what she was fundraising for because if she did not know, there could be a problem of double funding rather than her saying that she thought there was any existing problem of double funding which she was flagging up to Mr Lacey as her manager.

87. We also find that Mr Lacey's understanding of the discussion was that the Claimant was asking him to give her information about how to do her job. We find that the Claimant expressed a view that did not provide any particular information to the Respondent about fundraising at that meeting. We find as fact that the Claimant did not make a protected disclosure at that meeting.

88. We have also considered whether what was said at that meeting with the letter sent subsequently could amount to a disclosure of information and find that it does not. We have also considered what effect anything that was said at the meeting had on subsequent actions of the Respondent and on Mr Lacey in particular. We find as fact that the Claimants comments about fundraising had no effect on any decision that Mr Lacey made, or that any other member of staff of the Respondents made in respect of the Claimant.

89. At the end of the meeting the Claimant left feeling positive. Mr Lacey appeared to take issue and be critical of the fact that the Claimant was positive. He describes her as bouncing out of the meeting with a smile.

90. We find that the meeting finished between 3.30pm and 4.00pm. The parties don't agree as to how long it took but agree it started at 2.30 and we note that the office closes at 5.00pm. Mr Lacey states that following the meeting he took advice from Mentor, the HR adviser.

91. The following day at about 4.30pm the Claimant was asked by Sharon Cruise to come to a meeting with her. At that meeting the Claimant was handed a formal notice to improve. Mr Lacey had requested that Ms Cruise meet the Claimant to hand the notice to the Claimant. The notice included a reference to disciplinary matters.

92. The Claimant states and we accept that she was shocked and felt physically sick and Ms Cruise accepts that the Claimant was obviously upset in that meeting. The Claimant relies upon the notice to improve as a detriment and we therefore have to determine why it was given to the Claimant at this point. Was it as the Respondent asserts purely in respect of concerns over the Claimant's performance? If not, was it motivated and if so, to what extent, by anything said by the Claimant in the meeting the previous day either about

the disclosure of information which the Claimant says is a protected disclosure, or what was said about her health and her health needs?

93. Mr Lacey tells us that the letter was written because he had had several meetings with the Claimant and he felt she needed to take the concerns about her performance on board. He said she appeared reluctant to do so. He said he did not feel confident during the course of the meeting that his concerns were being taken seriously and did not think that they, the Respondent, would see the needed improvement unless further step were taken. He said the Respondent needed to see some progress.

94. In response to questions from the Judge about why disciplinary action is referred to in the letter, Mr Lacey said that he did not feel he was being taken seriously and was puzzled by the Claimant's approach. He said he felt the need to put it in writing because he was not confident that changes would happen. He felt that they kept discussing issues but getting nowhere.

95. We have found as fact that there had not been any previous discussion with the Claimant about performance issues. We have found that Mr Lacey had been generally supportive of the Claimant and understanding of the impact of her bereavement upon her. We find that this was the first time that there had been any one to one discussion of the Claimant's performance.

96. On balance we find as fact that at the end of the meeting Mr Lacey was concerned and remained concerned afterwards as to whether or not he had got his point across and whether he would see an improvement.

97. We find that part of the reason for Mr Lacey's concern and therefore the issue of the notice of concern was that the Claimant had raised her health issues in the meeting and had referred for her need for time off and had pointed to her ill health and her bereavement as a reason for some of the issues that were being discussed.

98. Since Mr lacey was concerned about whether or not any improvement would be seen by him, and since the Claimant had raised issues about her health impacting on her work, we find that it was a combination of these factors, which caused the concern. We infer from the evidence and facts found, that Mr Lacey was concerned in part at least, that the discussion about the Claimant's current health and the time off that she was taking, would prevent or hinder the Claimant from delivering the changes he wanted within the time her wanted.

99. We find that he was concerned in part at least that her health may in the future prevent her from meeting deadlines. Whilst we do not think this was the only reason for the issue of the notice, we do find as fact that it was part of the reason.

100. We find that the Claimant's comments in respect of fundraising did not influence the Respondent in any material way when he considered issuing the notice. We have distinguished between the discussion that took place about the Claimant's health and the discussion about funding on the basis that any discussion about funding formed a part of Mr Lacey's general

concern about performance issues and whether or not the Claimant knew how to do her job.

101. The Claimant responded to the notice on 1 November 2017 in writing. We find as fact that this letter expresses her upset but is also a letter in which she seeks to map the way forward. The Claimant sets out in reasonable terms what information and assistance she needs in order to move forward. It is a well written letter and considering how upset she was at the time she clearly focussed on what she was being asked to do. The letter gives a clear idea of what she thought was discussed in the meeting in respect of the concerns raised with her. We find it is an entirely appropriate letter for her to have written which deserved and required a reply, dealing with her specific and detailed concerns. We note that she had been asked to produce an action plan for which no template was provided. We were told that there was no company template and the Claimant told us that she eventually found one on google which she used.

102. We find that Mr Lacey's response to this letter was surprising. Instead of reading the letter as positive engagement with his concerns and a genuine requirement for assistance Mr Lacey criticises the Claimant for going into detail and not moving forward. In fact, we find that the letter contains much about how the Claimant wanted to move forward.

103. The Claimant asks us to find that the letter she wrote contains a disclosure of information which is capable of amounting to a protected disclosure. We find as fact that her concerns about fundraising are referred to at page 270 in the letter. We find that it is not a disclosure of information by her but rather is a request by the Claimant for information about what she is being asked to do. She is not suggesting that she is being asked to do something which she thinks is unlawful or that may be unlawful.

104. Whilst the Claimant may well have had concerns that fundraising carried out without a clear purpose may lead to a breach of charity rules, this letter does not say that in terms and nor can it be implied from the words written.

105. The rest of the letter is very detailed and sets out the Claimant's concerns and questions with clarity. If the Claimant had been concerned about a breach of the charity, we find that she would have set out more clearly.

106. We heard evidence from the Claimant and the Respondent about how funds are raised and how they are accounted for by the Respondent and by the associated charitable foundation which is a separate body. The impression that we have all gained is that the rules and procedures operated in respect of fundraising by the Respondent organisation are far from clear within the organisation and certainly they were not clearly explained before the Employment Tribunal. We accept that the Claimant was unclear about what she was being asked to do and that she had concerns about this, bearing in mind the threat of disciplinary action. We do not find what she wrote in the letter by itself or combined with what we find was said at the meeting amounts to a disclosure of information.

107. Mr Lacey did not at any time give any formal or written response to the Claimants letter, but instead called the Claimant to a meeting with him, again with no notice and no indication of what the meeting was for.

108. Mr Lacey invited Ms Cruise to attend and take minutes but the Claimant was not offered the opportunity to have anyone attend with her. We are asked to consider whether or not it would have been a reasonable adjustment for the Respondent to give notice of the meeting and to have enabled her to have a companion with her.

109. We find that given the circumstances of her health and her obvious distress and the more formal way that was now being followed to deal with her perceived performance issues, that she should at this point have been given both notice of the meeting and of the purpose of the meeting and have been asked if she wished to have somebody with her.

110. We note that in her letter she refers to her shock and confusion at receiving the notice. We find that she was at this point at a substantial disadvantage compared to other employees who were not disabled by not being given notice of the meeting and by not being the opportunity to have a companion when she was already stressed. Both Mr Lacey and Miss Cruise had met her previously and noted her distress. The Claimant was unsupported and anxious and unable to properly prepare for this meeting. She was less able to deal with the meeting and this may have led to disadvantage.

111. The question that the Tribunal have had to determine is what the reason was for the dismissal a month later on 11 December 2017.

112. Between the meeting on 6 November 2017 and the Claimant's dismissal on 11 December 2017, a number of things happened.

113. The first thing that happened is that the Claimant drafted an action plan. We find that this was a sensible and fair plan which provided reasonable time limits within which actions would be carried out and reviewed.

114. Following the Claimant's submission of this to her line manager Mr Lacey, he made a series of changes to it without consulting or discussing it further with her and returned it on 17 November 2017. The Claimant stated that the time frames for carrying out the actions were reduced which made it harder for her to complete. The Claimant was at this stage very concerned about the threat of disciplinary action.

115. The second thing that happened is that the Claimant's line management was moved from Mr Lacey to Hannah Davis. We note that Ms Davis was probably the obvious person to take over the Claimant's line management given that Mr Lacey was often out of the country and that Ms Davis was both working with the Claimant and had worked with the company for some years but as a matter of good practice and given the Claimant's upset and distress at the time this ought to have been discussed with her. Instead she was informed by email.

116. Not only was the Claimant's line management changed but the time frame for her achieving the actions which she had drafted had been reduced. The

Claimant tells us that when she got the email she felt dizzy and thought she was going to have a panic attack, we accept this.

117. The next thing that happened and we find this as fact, was that the Claimant's health deteriorated. We have seen a list of the Claimant's absences on page 411 of the bundle.

118. On 15 November 2017 before the change in the Claimant's line management and before the reduction in timescales were notified, the Claimant had taken a day off sick, self certificating. The process of self certification involved the Claimant filling in an online form which we were told was then automatically sent over to Mr Lacey. Mr Lacey told the Tribunal that he did not recall seeing the email but we find from the documentation we have seen and the evidence we have heard that it was sent electronically to him. We find that he did receive the electronic version and that he did therefore see the entry that the Claimant had made that she was exhausted. We also see that he was reminded to validate this on 22 November 2017 (page 359).

119. The 15 November was a Wednesday and on Friday 17 November 2017 Mr Lacey handed over to Hannah Davis.

120. On 20 November 2017, the Claimant attended the back to work meeting with Miss Davis. Miss Davis sent a note to Mr Lacey updating him about the return to work meeting afterwards and Miss Davis also refers to this in her HR notes at page 405.

121. Although this was a back to work meeting Miss Davis raised the action plan with the Claimant again without notice to her that this would be discussed. Following that meeting, Miss Davis continued to discuss all steps concerning the Claimant with Mr Lacey. At the 20 November 2017 meeting the action plan which had already been amended by Mr Lacey was again amended and the Claimant tells us that she went home feeling very stressed.

122. From looking at the three action plans, it is clear that there has been a reduction in the timeframe set out by the Claimant for achieving a number of the tasks. For example, the review of the materials which the Claimant had allowed herself seven days is reduced to one day by the time it is considered by Hannah Davis. It is to be completed between 12 and 13 December 2017. In respect of other actions there is a reduction from four days to one day, again, with one item to be achieved and reviewed on the same day, 13 December 2017.

123. Looking at these three action plans we find that the Claimant had given herself sufficient time to carry out the actions and review them, presumably taking account of her health and stress that she was feeling at these times. They were reviewed and reduced by Mr Lacey and then again by Hannah Davis within a relatively short period of time.

124. Both Respondents argue that the change in date was only of the review date and that the Claimant could have already started to carry out the work but this has all the appearance of an employer deliberately moving goal posts, making it harder for the employee to succeed. We do not accept that this

was a genuine process designed to assist the Claimant to improve and find as fact that she was at this point being set up to fail.

125. The Claimant had been told to set her own plan but the Respondent changed the dates twice in a very short space of time. The Claimant suffered severe stress which was clearly visible to the Respondent and was signed off sick by the doctor on 21 November 2017with work related stress.

126. The Claimant was off sick, with her sickness being recorded as being for a combination of reasons including anxiety, stress and depression.

127. On 22 November 2017, Miss Davis had replied to an email from the Claimant stating that they would discuss making reasonable adjustments to the action plan on her return to work.

128. On 28 November 2017, the Claimant contacted Miss Davis to say that she was planning to return to work but that her doctor wanted there to be extension to the deadline set and some flexibility to work over the next few weeks. She returned to work on 29 November and sought a back to work meeting with her line manager Miss Davis.

129. Miss Davis was out of the office, but a back to work meeting was arranged for 5 December 2017. Again, there was no offer that the Claimant should be accompanied or could be accompanied to the meeting on 5 December 2017.

130. We note that the Claimant had worked only seven days since the first action plan approved by Mr Lacey on 17 November 2107. Both Mr Lacey and Miss Davis knew that a significant part of the Claimant's absence was due to stress and anxiety and we have found that Mr Lacey knew that she had issues with past health problems arising from post traumatic stress disorder. It was widely known within the office that the Claimant had been upset and distressed and several staff including those in her team talked about her panic or her being otherwise upset and distressed.

131. We find that both Miss Davis and Mr Lacey must have been aware that the Claimant's ill health was a significant factor preventing her from meeting targets and attending at work. We find that the Respondent had clear knowledge of the Claimant's disability as a result of her medical certificates, their own observations and the information that she had provided to them but that despite this neither Mr Lacey nor Miss Davis considered a referral to Occupational Health at any time. They told us they did not think it was necessary.

132. At this stage, we unanimously conclude that both Mr Lacey and Miss Davis knew or ought to have known that the Claimant was disabled and they had a clear responsibility in any event to make enquiries about her health and to take steps necessary to protect and support a disabled employee, including a duty to make reasonable adjustments.

133. Following the meeting on 5 December 2017 Miss Davis emailed Mr Lacey feeding back a conversation about the Claimant's request for amended duties that had been requested by her GP. Mr Lacey's response was that he was not willing to consider amended duties.

134. We find that his immediate response is an insight about his true feelings faced with the recommendation from a general practitioner and an employee clearly struggling because of her ill health. His response to a request for reasonable adjustments from the Claimant appears to be one of irritation with the Claimant.

135. On 11 December 2017, the Claimant attended at work and was asked to attend a meeting with Miss Davis. She was offered no accompaniment and was not told what the purpose of the meeting was. She was handed a letter of dismissal.

136. We find that the decision to dismiss was taken jointly by Mr Lacey and Miss Davis. They had worked closely with one another for some time but were not able to agree before us the reason for the dismissal and gave differing reasons which included the Claimant's performance issues but also included the Claimant being belligerent and not being the right fit for the organisation and her response to the action plan.

137. We find that the references to the Claimant's personality, to her not being the right fit and to her response to the action plan are a reference to her asking for reasonable adjustments to be made and to her having been distressed, panicked and upset when seeking to respond to changing goal posts and the increasing pressure that she was put under.

138. We find that the comments and reasons were related to her disability and her need for reasonable adjustments.

139. We find that the increased pressure to comply with a shorter time frame in the action plan exacerbated her existing conditions, leading to time off due to her ill health and that it was for these reasons the Claimant was considered not to be a good fit for the organisation. The Claimant was a disabled employee who required different and additional support and adjustments. She had taken sickness absence and would require ongoing support and may not therefore be able to meet deadlines set out in the action plan. These are factors which arise from her disability. Rather than support the Claimant's return to work with a more achievable action plan the Respondent dismissed her.

140. We find that whilst the Respondent did have concerns about the Claimant's performance, her dismissal was caused by the fact that she required adjustments to the workload; support and time off in order to be able to deal with the demands that had been made.

141. The Respondent had not specifically addressed the question whether or not dismissal of the Claimant was a proportionate means of achieving a legitimate aim but we do accept that management of performance in order to achieve internal improvement can be a legitimate aim. However, we find that the method of managing the Claimant in this case was disproportionate and that the decision to dismiss the Claimant without giving her a proper opportunity to improve with the necessary adjustments in place and time to recover her good health was disproportionate.

142. In respect of the law, I have considered the legal matters set out before me by both the Respondent's Counsel and the Claimant's Counsel and I have taken into account, both the legislative provisions and the case law referred to. I don't intend to go into further detail at this point because it was indicated that the parties are in agreement about the legal principles which apply in this case.

**The Legal Principles and Provisions**

143. Section 43B of the Employment Rights Act 1996 defines a protected disclosure as any information which *in the reasonable belief the worker making disclosure is made public interest and tends to show* one or more of the matters set out. These include is believed that a criminal offence has been committed or that a person has failed is failing or is likely to fail to comply with any legal obligation to which he is subject . We were referred to the case of ***Okwu v Rise Community Action*** UKEAT 0082 1900 in which the EAT stated that the question which the ET has to determine is whether it was disclosure of information, which in the reasonable belief of the Claimant was made in the public interest and tended to show one of the things listed in section 43B.

144. Section 103A ERA provides that an employee who is dismissed shall be regarded for the purposes of the act as unfairly dismissed if the reason or if more than one the principal reason is that the employee made a protected disclosure.

    47B ERA addresses detriments on grounds making protected disclosures. The burden of proof is on the Respondent in a detriment claim and must show the detriment was not materially influenced by the disclosure. We were referred to the case of ***Fecitt v NHS Manchester*** in this respect. The test in s. 47B is whether the act was done "on the ground that" the disclosure had been made. In other words, that the disclosure had been the cause or influence of the treatment complained of (see paragraphs 15 and 16 of the decision in ***Harrow London Borough Council-v-Knight*** [2002] UKEAT 80/0790/01).

145. First, we had to determine whether there had been disclosures of 'information' or facts, which we remind ourselves was not necessarily the same thing as a simple or bare allegation (see the cases of ***Geduld-v-Cavendish-Munro*** [2010] ICR 325 in light of the caution urged by the Court of Appeal in ***Kilraine-v-Wandsworth BC*** [2018] EWCA Civ 1346). An allegation could contain 'information'. They were not mutually exclusive terms, but words that were too general and devoid of factual content capable of tending to show one of the factors listed in section 43B (1) would not generally be found to have amounted to 'information' under the section. The question was whether the words used had sufficient factual content and specificity to have tended to one or more of the matters contained within s. 43B (1)(a)-(f). Words that would otherwise have fallen short, could have been boosted by context or surrounding communications. The issue was a matter for objective analysis, subject to an evaluative judgment by us in light of all the circumstances.

146. Next, we considered whether the alleged disclosures indicated which obligation was in the Claimant's mind when the disclosure was made such that the Respondent was given a broad indication of what was in issue (***Western Union-v-Anastasiou*** UKEAT/0135/13/LA).

147. We also had to consider whether the Claimant had a reasonable belief that the information that she had disclosed had tended to show that the matters within s. 43B (1)(b), (d) of (f) had been or were likely to have been covered at the time that any disclosure was made. To that extent, I had to assess the objective reasonableness of the Claimant's belief at the time that she held it (***Babula-v-Waltham Forest College*** [2007] IRLR 3412 and ***Korashi-v-Abertawe University Local Health Board*** [2012] IRLR 4). 'Likely', in the context of its use in the sub-section, implied a higher threshold than the existence of a mere possibility or risk. We remind ourselves that the test was not met simply because a risk could have materialised (as in ***Kraus-v-Penna*** [2004] IRLR 260 EAT). Further, the belief in that context had to have been a belief about the information, not a doubt or an uncertainty (see Kraus above). 'breach of a legal obligation' under s. 43B (1)(b) was a broad category and has been held to include tortious and/or statutory duties such as defamation (***Ibrahim-v-HCA*** UKEAT/0105/18).

148. Next, we had to consider whether the disclosures had been 'in the public interest.' In other words, whether the Claimant had held a reasonable belief that the disclosures had been made for that purpose. As to the assessment of that belief, we had to consider the objective reasonableness of the Claimant's belief at the time that she possessed it (see ***Babula*** and ***Korashi*** above). That test required us to consider her personal circumstances and myself the question; was it reasonable for her to have believed that the disclosures were made in the public interest when they were made.

149. We remind ourselves that when considering whether or not the disclosure was made in the public interest, we must consider whether or not the disclosure is one that, in the reasonable belief of the worker in question, is made in the public interest. (***Chesterton Global (t/a Chestertons) v NurMohamed*** [2017] EWCA civ 979. where there are mixed interests it will be for the ET to rule as a matter of fact as to whether there was sufficient public interest to qualify under the legislation.

150. "The question for consideration under section 43B (1) of the 1996 Act is not whether the disclosure per se is in the public interest but whether the worker making the disclosure has a reasonable belief that the disclosure is made in the public interest" (per Supperstone J in the EAT, paragraph 28).The position was to be compared with a disclosure which was made for purposes of self-interest only, as in ***Parsons-v-Airplus International Ltd*** UKEAT/0111/17).

151. Finally, we did not have to determine whether the disclosures had been made to the right class of recipient since the Respondents accepted that they had been made to the Claimant's 'employer' within the meaning of section 43C (1)(a).

**Dismissal (s. 103A)**

152. Since the Claimant lacked the requisite service to bring an ordinary unfair dismissal claim, the burden is on her to prove the reason for the dismissal under s.103A on the balance of probabilities; it is a greater a burden than the requirements to merely prove a prima facie case if she had a two-year service under ***Kuzel-v-Roche*** [2008] IRLR 530; ***Ross-v-Eddie Stobart*** [2013] UKEAT/0068/13/RN.

**Unlawful Discrimination .**

153. We reminded ourselves that claims made under the Equality Act 2010 are subject to the reverse burden of proof provisions under section 136 which provides that if the court finds facts from which it could decide in the absence of any other explanation that a person has contravened the provision concerned, the court must hold the contravention has occurred, unless the person is able to show that the contravention has not occurred.

154. We remind ourselves that in practical terms this means that the Claimant is the burden of proving the primary facts in the case and that if we can conclude from those primary facts that discrimination has taken place we must find that it has done unless the Respondent proves to us that they have not committed to discriminatory act, by proving for example that there is a wholly non-discriminatory explanation for the conduct.

155. We remind ourselves that Respondent in such a situation must be able to demonstrate that there has been no discrimination whatsoever.
The question of knowledge is relevant to claims of both a failure to make a reasonable adjustment for a disabled person and claims of discrimination from reason arising from disability under section 15 of the Equality Act.

156. We remind ourselves that an employer who does not know and could not reasonably expected to know of disability will have a defence to a discrimination claim under section 15. We also remind ourselves that knowledge may be constructive knowledge, if an employer ought to have known of the Claimant's disability.

157. An employer has a defence to a claim under S.15 (2) EqA if it did not know that the Claimant had a disability. This stipulates that subsection (1) does not apply if the employer shows that it 'did not know, and could not reasonably have been expected to know' of the employee's disability. However, we remind ourselves that the employer cannot simply turn a blind eye to evidence of disability. While the EqA stops short of imposing an explicit duty to enquire about a person's possible or suspected disability, we note that the EHRC Employment Code states that an employer must do all it can reasonably be expected to do to find out whether a person has a disability (see para 5.15). It suggests that 'Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a "disabled person"' — para 5.14.

158. We noted that the code contains the following specific example, which we took into consideration: 'A disabled man who has depression has been at a particular workplace for two years. He has a good attendance and performance record. In recent weeks, however, he has become emotional

and upset at work for no apparent reason. He has also been repeatedly late for work and has made some mistakes in his work. The worker is disciplined without being given any opportunity to explain that his difficulties at work arise from a disability and that recently the effects of his depression have worsened. The sudden deterioration in the worker's time-keeping and performance and the change in his behaviour at work should have alerted the employer to the possibility that these were connected to a disability. It is likely to be reasonable to expect the employer to explore with the worker the reason for these changes and whether the difficulties are because of something arising in consequence of a disability' — para 5.15.

159. The Code also makes the important point that knowledge of a disability held by an employer's agent or employee — such as an occupational health adviser, personnel officer or recruitment agent — will usually be imputed to the employer (see para 5.17).

160. For discrimination under S.15(1) to be established, we remind ourselves that we must determine when the employer had the requisite knowledge of the Claimant's disability and whether it had that knowledge at the time it treated her unfavourably. If as here, the treatment complained of is made up of a series of distinct acts occurring over a period, we must consider not only whether the employer had the requisite knowledge at the outset but also, if it did not, whether it gained that knowledge at any subsequent stage when the treatment was ongoing.

161. We note that, while lack of knowledge of the disability itself is a potential defence to a S.15 EqA claim, lack of knowledge that a known disability caused the 'something' in response to which the employer subjected the employee to unfavourable treatment is not. In ***City of York Council v Grosset*** 2018 ICR1492, CA, the Court of Appeal held that, where an employer dismisses a disabled employee for misconduct caused by his or her disability, the dismissal can amount to discrimination under S.15 EqA even if the employer did not know that the disability caused the misconduct. When considering a complaint under s. 15 of the Act, we had to consider whether the employee was "treated unfavourably because of something arising in consequence of her disability".

162. There needed to have been, first, 'something' which arose in consequence of the disability and, secondly, there needs to have been unfavourable treatment which was suffered because of that 'something' (***Basildon and Thurrock NHS-v-Weerasinghe*** UKEAT/0397/14). Although there needed to have been some causal connection between the 'something' and the disability, it only needed to have been a loose connection and there might be several links in the causative chain (***Hall-v-Chief Constable of West Yorkshire Police*** UKEAT/0057/15 and ***iForce Ltd-v-Wood*** UKEAT/0167/18/DA). It need not have been the only reason for the treatment; it must have been a significant cause ***(Pnaiser-v-NHS England*** [2016] IRLR 170), but the statutory wording ('in consequence') imported a looser test than 'caused by' (***Sheikholeslami-v-University of Edinburgh*** UKEATS/0014/17).

163. We remind ourselves that we must focus on the mind of the putative discriminator. (***IPC Media-v-Millar*** [2013] IRLR 707) we needed to ask

ourselves what, conscious or unconscious, the motive for the unfavourable treatment claim was and whether it was "something arising in consequence of" the employee's disability. We were referred to ***Baldeh v Churches Housing Association of Dudley and District Ltd*** EAT 0290/18, that it is sufficient for the something arising to have a significant influence on the decision maker in this respect.

164. Under section 15, there is no requirement for a comparator and 'Unfavourable' treatment does not equate to 'less favourable treatment' or 'detriment'. We had to consider whether the Claimant had been subjected to something that was adverse rather than something that was beneficial. This must be measured objectively and the test would not be met simply because the Claimant thought that the treatment could have been more advantageous (***Williams-v-Trustees of Swansea University Pension and Assurance Scheme*** [2019] ICR 230, SC).

165. We remind ourselves that if the Respondent can show that any unfavourable treatment was a proportionate means of achieving a legitimate aim, then there will be no discrimination under section 15.
Duty to make adjustments

166. We remind ourselves that section 20(3) EqA provides that an employer will have a duty to make reasonable adjustments for a disabled employee in three situations. In this case, the Claimant focused on the first requirement, which is a requirement to make reasonable adjustment where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

167. We were referred to ***Cosgrove v Ceasar and Howie*** [2001] IRLR 65 and remind ourselves that an employer is not absolved of the duty just because a Claimant does not suggest necessary adjustments. We were also referred to ***Bynon v Wilf Gilbert ( Staffordshire) Ltd ET Case No.1301482/08*** and ***Lamb v the Business Acadamy Bexley*** UKEAT/ 0226/15/JOJ and remind ourselves that the Claimant must identify the PCP relied upon as well as the precise nature of the disadvantage it creates in relation to the disabled person in comparison with other non disabled person. We remind ourselves that the phrase PCP is to be broadly defined, having regard to the purpose of the statute being the elimination of discrimination against those who suffer from a disability. It can include formal and informal practices and in some cases may include one off decisions.

**Victimisation**

168. The Claimant claims that she was victimized and relies upon statements made at the meeting of 7 September 2017 as being a protected act. We remind ourselves that to be a protected act, the statement must be within section 27(2) EqA 2010. That is the statement must either refer to proceedings under the act, or make an allegation. Whether or not express, that a person has contravened the EqA . Secondly, we remind ourselves of the test of causation under s. 27 , which required us to consider whether the Claimant has been victimised 'because' she had done a protected act, but

we were not to have applied the 'but for' test (**Chief Constable of Greater Manchester Constabulary-v-Bailey** [2017] EWCA Civ 425); the act had to have been an effective cause of the detriment, but it does not have to be the principal cause. However, it has to have been the act itself that caused the treatment complained of, not issues surrounding it.

**Burden of proof**

169. We reminded ourselves of the statutory reversal of the burden of proof in discrimination cases. We took into account the reasoning in the case of the Igen ltd v Wong [2005]IRLR 258 , Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 332 and Madarassy v Nomura International plc 2007 IRLR 246.
The tribunal is required to consider at the first stage whether or not the Claimant has proved facts which could establish that Respondent has committed an act of discrimination. If Claimant does prove such facts then it is for the Respondent to establish on the balance of probabilities that it did not commit the unlawful act of discrimination in coming to the conclusion as to whether or not the Claimant has established a prima facie case the tribunal is to examine all the evidence provided by both Respondent and by Claimant

The unanimous Judgment of the Employment Tribunal is as follows:

**Public Interest Disclosure**

170. We find that the Claimant did not make a disclosure in her meeting of 30 October 2017 to Mr Lacey or in her written letter of 1 November 2017 to Mr Lacey. We find that there was no disclosure of information either individually or in combination.

171. We find that the Claimant spoke about her concerns over fundraising and that she expressed opinions but disclosed no information and that there was therefore no qualifying disclosure. If we had found that she had made a disclosure, we would have found it to have been in the public interest and we would have found that the disclosure had been made to Mr Lacey.

172. As a matter of logic, it follows that we find that the Claimant's dismissal and the detrimental treatment upon which she relies in this respect were not materially influenced by disclosures made by the Claimant. In any event and to the extent that the Claimant did discuss or speak about concerns in respect of fundraising we do not consider that the Claimant's comments about fundraising, or the matters set out in the subsequent letter influenced to any material extent any decision that was subsequently made about her employment.

**Disability**

173. We find that the Respondent was told that the Claimant was suffering from post traumatic stress disorder in her interview. We also find that the Claimant discussed her disability and the impact of her step father's death on her post

traumatic stress disorder when she met Mr Lacey in September 2017. We find that the Respondent knew that the Claimant was suffering from a variety of symptoms related to stress. The stress suffered at work was exacerbating a pre-existing condition. We find that the Respondent knew or ought to have known of buthe Claimant's disability by September 2017 but if we are wrong about that, that they had sufficient evidence of the Claimant's ill health by the end of November 2017, that they ought to have known that she was disabled and how her disability was affecting her.

**Victimisation**

174. We do not find that the oral grievance allegedly raised on 7 September 2017 was a protected act. If we are wrong about this, we accept that the giving of the notice to improve on 31 October was a detriment but we do not find that anything said in the meeting on 7 September, had any causative effect whatsoever on the decision to give the Claimant a notice to improve on 31 October 2017. The Claimant was not given the notice to improve because of anything that she had said on 7 September 2017.

**Failure to make reasonable adjustments**

175. We find that the Respondent operated the following provisions, criterions or practices as set out in the list of issues and applied them to the Claimant:
    a. not permitting a companion to meetings which were not grievance or disciplinary,
    b. providing little or no notice of meetings,
    c. failing to warn that a meeting which did result in dismissal, may result in dismissal and
    d. failing to consider alternatives to dismissals such as final warning or redeployment.

176. We find that the Claimant was disadvantaged in that she was left unsupported, anxious and insufficiently able to respond or to prepare in such a way as to be able to deal appropriately with issues raised at meetings.

177. The failure to warn the Claimant that a meeting could result in dismissal put her at increased risk of having a panic attack. The Respondent created an environment whereby the Claimant was at real risk of dismissal. We find that the disadvantages to the Claimant were substantial compared to a person who did not suffer from post traumatic stress. The Respondent was under a duty to take reasonable steps to avoid the disadvantage, but failed to take any such steps. They failed to make any reasonable adjustments.

**Discrimination arising from disability**

178. The Claimant's disability was post traumatic stress disorder and we find that the following arose from her disability.

179. Firstly, the Claimant needed to take periods of sick leave in order to deal with stress and anxiety. The Claimant required adjustments in the form of an amended timeframe for undertaking tasks allocated to her as part of her improvement plan and some flexible work on return to work following her sick leave. Put in another way, she would take longer than others to complete the

tasks she was set and would require greater flexibility than others in the workplace. We find that the Claimant was subjected to unfavourable treatment in that she was given a formal notice to improve on 31 October 2017 and in that she was later dismissed and in that she was summarily dismissed. We find that the dismissal was because of the matters set out in 5(a)(1) and (2). She was dismissed for a reason arising from her disability.

180. The Respondent has provided no specific evidence as to why dismissing the Claimant on 11 December 2017 was a proportionate means of achieving a legitimate aim, other than to assert that the Claimant's performance was poor and that management techniques were not working. Whilst a requirement for improved performance may be a legitimate aim, we do not find that dismissing the Claimant was a proportionate means of achieving that improvement in this case.

181. The Respondent did not follow any formal procedure before dismissing the Claimant and the steps taken to manage what was alleged to be poor performance do not satisfy the requirements of a fair disciplinary procedure for the purposes of the Claimant's claims in respect of ACAS which will be a matter for remedy.

**182. Remedy**

183. We accept that the Claimants evidence of her earnings of £496.85 p per week. We also accepted the Claimants evidence that it was more probable than not that she would receive the commission. The Claimant has told us that commission was paid on a monthly basis and was paid regardless of whether targets which was set for the team has been met. The Claimant also stated and we accept that in reality the teams met their targets and that this would have been the case had she remained in work. We find that these were targets set for the teams in general and were not individual targets and that performance bonuses had been paid as a matter of course throughout the Claimant's employment.

184. We have heard evidence about the impact of the Respondents treatment upon the Claimant and the availability of NHS support services to assist with her mental health disability. We accept her evidence that she had to wait some months before suitable medical support was available to her and we accept that the impact upon her health was significant.

185. We accept the Claimants evidence that she did make initial attempts to find alternative employment by contacting other organisations and that on at least one occasion she believed she had secured alternative work but that the offer was withdrawn when she told them that she had been dismissed and did not have a reference. We also accept that the lack of the reference and the dismissal itself would have made it very difficult for the Claimant to be recommended by employment agencies. We accept her evidence that she tried to set up in business on her own because without a reference from the Respondents, none of the agencies which she approached were able to help her find work. We also accept that whilst she was able to do some work as a self-employed consultant that this was limited and not particularly lucrative.

186. We accept the Claimants evidence that she sought medical assistance in dealing with her health problems and find that once she started to receive medical assistance her health improved she was better able to start looking for work . We find that in the circumstances of her dismissal and given her ill health it was not unreasonable for her to be unable to make any significant attempts to find work until she had sought and received medical assistance.

187. In considering the appropriate period for which to award compensation we have heard evidence from the Claimant about the treatment she received, and accept her evidence about the point in time at which her health started to improve.

188. We find that the Claimant did receive medical assistance and that by the end of August 2018 she was better able to start looking for work again.

189. We find that the period between 11 December 2017 when she was dismissed and 12 November 2018 is a reasonable period to compensate the Claimant for. We make this finding on the basis that the treatment that the Claimant was receiving continued until around about the end of August 2018 and had a positive effect on her and her ability to seek suitable similar work. We find that with the Claimant's skills and abilities and given the work that she was doing , that she ought to have been able to find suitable work to fully mitigate her loss at the end of a 3 month period .

190. We therefore award the Claimant loss of earnings for a period of 48 weeks at the rate set out making a figure of **£23,848.80**.

191. We consider that the Claimant is entitled to an award for injury to feelings. The discrimination to which this payment was subjected was not that of a single act, and we have found a number of points at which the Respondent failed to make reasonable adjustments. Both counsel argued for the middle band of Vento guidelines and we find that the proper port in this case taking into account the impact on the Claimant of the discriminatory treatment she suffered is £14,000.00. The Respondent argued for a figure of £12,000 and the Claimant for figure of £15,000.

192. We have also considered this the lack of any proper procedure followed by the Respondents when dismissing the Claimant. We consider that an uplift of 15% to the payment of compensation only is appropriate in this case.

193. In view of the level of the water and the period for which we have awarded it and having uplifted the figure of compensation we do not consider appropriate interest in this case .

194. **The total award is £42,284.12** and is comprised as follows:

    a. Basic award - £508.00
    b. Loss of earnings – 23848.80
    c. 15% uplift on loss of earnings – £3577.32
    d. Injury to feeling award - £14,000.00
    e. Loss of statutory rights - £350.00

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Employment Judge Rayner

Date: 28 November 2019
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